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An Introduction to the Oklahoma Evidence Code: Relevancy, Competency, Privileges, Witnesses, Opinion, and Expert Witnesses

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AN INTRODUCTION TO THE OKLAHOMA EVIDENCE CODE: RELEVANCY, COMPETENCY, PRIVILEGES, WITNESSES, OPINION, AND EXPERT WITNESSES†

Walker J. Blakey*

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† This article is the first in a series to be published in the *Tulsa Law Journal* which will comprehensively examine the Oklahoma Evidence Code in its entirety. This article draws upon the author's work for the Institute on the Oklahoma Evidence Code sponsored by the Oklahoma Bar Association Commission on Continuing Legal Education, upon work on a proposal for rules of evidence for North Carolina which was supported by the North Carolina Law Center, and upon work on a book tentatively titled *An Introduction To The Federal Rules of Evidence*. I must thank Dean Frank T. Read and Professor Ralph C. Thomas of the University of Tulsa College of Law for their assistance in dealing with Oklahoma law and my colleague Professor Joseph J. Kalo for his critique of this article. I received assistance on work which is incorporated into this article from Marilyn O. Adamson, now a member of the Oklahoma Bar, Katharine Hershey, now a member of the State of Washington Bar, and Katherine McArthur Schwartz, a third-year student at the University of North Carolina School of Law.

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I. INTRODUCTION—A FEW WORDS OF PRAISE AND EXPLANATION

A. *The Need For An Evidence Code*

The major problem with the law of evidence is that there is too much of it. Trial courts must decide evidence questions which involve almost every possible problem of human knowledge, and they must decide most of those questions in a few seconds. Appellate courts also find it necessary to decide most of the evidence questions that come before them very quickly. Even in those few cases in which an appellate court is able to spend substantial time on an evidence question the appellate court must keep in mind the circumstances in which trial courts make evidence rulings. Therefore it should not be surprising that much of the law of evidence is confused, unclear, archaic, and inconsistent. Indeed, what should be surprising is that the common law of evidence has worked as well as it has.

The Oklahoma Evidence Code,¹ which went into effect on October 1, 1978, promises to improve and to clarify the law of evidence, but the Code cannot do the impossible. It cannot reduce the number of evidence questions which must be decided, nor can it completely restate the law of evidence. It can, however, eliminate certain requirements which no longer seem necessary and state some reasonably clear and well chosen principles with which lawyers and judges can approach future trials.

B. *The Oklahoma Evidence Code Is Based Upon the Federal Rules of Evidence*

The Oklahoma Evidence Code is based upon and is very similar to the Federal Rules of Evidence.² Although earlier efforts to produce an

1. Oklahoma Evidence Code, ch. 285, 1978 Okla. Sess. Laws (to be codified as OKLA. STAT. tit. 12, §§ 2101 to 2107, 2201 to 2203, 2301 to 2305, 2401 to 2411, 2501 to 2513, 2601 to 2615, 2701 to 2705, 2801 to 2806, 2901 to 2903, 3001 to 3008, and 3101 to 3103). In this article all citations as well as textual references to the Oklahoma Evidence Code will be called by section numbers as they appear in the Senate Bill, since these numbers are largely the same as the numbers of the corresponding federal evidence rules and the numbers of the rules in the proposed Oklahoma Evidence Code. The codification uses the same numbering system but adds 2,000 to each number, thus a citation or textual reference to § 401 indicates codification at OKLA. STAT. tit. 12, § 2401 (Supp. 1978). In addition, textual references to the Code refer to the Oklahoma Evidence Code as enacted, although the full name is also used where needed for clarity.

2. See note 6 *infra* and accompanying text.

evidence code for Oklahoma had been made,³ the Evidence Code which the Oklahoma legislature finally adopted was based largely upon the efforts of the Subcommittee on Evidence of the Code Procedure-Civil Committee of the Oklahoma Bar Association.⁴ Ed Abel, chairman of the Subcommittee, stated that it had "worked diligently for almost four years to draft a set of rules for Oklahoma as close as possible to the Federal Rules and yet preserve, in a very few cases, those existing Oklahoma rules which the subcommittee felt were worthy of continuation."⁵ Chairman Abel suggested three reasons that the Subcommittee chose the Federal Rules of Evidence as a model:⁶ law reform,⁷ workability,⁸ and the need for uniformity between state and federal practice.⁹

Except for the articles on judicial notice, presumptions, and privi-

3. In 1961, the *Oklahoma Bar Association Journal* published the 1953 Uniform Rules of Evidence as promulgated by the National Conference of Commissioners on Uniform State Laws together with a commentary prepared by Professor Maurice H. Merrill on the relationship between those proposed rules and existing Oklahoma law. 33 OKLA. B.A.J. 599 (1961).

In 1969, a Subcommittee of the Code Procedure—Civil Committee of the Oklahoma Bar Association completed a three-year study by publishing *Oklahoma Rules of Evidence (tentative draft No. 3)*, 40 OKLA. B.A.J. 1839 (1969).

4. The Subcommittee consisted of Ed Abel, (chairman), Burck Bailey (who had chaired the 1966-1969 efforts), James W. (Bill) Berry, James R. Cox, David Fields, Kent Frates, Eric Groves, Norman A. Lamb, Kenneth McKinney, Judge Homer Smith, Tom Wallace, and Professor Leo H. Whinery of the University of Oklahoma College of Law. Professor Whinery served as Reporter of the Subcommittee. Chairman Abel wrote of Professor Whinery's efforts:

Finally, lawyers and judges of the State of Oklahoma should be apprised of the outstanding work and dedication to this project of Professor Leo H. Whinery of the University of Oklahoma Law Center. Were it not for Professor Whinery's dedication, the untold hours spent by him in research, and his drafting of these rules and comments it would not have been possible for the subcommittee to have completed its work.

Subcommittee on Evidence of the Code Procedure—Civil Committee of The Oklahoma Bar Association, *Proposed Oklahoma Code of Evidence*, 47 OKLA. B.A.J. 2606, 2606-07 (1976) [hereinafter cited as *Proposed Code*].

5. *Proposed Code*, *supra* note 4, at 2606.

6. In addition to the Federal Rules of Evidence, the 1974 Uniform Rules of Evidence were also used as a model for the Code as finally proposed by the Subcommittee. However, the 1974 Uniform Rules of Evidence were themselves based on the Federal Rules. As Chairman Abel stated:

In most instances the rules are identical to the Federal Rules and in only three Articles, where the rules were simply not appropriate to a state code of evidence, were any substantial departures made from the Federal Rules. Moreover, the draft of the subcommittee is now substantially in accord with the Uniform Rules of Evidence as modified by the Conference of Commissioners on Uniform Rules in 1974 to conform to the Federal Rules.

Proposed Code, *supra* note 4, at 2606-07.

7. *Proposed Code*, *supra* note 4, at 2607.

8. *Id.*

9. Chairman Abel stated:

[The Federal Rules of Evidence were] finally selected by the subcommittee as the guide to follow, largely to assure *uniformity* between the Federal rules and any Oklahoma code that might be adopted subsequently so that an essentially uniform set of rules might be

leges, the proposed Code which was sent to the legislature was almost identical to the Federal rules of Evidence. The organization of the Code, the numbering of the rules, and the language of the rules were almost the same. The Subcommittee made changes in the language of a federal rule or rejected a federal rule only for definite purposes.

The Code which the legislature finally adopted is firmly based upon the Code which the Subcommittee proposed;¹⁰ therefore, it is also firmly based upon the Federal Rules of Evidence. The basic ideas and structure are the same and the numbering is almost the same. This similarity is somewhat concealed, however, by the enormous number of small changes which appear in the Code as it was enacted.

Some of the changes which the legislature made in the language of the Code were apparently intended to change the meaning of the particular provision involved or at least to eliminate an objectionable phrase. Most of the changes, however, appear to have been made merely for purposes of style—either to make the Code conform more closely to the style of other Oklahoma statutes or merely to improve the style. Unfortunately, one of the effects of these changes is to make it more difficult to compare a federal rule with the Code section to which it corresponds. Close inspection usually suggests that the rewording has not changed anything,¹¹ but the rewording does seem to require such close inspections.¹²

To avoid confusion, the reader should be aware of two formal differences between the Oklahoma Evidence Code and the Federal Rules of Evidence. The first distinction is that the Code uses the word “section” for what the Federal Rules calls a “rule”. Thus, Oklahoma Code sections will be compared to federal rules. Although corresponding sections and rules will often have the same number, this is not always true. In addition, this article will frequently discuss the Subcommit-

applied by the lawyers irrespective of the court in which they might practice, Federal or State, and thereby further expedite and improve the trial of cases in Oklahoma.

Proposed Code, supra note 4, at 2606.

10. Professor Whinery and Dean Frank T. Read both contributed greatly to the success of efforts to secure the adoption of the Code by the Oklahoma legislature.

11. However, the meaning of a part of § 407 may have been changed unintentionally. See notes 83-89 *infra* and accompanying text.

12. In the appendix which follows this article, the federal evidence rule (or any other acknowledged ancestor) which corresponds to each section of the Code is indicated, accompanied by an opinion of whether the Code section is reworded, changed, or the same as the corresponding federal rule. The appendix also discusses other formal differences between the Code and the Federal Rules.

tee's proposed Evidence Code whose provisions were also called "rules."

The second formal difference between the Code and the Federal Rules is the method used to designate subdivisions. This difference is illustrated by the fact that Code section 404(A)(2) corresponds to federal rule 404(a)(2) and to proposed Oklahoma rule 404(a)(2), and that section 801(4)(a)(1) corresponds to federal rule 801(d)(1)(A) and to proposed Oklahoma Evidence rule 801(d)(1)(A).

C. The Code Is A Clearer and Improved but Incomplete Restatement of Familiar Law

Upon examining the new Code, Oklahoma attorneys with experience in litigation will be struck by the fact that a very large part of the Code appears to be familiar law.¹³ Certainly most of the terms are familiar, and most of the rules seem to be familiar as well. But even if the Code did nothing but restate the Oklahoma law of evidence as it existed, its adoption could be justified by its clarity and greater accessibility. However, the Code also makes changes in the familiar law. Many of these changes represent bold and generally successful attempts to improve the law of evidence. Section 609¹⁴ is an example of such a change, and is one which no one could overlook. It is clearly a rule drafted by a committee (or, in fact, by a series of committees¹⁵) whose members were unable to agree on basic principles. It attempts to reach a compromise between traditional rules permitting convictions of crimes to be used to impeach a witness and recent decisions restricting the use of prior convictions for impeachment purposes.¹⁶

The most successful changes made by the Code are simplifications of prior law. Some of these simplifications merely state guidelines for the solutions to certain problems. The most important of these is section 403, which is discussed at several points throughout this article.

13. As Chairman Abel stated:

Perhaps of greatest significance, as these rules are examined and studied, it will be found that there is relatively little departure from the existing Oklahoma law of evidence. Only changes or additions were made where necessary to fill voids in the law or remove anachronisms no longer appropriate to a modern code of evidence.

Proposed Code, supra note 4, at 2607.

14. See note 301 *infra* for the text of § 609.

15. See 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 609[01] & *Congressional Action on Rule 609*, at 609-2 (1978 & Supp. 1978) [hereinafter cited as WEINSTEIN & BERGER] for the history of this section.

16. For a more detailed discussion of § 609, see notes 301-07 *infra* and accompanying text.

Other simplifications resolve problems by eliminating traditional but unnecessary restrictions. For example, the Code places very few limitations on the simple principle of competency,¹⁷ since the Code abolishes the dead man's statute, the disqualification of witnesses with prior convictions of crimes involving perjury, and almost all restrictions on testimony by spouses.

These simplifications and the more elaborate changes such as section 609 are the most noticeable modifications of the law of evidence which the Code makes. But the most frequently found changes introduced by the Code in its restatement of familiar law might be referred to as incidental changes. These changes were often supported by the common law, and the draftsmen of the Federal Rules and those of the Code were forced to choose between incorporating these changes or adopting more restrictive versions of the same rule. In such situations, the draftsmen of the Federal Rules and those of the Code usually chose the alternative which favored greater admissibility.

An example of this type of change is section 801(4)(b)(4).¹⁸ This Section deals with the question of when an out-of-court statement by an employee can be admitted as an admission of a party opponent to be used against his employer. The rule which is most widely adopted in the country requires a showing that the employee was authorized to make such a statement before the statement can be admitted against the employer, even if the statement concerned conduct of the employee for which the employer was responsible.¹⁹ Thus, it could be held that a truck driver was employed to drive a truck but not to talk about why he had just driven his truck over the plaintiff.²⁰ Strong arguments can be made against a rule which separates events as naturally intertwined as driving a truck and explaining an accident which occurred while driving it and which purports to give an employer the option to authorize the first without authorizing the second. Many courts have either rejected the traditional rule or evaded its worst effects by misapplying it.²¹

17. See notes 156-61 & 174-78 *infra* and accompanying text for a discussion of these few restrictions.

18. The corresponding federal rule would be 801(d)(2)(D).

19. McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 267, at 639-41 (2d ed. E. Cleary 1972) [hereinafter cited as McCORMICK]; 4 J. WIGMORE, EVIDENCE § 1078, at 170 n.4 (J. Chadbourne 1972).

20. Roush v. Alkire Truck Lines, 299 S.W.2d 518 (Mo. 1957).

21. The Federal Advisory Committee's note to the corresponding portion of federal evidence rule 801 states:

The law of Oklahoma on this issue prior to the adoption of the Code appears to be somewhat uncertain,²² but the Code makes it clear that statements by employees such as this hypothetical truckdriver may be admitted against their employers as admissions of a party opponent. Section 801 achieves this result by dividing its treatment of statements by employees and agents into two rules.²³ Section 801(4)(b)(3) permits statements which are actually authorized by a party to be admitted as an admission of that party. Section 801(4)(b)(4) deals with statements by an agent or servant of a party which are not actually authorized by that party. Such statements are admissible as admissions by that party if they were made by the agent or servant "concerning a matter within the scope of his agency or employment."²⁴

The Code is not a complete restatement of the law of evidence. Some of the traditional rules that are omitted could be logically derived from some of the general rules contained in the Code, such as the general rules of relevancy,²⁵ and the rule authorizing limited admissibility.²⁶ But it is quite clear that the draftsmen of the Code assumed that those portions of the common law of evidence that were not affected by

The tradition has been to test the admissibility of statements by agents, as admissions, by applying the usual test of agency. Was the admission made by the agent acting in the scope of his employment? Since few principals employ agents for the purpose of making damaging statements, the usual result was exclusion of the statement. Dissatisfaction with this loss of valuable and helpful evidence has been increasing. A substantial trend favors admitting statements related to a matter within the scope of the agency or employment

Rules of Evidence For United States Courts and Magistrates, 56 F.R.D. 183, 298 (1972) [hereinafter cited as Proposed Federal Rules]. See also McCORMICK, *supra* note 19, § 267, at 641; 4 J. WIGMORE, EVIDENCE § 1078, at 162 n.2 (J. Chadbourne 1972).

22. The Evidence Subcommittee's note to this portion of the proposed code, *Proposed Code*, *supra* note 4, at 2646, states that the rule of § 801(4)(b)(4) is in accord with prior Oklahoma law, citing *Terrell v. First Nat'l Bank & Trust Co.*, 204 Okla. 24, 226 P.2d 431 (1950). There is language in that case, however, which could be used to support the argument that an employee must be authorized to make an admission. *Id.* at 26, 226 P.2d at 434.

23. Section 801(4) provides, in part:

A statement is not hearsay if:

- b.
- b. the statement is offered against a party and is
 - (3) a statement by a person authorized by him to make a statement concerning the subject, or
 - (4) a statement by his agent or servant concerning a matter within the scope of his agency or employment

24. The result under § 801(4)(b)(4) can be described as denying employers the alternative of authorizing persons to work for them without authorizing those persons to talk about their work. Thus, § 801(4)(b)(4) dictates that the employer who authorizes an employee to do something also authorizes him to talk about that work; therefore, the employee's statements concerning his work are admissible as admissions of the employer.

25. Sections 401-03.

26. Section 105.

the Code would remain intact to supplement the Code. Thus, the Code uses such terms as direct examination, cross-examination, and leading questions without providing definitions for those terms.²⁷ There is a rule concerning access to writings used to refresh memory,²⁸ but no rule concerning any other aspects of refreshing memory. Similarly, there is no reference to most of the possible means of impeaching a witness, but it is clear that they are still available.

D. The Code Must Be Read As A Code

Clearly the Code is not a complete recasting of the law of evidence. It is incomplete, and much of what it does contain is stated in familiar language. Even so, the Code is a code. It must be read as an entity with proper attention to all of its relevant language. One brief example will illustrate this point. Consider the situation of a busy lawyer who discovers just before trial that his Japanese client has brought photocopies of his relevant business records with him rather than the originals which he was told to bring. If this lawyer gives the Code a cursory glance, he will find the following apparently conservative rule in section 1002:

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required except as otherwise provided in this Code or by other statutes.

A busy lawyer who reads this section might stop his research and start trying to obtain a stipulation from opposing counsel. This busy lawyer would not have found the relevant provisions of the Code. Section 1002 is only one part of Article X, which contains eight sections, including section 1001, a definitional section. Section 1001(4) provides:

A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements or miniatures, or by mechanical or electronic recording or by chemical reproduction, or by other equivalent technique which accurately reproduces the original.

The term "duplicate" reappears in section 1003, which provides:

A duplicate is admissible to the same extent as an original under this rule or as may otherwise be provided by statute unless:

27. Sections 611(C), 611(D), and 801(4)(a).

28. Section 612.

1. A question is raised as to the authenticity of the original;
or
2. In the circumstances it would be unfair to admit the duplicate in lieu of the original.

The foregoing example illustrates a second point in addition to the necessity of considering all of the relevant language in the Code in order to determine what a particular section means. The Code is frequently of surprisingly little help in referring a reader to other relevant Code provisions. How is the reader to discover when "except as otherwise provided" refers to an important exception such as section 1003 and when, as in section 601, the same language refers to minor and unlikely exceptions? The hard answer to that question is that it is a lawyer's responsibility to learn everything about the Code. One of the reasons that the Federal Rules and the Code are so short is undoubtedly a desire that trial lawyers familiarize themselves with the entire set of rules. The final portion of this introduction will suggest some sources that will help lawyers to interpret the Code. These sources will make it clear that the interrelationships between the different sections of the Code are so complex that the absence of cross-references within the Code sections is largely justified.

A third point about the Code as a code which the previous example failed to illustrate, since the Code provided an answer to the problem, is that the language of the Code will not answer all questions which arise. Of course, when that happens, prior law may be of some assistance, but the structure of the Code itself must be considered for assistance in interpreting its language. The best illustration of the importance of considering the structure of the Code as well as its language is the relationship between section 403 and the other sections of the Code.²⁹

E. Sources of Assistance

It should be apparent that the lawyers who will have to work with the Code face a major challenge. They will have to learn how to analyze the Code as a whole and how to interpret its provisions. It is hoped that this article will be of some assistance in both aspects of this challenge, but the following discussion will provide some additional sources of assistance as well.

Both the proposed Oklahoma Code of Evidence submitted by the

29. This problem is discussed in length at notes 57-82 *infra* and accompanying text.

Evidence Subcommittee in 1976 and the Federal Rules of Evidence were accompanied by comments prepared by their draftsmen which may be helpful in interpreting the Oklahoma Evidence Code itself. Each of the rules in the Oklahoma Evidence Subcommittee's proposal is accompanied by an Evidence Subcommittee's note briefly explaining the purpose of the rule and its relationship to prior Oklahoma law.³⁰ Each of the rules contained in this proposal became a section of the Code as it was finally adopted by the legislature, and the proposed rule which corresponds to a particular Code section can easily be found.³¹ Furthermore, a slightly revised version of the Evidence Subcommittee's notes³² appears throughout the supplement to title 12 of the *Oklahoma Statutes Annotated* in the form of comments to the enacted Code sections.³³

The Federal Rules of Evidence were also accompanied by comments prepared by their draftsmen, and Oklahoma lawyers will find those comments helpful in dealing with the Oklahoma Evidence Code. However, the number and the complexity of these comments are almost overwhelming. There are two reasons for this. First, the comments which accompanied the preparation of the Federal Rules dealt somewhat more fully than did the Oklahoma notes with the problems of applying a short series of evidence rules to the apparently unlimited number of problems that can arise in a trial. Thus, the federal comments are more complex. Second, there were an enormous number of comments by draftsmen of the Federal Rules of Evidence because those rules had an enormous number of draftsmen.

The Federal Rules of Evidence went through both the complete process for adoption as rules by the Supreme Court of the United States and the complete process for adoption as statutes by Congress. The Rules were first prepared by an Advisory Committee on Rules of

30. *Proposed Code, supra* note 4.

31. In Article I, the legislature added a § 101, moved rule 101 to § 103, and added one number to the section numbers for each of the remaining rules. Thus rule 103 became § 104 and so on. In Article V, the legislature added § 506 and therefore added one number to the numbers of sections corresponding to rules 506 through 512.

32. OKLA. STAT. ANN. tit. 12, §§ 2101 to 3101 (Supp. 1978). The word section and the appropriate section numbers have been substituted for the references to the proposed rules, and almost all references to the 1969 proposed Code have been dropped. New notes have been written for §§ 506 (in which the legislature added a newsman's privilege) and 410 (which was based upon the amended federal rule rather than the original federal rule used as a model by the Subcommittee), and minor changes have been made in the language of many notes.

33. This treatment of the original notes suggests that the Subcommittee believed that the many changes in the language of the Code which the legislature made did not affect the meaning of many provisions. See notes 11-12 *supra* and accompanying text.

Evidence appointed by the Chief Justice of the United States.³⁴ This Advisory Committee published two well-publicized drafts³⁵ with Advisory Committee's notes before preparing the draft which the Supreme Court of the United States accepted and attempted to adopt.³⁶ The Advisory Committee's notes which accompanied each draft were intended to explain the rules and were changed to conform to changes in the rules themselves in the various drafts. The notes were also excellent essays on the evidence problems which the rules attempted to solve. Undoubtedly, much or even all of the credit for the quality of those notes must be given to the Reporter to the Advisory Committee, Professor Edward W. Cleary.

The draft of the Federal Rules of Evidence which the Supreme Court had accepted was prevented by Congress from becoming effective.³⁷ Congress then undertook to prepare the Federal Rules of Evidence itself. This effort produced a full legislative history: House hearings,³⁸ a House report,³⁹ Senate hearings,⁴⁰ a Senate report,⁴¹ and a Conference Committee report,⁴² as well as some debates on the floor of Congress⁴³ before the version of the rules which was finally adopted went into effect on July 1, 1975.⁴⁴

Several efforts have been made to organize this mass of commentary on the Federal Rules of Evidence. The most widely used of these is a compilation prepared by Professor Cleary for the Federal Judicial Center which has been reproduced in a number of forms including a

34. See Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Rules on Evidence for the United States District Court and Magistrates, 46 F.R.D. 161, 173-74 (1969) [hereinafter cited as Preliminary Draft].

35. Preliminary Draft, *supra* note 34; Committee on Rules of Practice and Procedure of the United States, Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates, 51 F.R.D. 315 (1971). There was also a "less-publicized draft" published informally by the Judicial Conference of the United States in October, 1971. Rothstein, *The Proposed Amendments to The Federal Rules of Evidence*, 62 GEO. L.J. 125, 126 n.4 (1973).

36. Proposed Federal Rules, *supra* note 21.

37. An Act, Pub. L. No. 93-12, 87 Stat. 9 (Mar. 30, 1973).

38. *Hearings (on Proposed Rules of Evidence) Before the Special Subcomm. On Reform of Federal Criminal Laws of the House Comm. on the Judiciary*, 93d Cong., 1st Sess., Ser. 2 & Supp. (1973) [hereinafter cited as *House Hearings*].

39. H.R. REP. No. 650, 93d Cong., 1st Sess. (1973) [hereinafter cited as HOUSE REPORT].

40. *Hearings on Federal Rules of Evidence before the Comm. on the Judiciary, United States Senate*, 93d Cong., 2d Sess. (1974) [hereinafter cited as *Senate Hearings*].

41. S. REP. NO. 1277, 93d Cong., 2d Sess. (1974) [hereinafter cited as SENATE REPORT].

42. H.R. REP. No. 1597, 93d Cong., 2d Sess. (1974) [hereinafter cited as CONFERENCE REPORT].

43. 120 CONG. REC. 2366-94, 36925-26, 37069-84 (1974).

44. An Act, Pub. L. No. 93-595, 88 Stat. 1296 (Jan. 2, 1975).

pamphlet published by West.⁴⁵

Further assistance is available from several commentaries on the Federal Rules of Evidence. These include works by Judge Weinstein and Professor Berger,⁴⁶ by Professor Rothstein,⁴⁷ and by Professors Saltzburg and Redden.⁴⁸ Professor Moore, with the assistance of Helen I. Bendix, has added two volumes dealing with the Federal Rules of Evidence to his multivolume set on federal practice.⁴⁹ Also, a newsletter in Federal Rules of Evidence developments edited by Professor Schmertz⁵⁰ is available. Furthermore, two of the most interesting sets of commentary—one by the late Professor Louisell and Professor Mueller⁵¹ and one by Professors Wright and Graham⁵²—are still in the process of preparation and publication.

II. RELEVANCY

A. General Rules of Relevancy (Sections 401, 402, and 403)

1. The Minimum Standard of Sections 401 and 402

The Oklahoma Evidence Code contains two general rules of relevancy. The first rule is a general standard created by sections 401 and 402. Section 401⁵³ adopts the broadest possible definition of relevant evidence. Under that section, relevant evidence means evidence having any tendency to make the existence of some fact more or less probable

45. FEDERAL RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES (West 1975). The *United States Code Annotated* has organized the comments of the draftsmen in a similar manner, and also organizes both pre-Rules and post-Rules federal cases in annotations to the Federal Rules. 28 U.S.C.A. Federal Rules of Evidence (1975 & Supp. 1978).

46. WEINSTEIN & BERGER, *supra* note 15, is an eight volume set which was originally published in 1975 but is supplemented through both replacement pages and supplements. It is very detailed.

47. P. ROTHSTEIN, UNDERSTANDING THE NEW FEDERAL RULES OF EVIDENCE (1973 & Supps. 1974, 1975) is full of insight, but use of it is complicated by the fact that it began as a commentary on the Supreme Court version of the Federal Rules.

48. S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL (2d ed. 1977) is a very crowded one volume manual which reviews (very briefly) new articles as well as new cases.

49. 10-11 J. MOORE & H. BENDIX, MOORE'S FEDERAL PRACTICE (1976 & Supp. 1978) [hereinafter cited as MOORE & BENDIX].

50. *The Federal Rules of Evidence News*, published by Callaghan & Co.

51. 1-2 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE (1977, 1978 & Supp. 1978) [hereinafter cited as LOUISELL & MUELLER].

52. 21 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE (1977 & Supp. 1978) [hereinafter cited as WRIGHT & GRAHAM].

53. Section 401. Definition of "Relevant Evidence."

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

than it would be without the evidence. Section 402⁵⁴ requires the exclusion of any evidence which cannot meet this minimum standard.

The general standard required by sections 401 and 402 is a *very* minimum standard because the actual value of many pieces of evidence depends upon their being combined with other evidence. The Federal Advisory Committee's note on the identical federal rule explained:

The standard of probability under the rule is "more . . . probable than it would be without the evidence." Any more stringent requirement is unworkable and unrealistic. As Dean McCormick says, "A brick is not a wall," or, as Falknor, *Extrinsic Policies Affecting Admissibility*, quotes Professor McBaine, ". . . [I]t is not to be supposed that every witness can make a home run."⁵⁵

Evidence that lacks even any tendency to make something more probable or less probable will be of no value even in combination with other evidence and is therefore excluded.

2. The Balancing Test of Section 403

Code section 403⁵⁶ creates a second, and higher, standard of relevancy which must also be met by evidence which qualifies under sections 401 and 402. Section 403 establishes a balancing test under which evidence may not be admissible if its probative value is insufficient to justify some damaging impact it may have on the proceedings. The Federal Advisory Committee explained the creation of this second general standard by stating that "certain circumstances call for the exclusion of evidence which is of unquestioned relevance. These circumstances entail risks which range all the way from inducing decision on a purely emotional basis, at one extreme, to nothing more harmful than merely wasting time, at the other extreme."⁵⁷

The final version of section 403 does not include "waste of time,"

54. Section 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible.

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Oklahoma, by statute or by this Code. Evidence which is not relevant is not admissible.

55. Proposed Federal Rules, *supra* note 21, at 216 (citations omitted).

56. Section 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion or Cumulative Nature of Evidence.

Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, needless presentation of cumulative evidence, or unfair and harmful surprise.

57. Proposed Federal Rules, *supra* note 21, at 218.

one of the factors included in both federal rule 403 and the version of 403 proposed by the Oklahoma Evidence Subcommittee,⁵⁸ but this change does not affect the meaning of the section. Several of the other factors listed in the section, such as cumulative evidence, confusion of the issues, misleading the jury, and undue delay, can be applied to exclude evidence of probative value which would involve a waste of time. Although each of these factors would appear to involve some requirement beyond simple waste of time, as a practical matter one or more of them will apply to every case in which a court would be willing to hold that the evidence of low probative value should be excluded as a waste of time.⁵⁹

Furthermore, even if section 403 did not give the courts the power to exclude such evidence, the courts already have that power under older doctrines such as remoteness and collateralness.⁶⁰ These powers are necessarily available to the courts because they are (as Holmes pointed out with respect to the collateral issue objection) “a concession to the shortness of life.”⁶¹

3. Unfair and Harmful Surprise Under the Oklahoma Evidence Code

Section 403 adds to the list of circumstances which may be weighed against the probative value of a piece of evidence one element that was not included in federal rule 403—“unfair and harmful surprise.” The Federal Advisory Committee considered including surprise as a ground of exclusion but gave two reasons for rejecting it:

While it can scarcely be doubted that claims of unfair surprise may still be justified despite procedural requirements of notice and instrumentalities of discovery, the granting of a continuance is a more appropriate remedy than exclusion of the evidence Moreover, the impact of a rule excluding evidence on the ground of surprise would be difficult to estimate.⁶²

58. *Proposed Code, supra* note 4, at 2620.

59. *See Dolan, Rule 403: The Prejudice Rule in Evidence*, 49 S. CAL. L. REV. 220, 242 n.82 (1976).

60. Dolan demonstrates both the newness of the prejudice rule and its relationship to older rules permitting exclusion of evidence on such grounds as remoteness and collateralness. Dolan, *supra* note 59, at 221-24, 262-64.

61. *Reeve v. Dennett*, 145 Mass. 23, 28, 11 N.E. 938, 943-44 (1887).

62. *Proposed Federal Rules, supra* note 21, at 218-19.

The Oklahoma Evidence Subcommittee added unfair and harmful surprise to its draft of 403 and stated:

The Advisory Committee to the Federal Rules excludes surprise on the theory that this should not be directed to the exclusion of evidence but rather to a continuance to enable the adversary to respond. Also, some codes, such as in California and New Jersey, which often omit surprise are premised on the existence of modern discovery practices which reduce the likelihood of surprise. Currently, "unfair surprise" is a ground for the exclusion of evidence in Oklahoma. The Subcommittee has included "unfair and harmful" surprise as a ground for exclusion where it is an overriding, deliberate type of surprise.⁶³

Two points must be considered whenever evidence is sought to be excluded under Code section 403 on grounds of surprise. First, the section only applies if the court finds that the surprise is "unfair and harmful." Second, surprise is a circumstance that can frequently be cured through the allowance of time. This is true with respect to both fair and unfair surprises. The trial court has the power to deal with either kind of surprise by granting time for the surprised party to overcome the surprise.⁶⁴ Such a solution would avoid the necessity of deciding whether a surprise was unfair, which must frequently be a difficult question and will always be tangential.

4. Discretion of the Trial Judge Under Section 403

It is universally agreed that a rule such as section 403 calls upon the trial judge to exercise a power that is discretionary in nature and that decisions by the trial judge under such a rule are reversible only for abuse of discretion.⁶⁵ The language used in the Section is permis-

63. *Proposed Code*, *supra* note 4, at 2620.

64. Louisell and Mueller state that even under federal rule 403 which does not authorize exclusions of evidence on grounds of either kind of surprise:

As a practical matter, it seems clear that upon making a credible claim of surprise, trial counsel should be allowed at least a brief recess, particularly where this can be accomplished by merely extending a midday or day's end recess. Longer adjournments will be warranted only occasionally, perhaps the most compelling cases being those in which some act by the opposition of the party seeking the continuance impeded the efforts of the latter to prepare for trial. And in court-tried cases, an adjournment or recess should be far more freely allowed than in jury cases, since the relative inconvenience is so much less in the former instance than the latter.

2 LOUISELL & MUELLER, *supra* note 51, §.130, at 71 (footnote omitted).

65. As Louisell and Mueller state:

The authority of the trial judge to exclude relevant evidence pursuant to Rule 403 is discretionary in nature. This is suggested in the very language of the Rule (especially the

sive (“may be excluded”), the standard is a balancing test, and the factors to be balanced are extremely general. Therefore the trial judge’s discretion is quite broad.

There are, however, limits to this discretion:

Of course the leeway which exists under Rule 403 is not an invitation for rulings without reason, and where the record does not reflect the basis for a ruling, review is likely to be more strict. As an opinion for the Second Circuit aptly observed, reversing a conviction where the judge disallowed testimony by a certain witness on the ground of fairness but refused on request to elaborate on the basis for his ruling, “where the reasons for a discretionary ruling are not apparent to counsel, they will probably not be apparent to an appellate court.”⁶⁶

Nevertheless, the power of the trial judge under a rule such as section 403 is great enough that Judge Weinstein and Professor Berger feel called upon to caution trial judges:

Since the trial judge is granted such a powerful tool by Rule 403, he must take special care to use it sparingly. The trier must rely primarily on the lawyer for decisions on what evidence will be useful. Except in rare situations, the good sense of lawyers and jurors and the tactical dangers of overreaching provide sufficient assurance that offered relevant evidence will be helpful. If there is doubt about the existence of unfair prejudice, confusion of issues, misleading, undue delay, or waste of time, it is generally better practice to admit the evidence taking necessary precautions by way of contemporaneous instructions to the jury followed by additional admonition in the charge.⁶⁷

5. The Relationship of Section 403 to the Other Sections of the Code

Section 403 is the most important section in the Code. It supplements all the other sections and provides a basis to exclude evidence which cannot be otherwise excluded. New users of the Code may

verbs “may be excluded”), and its legislative history. More importantly, all of the cases cited in this section clearly recognize this fact, and the point is driven home time and again by statements that a decision by the trial judge to receive or exclude evidence under the Rule may be reversed only for abuse of discretion.

Id. § 125, at 9 (footnotes omitted).

66. *Id.* § 125, at 11 (quoting *United States v. Dwyer*, 539 F.2d 924, 928 (2d Cir. 1976)).

67. I WEINSTEIN & BERGER, *supra* note 15, ¶ 403[01], at 403-7.

sometimes overlook this by reading individual sections by themselves rather than as a part of a code of evidence. The individual sections of the Code may invite such a misreading because they do not spell out their relationships with section 403. A careful examination of the structure and the language of the Code will make these relationships unmistakably clear, however. The portions of the Code dealing with admissible evidence are "largely made up of bans on evidence rather than affirmative provisions that certain evidence shall be admissible,"⁶⁸ and evidence must pass all the bans in order to be admissible. This is obviously true with respect to such rules as the special rules of relevancy which will be discussed in the next part of this article, but it is also true with respect to the rule against hearsay and the rules concerning expert witnesses.⁶⁹ These sections are all supplemented by section 403. Consequently, every question of admissibility raises a 403 problem. Each time it is asked whether a particular section will exclude certain evidence, it must also be asked whether section 403 will exclude that evidence even if the more particular section does not. Reference to 403 becomes so all pervasive in discussions of evidence admissibility that Saltzburg and Redden find it advisable to remind their readers that 403 is only a rule of exclusion and cannot be used to admit evidence that other rules exclude.⁷⁰

Commentators on the Federal Rules of Evidence have raised one serious question about the relationship of rule 403 to a few other federal rules which will also be a serious question with respect to the scope of section 403 of the Code. The Federal Rules of Evidence involved are essentially the same as the corresponding sections of the Code. The question usually arises with respect to federal rule 609, but the question also arises with respect to rules 405 and 608. Each of these rules contains provisions that certain forms of evidence may be used in certain situations. The language of rule 609 is the strongest language of this sort in the Federal Rules. It provides that the class of evidence with which it is concerned "shall be admitted."⁷¹ The question is whether any evidence which is admissible under these rules may be excluded under 403.

68. P. ROTHSTEIN, *supra* note 47, at 28.

69. For the special rules of relevancy, see notes 83-111 *infra* and accompanying text. For expert witnesses, see notes 314-29 *infra* and accompanying text. Hearsay will be discussed in the second segment of this series to be published later.

70. S. SALTZBURG & K. REDDEN, *supra* note 48, at 115.

71. Oklahoma Evidence Code § 609 is a slightly reworded version of federal evidence rule 609. Section 609 also provides that certain evidence "shall be admitted."

The argument against applying 403 to supplement these particular rules is that Congress decided the question of whether unfair prejudice substantially outweighed the probative value of the classes of evidence involved in these rules when it adopted them. In the case of rule 609, the legislative history gives great support to such an argument. Rule 609 deals with the use of prior convictions to impeach a witness. It was the subject of intense debate both in the Advisory Committee and in Congress over whether the prejudicial effect of such convictions outweighed their probative value.⁷²

Under the rule finally adopted by Congress, the criminal convictions which may be admissible are divided into three classes. With respect to two of these classes, the trial court has discretion to weigh the probative value of the conviction against its prejudicial effect. The formulas provided for these weighings differ from the formula of rule 403, but it seems extremely unlikely that there will ever be any problems created by those differences.

The third class of convictions admissible under rule 609 is relatively recent convictions which “involved dishonesty or false statement.” The Congressional Conference Report explained that phrase as meaning “crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused’s propensity to testify truthfully.”⁷³ Rule 609 provides that evidence of a conviction of such a crime offered to impeach a witness “shall be admitted.”

Some commentators on the Federal Rules of Evidence apparently conclude that rule 609, or at least the portion dealing with convictions involving dishonesty or false statement, is entirely independent of rule 403. Thus Moore and Bendix state, “Rule 403 does not qualify Rule 609 since the latter is a specific rule that was carefully hammered out to meet various suggestions and objections, and the rule contains specifics about the exercise of discretion by the court,”⁷⁴ and “[609](a) is equally clear that the court has no discretion to exclude evidence of a prior conviction falling in the [dishonesty and false statement] category.”⁷⁵

I suggest that Moore and Bendix go too far, at least on the basis of

72. 3 WEINSTEIN & BERGER, *supra* note 15, ¶ 609[01].

73. CONFERENCE REPORT, *supra* note 42, at 9.

74. 10 MOORE & BENDIX, *supra* note 49, § 403.02[2].

75. *Id.* § 609.14[1].

existing authority, in separating rules 403 and 609. Even Louisell and Mueller probably go too far in their more cautious statement: "Rule 609(a) does not provide for similar discretion to exclude evidence of convictions involving dishonesty or false statement, regardless of the punishment, and it is entirely possible that Rule 403 cannot be invoked in this circumstance to exclude proof of such convictions."⁷⁶

These four commentators appear to be somewhat misled by the following statement from the Congressional Conference Report:

The admission of prior convictions involving dishonesty and false statement is not within the discretion of the Court. Such convictions are peculiarly probative of credibility and, under this rule, are always to be admitted. Thus, judicial discretion granted with respect to the admissibility of other prior convictions is not applicable to those involving dishonesty or false statement.⁷⁷

This statement will have to be considered in determining the relationship between rule 403 and rule 609, but it should be pointed out that this statement does not *determine* that relationship. The Conference statement does not mention rule 403, and it is extremely unlikely that the Conference Committee had rule 403 in mind when it made its statement.⁷⁸ The discretion which is denied to a court by rule 609 with respect to convictions involving dishonesty and false statement is the "judicial discretion granted" by rule 609 "with respect to the admissibility of other prior convictions."

This is not to say that there is not a problem in reconciling rule 609 with rule 403. There is a problem. There is also a similar problem in reconciling rules 405 and 608 with rule 403. Rule 609 does appear to provide that prior convictions involving dishonesty and false statement are always to be admitted. But I suggest that a party who wishes to impeach a witness with two hundred separate convictions for check forgery will not be permitted to do so. If this is correct, the problem is not whether rule 403 applies to convictions admissible under rule 609, but rather to what extent it applies to such convictions.

Saltzburg and Redden describe the present state of the law carefully and correctly. "The legislative history would support the view that Rule 609 is not fully governed by [Rule 403]."⁷⁹ The adoption of

76. 2 LOUISELL & MUELLER, *supra* note 51, § 126, at 28.

77. CONFERENCE REPORT, *supra* note 42, at 9.

78. *See id.* at 9-10.

79. S. SALTZBURG & K. REDDEN, *supra* note 48, at 116. *See also* United States v. Hayes, 553

609 was a determination by Congress of some of the problems of balancing probative value against possible prejudice that would otherwise have been left to the courts to decide under rule 403. It would be improper for the courts to ignore that congressional determination and to reconsider the questions which Congress has decided.⁸⁰ Thus, the courts clearly could not decide that the prejudicial effect of prior convictions involving dishonesty and false statement required that they always be excluded.⁸¹ Similarly, the courts could not refuse to use the special balancing tests which rule 609 requires to determine the admissibility of the other two classes of prior convictions with which rule 609 deals.

But there are more difficult questions which have not yet been answered. Suppose that the prejudicial effect of a conviction involving dishonesty and false statement is enlarged by the fact that the defendant is being tried for that same crime. Has Congress determined in advance, by adopting rule 609, whether that particular prejudicial effect is outweighed in such a case and should be ignored by the courts? There is at least the possibility that rule 403 gives the courts power to exclude that particular conviction. When attention is shifted from the Federal Rules of Evidence to Oklahoma Code sections 403 and 609, the question becomes even more doubtful. While the Oklahoma courts ought to find the Congressional reports and debates on the Federal Rules helpful in interpreting the Code, they are certainly not bound by anything which was said there unless that idea is also adopted in the structure and in the language of the Code.⁸² The structure and the lan-

F.2d 824, 827 n.4 (2d Cir. 1977); *United States v. Smith*, 551 F.2d 348, 358-59 n.20 (D.C. Cir. 1976); note 71 *infra*. But see *United States v. Brasher*, 548 F.2d 1315, 1326-27 (9th Cir. 1976).

80. Weinstein and Berger write that the part of federal rule 609 dealing with convictions involving dishonesty or false statement

mandates the admission of evidence of all prior convictions of any crime—felony or misdemeanor—involving dishonesty or false statement. It is as yet an open question whether a conviction involving dishonesty or false statement can nevertheless be excluded in the exercise of the judge's discretion pursuant to Rule 403 on grounds of confusion, waste of time, or extreme prejudice. Whatever discretion (outside of that specified) remains under Rules 102, 403 and 611(a) is exceedingly narrow since Congress considered the prior conviction to impeach issue more fully than any other single rule and the compromise it reached should be respected by the courts.

3 WEINSTEIN & BERGER, *supra* note 15, ¶ 609[03a], at 609-73 (footnote omitted).

81. This discussion assumes that both 609 and its application to a particular situation are not unconstitutional. Saltzburg and Redden point out, "Of course, if exclusion of evidence is absolutely necessary to insure a fair trial, the due process clause of the Fifth Amendment would govern." S. SALTZBURG & K. REDDEN, *supra* note 48, at 116.

82. See *State v. Day*, 91 N.M. 570, 577 P.2d 878 (1978), in which the New Mexico Court of Appeals held that New Mexico rule 403 did apply to evidence of prior convictions involving dishonesty and false statement despite the adoption of an amended New Mexico evidence rule 609

guage of Code sections 609, 405, and 608 do set forth some general principles permitting the use of certain kinds of evidence. On the other hand, section 403 gives the trial court the power to exclude evidence whenever its probative value is substantially outweighed by "the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, needless presentation of cumulative evidence, or unfair and harmful surprise." These sections can be reconciled by refusing to apply section 403 to exclude evidence admissible under sections 609, 405, and 608 unless the particular facts of the cases produce special problems that justify application of section 403.

B. *Special Rules of Relevancy (Sections 407, 408, 409, 410, and 411)*

1. Introduction

Article IV of the Oklahoma Evidence Code consists of three sections stating the general rules of relevancy, three sections dealing with the use of character evidence, and five miscellaneous sections which may be called the special rules of relevancy. Each of these special rules can be considered to be a variation—although sometimes a substantial variation—on a common pattern. Each of these sections deals with a particular kind of evidence, and each section begins by forbidding the use of that kind of evidence for certain purposes. Four of the five sections then go on to describe the other purposes for which that evidence may nevertheless be used. In three of the four sections this last part of the rule is logically unnecessary and merely serves as a "reminder" that evidence prohibited for one purpose may be admissible for other purposes. Only in section 410 (which deals with guilty pleas) does the last part of the section actually modify the special rule of relevancy stated in the first part of the section.

2. Subsequent Remedial Measures (Section 407)

The first sentence of section 407⁸³ provides that subsequent reme-

corresponding to federal evidence rule 609. In reaching this conclusion the New Mexico court held that "the intent of Congress in adopting the federal rules" did not control the New Mexico decision on that question. It was easier for a New Mexico court to reach that conclusion than it will be for an Oklahoma court to reach the same conclusion because New Mexico had already adopted its Rules of Evidence before Congress adopted the Federal Rules. *Id.* at —, 577 P.2d at 882-84.

83. Section 407. Subsequent Remedial Measures.

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This section

dial measures are not admissible to prove negligence or culpable conduct. This rule applies to an enormous variety of situations. Weinstein and Berger give such examples as repairs of a defective condition or installation of a safety device on an injury-causing machine, the subsequent modification of a product design, the discharge of the employee responsible for the accident, a change in company operating procedures or rules, and the removal of a hazardous condition from the premises where the accident took place.⁸⁴

The exclusionary rule set forth in the first sentence of section 407 applies, however, only to attempts to introduce such evidence to prove negligence or culpable conduct. The second sentence of the section allows evidence of remedial measures to prove "ownership, control, impeachment or feasibility of precautionary measures where controverted."

It appears likely that there will be disputes about the meaning of this second sentence. This sentence of section 407 is one of many parts of the Code which restate the corresponding part of a federal evidence rule (or a proposed federal evidence rule) with slight changes in word order, in punctuation, and even in the words used, without any apparent intention to change the meaning of the restated language. These slight changes appear to have been intended to improve the style of the rewritten provisions. In the second sentence of section 407, however, very slight changes in word order, word choice, and punctuation do appear to change the meaning of the sentence so that it will be very difficult to give Oklahoma Code section 407 the effect which the draftsmen of the Federal Evidence Rules intended federal rule 407 to have.

In fairness it must be pointed out that the Oklahoma Code section presents one possible reading of an ambiguous federal evidence rule. But the reading apparently adopted by section 407 is contrary to the reading which the draftsmen of the Federal Rules expected and has the effect of undercutting an important protective device which those draftsmen had intended to create. In both federal evidence rule 407 and the draft of section 407 proposed by the Oklahoma Evidence Subcommittee, the words "if controverted" appear in such a position and with such punctuation that they can be read as modifying all of the purposes (other than impeachment) for which evidence of subsequent

does not require the exclusion of evidence of subsequent measures when offered for another purpose including proof of ownership, control, impeachment or feasibility of precautionary measures where controverted.

84. 2 WEINSTEIN & BERGER, *supra* note 15, ¶ 407[01], at 407-5, 407-6.

remedial measures may be admissible.⁸⁵ In Oklahoma Evidence Code section 407, the corresponding words “where controverted” appear to apply to only one such purpose—proof of the feasibility of precautionary measures.

This change is important because the draftsmen of the federal rule added the words “if controverted” to their rule in the 1971 draft in the hope that they would help to alleviate the danger that the exceptions in the second sentence would devour the rule recognized in the first sentence of 407. Louisell and Mueller describe the problem: “So numerous are the purposes beyond reach of the exclusionary principle, and so often is proof of subsequent remedial measures considered relevant when offered for such purposes, that it is seldom that Rule 407 requires actual exclusion of evidence.”⁸⁶ The Advisory Committee’s note to federal evidence rule 407 reveals that the draftsmen intended the words “if controverted” to create a protective device which would apply to any “other purpose” for which evidence of a subsequent remedial measure would be admissible. The note states: “The requirement that the other purpose be controverted calls for automatic exclusion unless a genuine issue be present and allows the opposing party to lay the groundwork for exclusion by making an admission.”⁸⁷

In light of this background, Louisell and Mueller write with respect to federal rule 407:

Clearly the intent of Rule 407 is to give a stipulation controlling effect, so long as it covers all the points upon which evidence of subsequent remedial measures might be admissible.

The words “if controverted” carry additional meaning. It is not always necessary for the opponent of the proof to offer a stipulation to keep the evidence out—simply “not opposing” the point or points upon which the evidence might be admissible should suffice, under Rule 407, to require exclusion of the proof.⁸⁸

What effect does all this have on the application of Oklahoma Evi-

85. The last sentence of both federal evidence rule 407 and the proposed Oklahoma rule 407 is:

This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

86. 2 LOISELL & MUELLER, *supra* note 51, § 165.

87. Proposed Federal Rules, *supra* note 21, at 226.

88. 2 LOISELL & MUELLER, *supra* note 51, § 165, at 249 n.86.

dence Code section 407 to cases in which evidence of subsequent remedial measures is offered for any purpose other than to prove negligence or culpable conduct? As frequently happens when changes are made in evidence rules, the change in the language of the rule may not cause a change in the ultimate result.

There are two possible theories with which a party might successfully resist admission of evidence of subsequent remedial measures if the point which the evidence is offered to prove is either stipulated or uncontroverted. The first theory is that section 407 requires the court to exclude evidence of subsequent remedial measures offered to prove points which are uncontroverted. This is clearly true with respect to the "feasibility of precautionary measures." But a party might ask the Oklahoma courts to hold that the changes in the second sentence of section 407 were not intended to change the meaning of that sentence and that section 407 should be interpreted as requiring exclusion whenever the point to be proven is uncontroverted.

If the courts reject the theory that section 407 requires the exclusion of such evidence in such circumstances, they will then have to consider a second theory—that the courts themselves should exclude the evidence because it is not relevant. It may be possible to exclude such evidence on the basis that it does not even meet the minimum standard of sections 401 and 402.⁸⁹ It certainly should be possible to exclude it under the balancing test of section 403. Under section 403 a court would have to balance the very low probative value of evidence supporting a point that is uncontroverted against the danger of unfair prejudice (through a misuse of that evidence), undue delay, and needless presentation of cumulative evidence. A court applying section 403 could be expected to reach the result which federal evidence rule 407 was intended to require and exclude evidence of a subsequent remedial

89. Weinstein and Berger state that "the added phrase [if controverted] merely states what the law would have been anyway. If an issue is not controverted it needs no evidence to prove it." 2 WEINSTEIN & BERGER, *supra* note 15, ¶ 407[01], at 407-7. But Louisell and Mueller argue in their discussion of federal rule 401:

It should be noted that the fact of an admission established by the pleadings, or by any other means, does not necessarily mean that proof of the admitted matter should be excluded, nor that the matter is no longer "of consequence to the determination of the action." As the Advisory Committee carefully noted, "The fact to which the evidence is directed need not be in dispute." In other words, neither a stipulation nor an offer to stipulate can be used as a surefire device to prevent the reception of evidence, although it is also true that where facts have been stipulated the trial judge will have particularly great leeway under Rule 403 to exclude evidence on considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

1 LOUISELL & MUELLER, *supra* note 51, § 95, at 676-77 (footnotes omitted).

measure if it was being offered only for the purpose of proving an uncontroverted point.

3. Compromises, Offers to Compromise, and Statements Made in Compromise Negotiations (Section 408)

The purpose of section 408⁹⁰ is to encourage the settlement of disputed claims. In order to encourage the parties to discuss settlement, this section provides protection for three aspects of compromise negotiations: (1) offers of settlement, (2) settlements, and (3) conduct and statements made during settlement negotiations. The protection consists of a prohibition against the admission of evidence of any of these three aspects of negotiations to prove "liability for the claim, invalidity of the claim or the amount of the claim." However, such evidence is admissible for other purposes, and the section lists as examples of such other purposes: "proof of bias or prejudice of a witness, negating a contention of undue delay, or proof of an effort to obstruct a criminal investigation or prosecution."

Section 408 expands in two ways the generally accepted common law principle that unaccepted offers of compromise are not admissible as admissions of liability. First, the section applies to accepted compromises as well as unaccepted ones so that either settlement discussions or settlement agreements with third parties will not be admissible to prove liability. If the third party is also a witness, however, a settlement may very well be admissible to prove bias. Second, section 408 expands the scope of the exclusion so that "[e]vidence of conduct or statements made in compromise negotiations is not admissible." Under the common law, only offers of compromise (and perhaps the agreements as well) were protected. Unless a party to a negotiation knew enough about the law of evidence to state all of the facts "hypothetically" so that he did not admit anything, every statement of fact

90. Section 408. Compromise and Offers to Compromise.

Evidence of:

1. Furnishing, offering or promising to furnish; or
2. Accepting, offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount is not admissible to prove liability for the claim, invalidity of the claim or the amount of the claim.

Evidence of conduct or statements made in compromise negotiations is not admissible. This section does not require the exclusion of discoverable evidence merely because it is revealed in the course of compromise negotiations. This section does not require exclusion of evidence when it is offered for another purpose, including proof of bias or prejudice of a witness, negating a contention of undue delay, or proof of an effort to obstruct a criminal investigation or prosecution.

made during a negotiation was admissible against the party who made it. The draftsmen of federal evidence rule 408 decided that the principle of the rule should be expanded to cover all statements of fact made during compromise negotiations. The Federal Advisory Committee's note to federal evidence rule 408 stated:

The practical value of the common law rule has been greatly diminished by its inapplicability to admissions of fact, even though made in the course of compromise negotiations, unless hypothetical, stated to be "without prejudice," or so connected with the offer as to be inseparable from it. An inevitable effect is to inhibit freedom of communication with respect to compromise, even among lawyers. Another effect is the generation of controversy over whether a given statement falls within or without the protected area. These considerations account for the expansion of the rule herewith to include evidence of conduct or statements made in compromise negotiations, as well as the offer or completed compromise itself.⁹¹

Congress added a sentence to federal rule 408 which appears in Oklahoma Evidence Code section 408 in the following form: "This section does not require the exclusion of discoverable evidence merely because it is revealed in the course of compromise negotiations." This sentence was added to the federal rule by Congress in response to complaints that parties might somehow be able to prevent proof of facts admitted during compromise negotiations even though evidence of those facts was obtained from independent sources.⁹² The short answer to such fears was that nothing in 408 would ever have had any such effect, but Congress chose to respond to those fears with a "reminder" sentence whose only function is to state that obvious conclusion. The Oklahoma Evidence Subcommittee chose to adopt that sentence for the same reasons. The note to section 408 states:

The addition of the third sentence, however, insures that evidence, such as documents, is not rendered inadmissible merely because it is presented in the course of compromise

91. Proposed Federal Rules, *supra* note 21, at 227 (citation omitted).

92. The Congressional Conference Committee reported:

The House bill was drafted to meet the objection of executive agencies that under the rule as proposed by the Supreme Court, a party could present a fact during compromise negotiations and thereby prevent an opposing party from offering evidence of that fact at trial even though such evidence was obtained from independent sources. The Senate amendment expressly precludes this result.

The Conference adopts the Senate amendment.

CONFERENCE REPORT, *supra* note 42, at 6.

negotiations if the evidence is otherwise discoverable.⁹³

Section 408 applies only if the claim involved in the compromise negotiations was "disputed as to either validity or amount." The language of the section also seems to emphasize that the compromise should involve a valuable consideration, but that appears to be merely another way of describing a bona fide dispute. It will be apparent, upon a moment's reflection, that all compromises of bona fide disputes do involve what should be considered to be valuable consideration.⁹⁴ Weinstein and Berger suggest:

The term "valuable consideration" should be given its broadest interpretation to carry out the policy of the rule. For example, an apology or some private or public acknowledgment of a new policy is often the basis for bringing parties together, particularly where there is a continuing relationship. In the context of this rule, such a statement is a valuable consideration.⁹⁵

4. Payment of Medical and Similar Expenses (Section 409)

Section 409⁹⁶ forbids the admission of evidence concerning "furnishing, offering or promising to pay medical, hospital or similar expenses occasioned by an injury" to prove liability for the injury. The situation with which this rule deals does not arise very often, but when it does there is a strong tendency for the courts to exclude evidence of the furnishing or offering to pay for medical expenses.⁹⁷ Some of the decisions and the various evidence rules cited in the Federal Advisory Committee's note to federal evidence rule 409⁹⁸ require that the person protected have acted for "humanitarian motives," but the application of section 409 does not depend upon the motives of the person furnishing or offering to pay for medical expenses.

Section 409 does not appear to change Oklahoma law. The Oklahoma Evidence Subcommittee's note summarized the situation as follows:

93. *Proposed Code, supra* note 4, at 2623.

94. 1 A. CORBIN, CORBIN ON CONTRACTS § 140 (1963); RESTATEMENT (SECOND) OF CONTRACTS § 76B (Tent. Drafts Nos. 1-7, Rev. 1973).

95. 2 WEINSTEIN & BERGER, *supra* note 15, ¶ 408[01], at 408-11 & 408-12.

96. Section 409. Payment of Medical and Similar Expenses. "Evidence of furnishing, offering or promising to pay medical, hospital or similar expenses occasioned by an injury is not admissible to prove liability for the injury."

97. Annot., 65 A.L.R.3d 932 (1975).

98. Proposed Federal Rules, *supra* note 21, at 228.

There appear to be no Oklahoma cases in point, but since the same policy supporting [sections] 407 and 408 also support [section] 409 and given the refusal of the Oklahoma courts to admit remedial measures and offers of compromise it is unlikely that they would take any different position on the admissibility of medical expenses.⁹⁹

This is the only special rule of relevancy that does not go on to state that the evidence whose admission it forbids for a particular purpose is nevertheless admissible for other purposes. Neither the Federal Advisory Committee's note¹⁰⁰ nor the Oklahoma Evidence Subcommittee's note¹⁰¹ mention this omission or offer any explanation for it. The authorities agree, however, that evidence of offering or of furnishing such assistance should be admissible for other purposes.¹⁰² It is somewhat difficult to find cases illustrating such other purposes,¹⁰³ but it is clear that the possibility of other purposes does exist. Consider a case in which there was a question of whether the plaintiff was hit by the defendant's automobile or some other automobile. Evidence that the defendant had visited the plaintiff and had offered to pay his medical expenses would have some tendency to establish that the defendant was driving the automobile that struck the plaintiff¹⁰⁴ (especially if the defendant had acted before he was notified that he had been accused of striking the plaintiff).

Three other points about section 409 can be illustrated with the same hypothetical example. First, if the defendant had not only offered to pay medical expenses but had also admitted any of the details of the accident, those statements would be admissible against him. Unlike

99. *Proposed Code*, *supra* note 4, at 2624.

100. Proposed Federal Rules, *supra* note 21, at 228.

101. *Proposed Code*, *supra* note 4, at 2624.

102. 2 LOUISELL & MUELLER, *supra* note 51, § 179; 2 WEINSTEIN & BERGER, *supra* note 15, ¶ 409[02]; P. ROTHSTEIN, *supra* note 47, at 39; 10 MOORE & BENDIX, *supra* note 49, § 409.04.

103. *Meegal v. Memphis Street Ry. Co.*, 33 Tenn. App. 247, 238 S.W.2d 519 (Ct. App. 1950), which is frequently cited, suggests in dictum that assistance or an offer of assistance might be used to prove control or the identity of the apparatus causing the injury. *Id.* at 251, 238 S.W.2d at 520. Similarly, *Hartford Accident & Indem. Co. v. Sanford*, 344 F. Supp. 969 (W.D. Okla. 1972), permitted an estoppel to be based upon payments that may or may not have been for medical or hospital costs because of uncertainty as to whether or not then existing Oklahoma law would permit the payments to be admitted in evidence as an admission of liability. The adoption of Oklahoma Evidence Code § 609 eliminates that question and this possible use of the fact of payments. *See also* note 104 *infra*.

104. This hypothetical is based upon *Arnold v. Owens*, 78 F.2d 495 (4th Cir. 1935), another case which is sometimes cited for other possible uses of this kind of evidence. In that case, however, the Fourth Circuit held that evidence of the offer to pay should not have been admitted even on the issue of identity because the evidence of identity was sufficient without such evidence.

section 408 (dealing with offers of compromise), section 409 “does not extend to conduct or statements not a part of the act”¹⁰⁵ of offering to pay. Second, if the defendant had offered to pay the medical expenses as an offer to settle the plaintiff’s claim, section 408 would appear to apply. (Surely the amount of a claim for personal injuries is always in dispute.) In that event both the offer and any accompanying admissions of fact would be inadmissible to prove liability. However, the facts of the admissions could be discovered in other ways and, both the offer and the admissions could be used to impeach the defendant if he testified inconsistently with them.

Third, and finally, both sections 408 and 409 are supplemented by section 403. All of the situations in which evidence is apparently admissible under sections 408 and 409 must also be subjected to the balancing test of section 403. Thus, if evidence of the defendant’s offer to pay medical expenses was offered to prove his identity as the driver of the automobile that struck the plaintiff, the court might find that those facts had a low probative value. This might be because those facts did not appear to be very strong evidence—as would be the case if the defendant had made his offer after being placed under arrest and taken to the hospital to be identified by the plaintiff. Also, the low probative value might be due to a lack of need for the evidence—as would be the case if there was overwhelming evidence to show that the defendant was the driver of the automobile that struck the plaintiff.¹⁰⁶ In either event the trial court might find that the danger of prejudice in revealing the offer to the jury would substantially outweigh such low probative value and exclude evidence of the offer even though it was offered for some “other purpose” which 408 and 409 did not forbid.

5. Guilty Pleas and Related Offers and Statements (Section 410)

This Code section is the same as federal evidence rule 410 as that rule was amended in late 1975. Section 410¹⁰⁷ comes very close to cre-

105. Proposed Federal Rules, *supra* note 21, at 228.

106. *See* note 104.

107. Section 410. Offer to Plead Guilty; Nolo Contendere; Withdrawn Plea of Guilty.

Except as otherwise provided in this paragraph, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of nolo contendere, or an offer to plead guilty or nolo contendere to the crime charged or any other crime, is admissible in a criminal proceeding for perjury or false statement if

ating an absolute rule against the use of certain guilty pleas and of related offers and statements against the person who made the plea or offer. The prohibition applies in any civil or criminal proceeding. The prohibition applies to evidence of any plea of *nolo contendere*, but it applies to guilty pleas which were actually made in court only if they were later withdrawn. The prohibition applies to any "offer to plead guilty or *nolo contendere* to the crime charged or to any other crime." Finally, the prohibition also applies to evidence "of statements made in connection with, and relevant to, any of the foregoing pleas or offers."

This section is complex because it attempts to achieve three different goals.¹⁰⁸ First, this section adopts the view that a party should be able to plead *nolo contendere* without creating evidence against himself, and it therefore prohibits evidence of such a plea. Second, this section prohibits evidence of a *withdrawn* plea of guilty on the theory that the power of the courts to permit the withdrawal of pleas will be rendered largely ineffective if the pleas may be used as evidence against the person who made them. Third, the section prohibits evidence of plea offers and discussions in order to encourage plea offers and settlements.

Note that this section, like section 408, protects not only offers but also statements made in connection with them. Section 410 also protects statements made in connection with the protected pleas. The section does contain a narrow exception which permits such statements to be proven in a criminal proceeding for perjury or false statement "if the statement was made by the defendant under oath, on the record and in the presence of counsel." This exception is certainly narrow¹⁰⁹ but is not quite as narrow as it may appear due to the increasingly common practice of taking guilty pleas at a record hearing with counsel and oaths. Whenever a plea taken at such a hearing is withdrawn, the statements made by the defendant during the hearing would qualify for use against him in a prosecution for perjury or false statement.

6. Liability Insurance (Section 411)

the statement was made by the defendant under oath, on the record and in the presence of counsel.

108. Proposed Federal Rules, *supra* note 21, at 229.

109. Both the federal evidence rule originally adopted by Congress and the proposed Oklahoma evidence rule contained a much broader exception which also permitted in-court statements made in connection with pleas to be used for impeachment. It should be noted that neither Oklahoma section 410 nor the present federal evidence rule 410 contain that exception.

Section 411¹¹⁰ restates familiar law.¹¹¹ Evidence of the existence of liability insurance is not admissible to prove negligence or wrongful action, but it is admissible for other purposes such as proof of agency, ownership, control, bias or prejudice of a witness. Section 411 also provides that evidence of the existence of liability insurance is admissible "where the question of possession of liability insurance is itself an element of the action."

C. Evidence of Character, Habit, and Routine Practice (Sections 404, 405, and 406)

1. Introduction—The Absence of Basic Change

The provisions of the Oklahoma evidence Code do make some changes in the rules of evidence concerning evidence of character. Probably the most important of those changes is the simple fact that the Code gives a fairly clear description of what the rules concerning evidence of character are to be. Other changes are expansion of testimony which character witnesses are permitted to give to include opinion¹¹² and restrictions on the kinds of criminal convictions which may be used to impeach a witness.¹¹³ These changes are discussed below.

The Code does not, however, attempt to change the fundamental features of the system by which evidence of character is admitted or excluded. As a result this area of the law will continue to be complex and confusing. It is still true under the Code, just as it was at common law, that the basic rule prohibiting the use of evidence of character as circumstantial evidence of behavior is cut apart by major exceptions and surrounded by situations to which it does not apply. It is also still true, just as it was at common law, that, when evidence of character is admitted under one of the exceptions as circumstantial evidence of behavior, special rules apply which require that proof be made through narrow and complex ritual methods.¹¹⁴ The Code's efforts to make this structure fairer add to its complexity.

110. Section 411. Liability Insurance.

Evidence of the existence of liability insurance is not admissible upon the issue of negligence or wrongful action. This section does not require the exclusion of evidence of liability insurance where the question of possession of liability insurance is itself an element of the action, or when offered for another purpose, including proof of agency, ownership, control, bias or prejudice of a witness.

111. See *Proposed Code*, *supra* note 4, at 2624.

112. See notes 119-28 *infra* and accompanying text.

113. See notes 301-07 *infra* and accompanying text.

114. See notes 119-28 & 301-07 *infra* and accompanying text.

2. The Basic Rule That Evidence of Character Is Not Admissible as Circumstantial Evidence of Behavior (Section 404(A))

The basic rule is stated in section 404(A).¹¹⁵ “Evidence of a person’s character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion” That is, it is not proper to attempt to prove that a person behaved in a certain way by introducing evidence that his character was such that he was likely to behave in that way. This basic rule is specifically made subject to three exceptions set forth in section 404(A). Furthermore, the Code indicates that there are three situations to which the basic rule does not apply. One of these is implied in the basic rule of section 404(A), and the other two are set out in sections 404(B) and 406.

3. Exception for Evidence of a Pertinent Trait of a Criminal Defendant (Section 404(A)(1))

This section gives an “accused” the option to offer evidence of a pertinent trait¹¹⁶ of his character as circumstantial evidence that he did not commit the crime charged. If the accused chooses to do so, the prosecution may then offer evidence “to rebut the same.” The kinds of evidence which either the accused or the prosecution can introduce are narrowly and specifically limited by section 405(A).¹¹⁷

The decision by the accused to introduce evidence concerning his

115. Section 404(A).

Evidence of a person’s character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

1. Evidence of a pertinent trait of his character offered by an accused or by the prosecution to rebut the same;
2. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor; or
3. Evidence of the character of a witness, as provided in Sections 607, 608 and 609 of this Code.

116. Note that this exception and the exception recognized in section 404(A)(2) apply only to evidence of a pertinent trait of character. The Oklahoma Evidence Subcommittee’s note to their proposed rule 404 explained:

The limitation to pertinent traits of character, rather than character generally, in Rule 404(a)(1) and (2) is designed to sharpen the importance of relevancy to permit proof of character by evidence of specific acts. It is acknowledged that this method may create prejudice and hostility, but it is also the most decisive revelation of character when it is put in issue.

Proposed Code, supra note 4, at 2621.

117. See notes 119-28 *infra* and accompanying text.

character as evidence of his innocence is frequently described as "putting his character in issue," a phrase which aptly conveys two ideas. First, the accused has the option of deciding whether evidence of his character may be introduced at all as circumstantial evidence of his innocence or guilt. Second, once the accused exercises his option to raise the question of his character, the prosecution may respond and use evidence of the accused's character to prove his guilt.

The statement that the accused may choose to "put his character in issue" is potentially misleading, however. It may lead to confusion between the situation in which the accused has the option of using evidence of his character as circumstantial evidence and the situation in which his character really is "in issue" in that some trait of his character is "an essential element of a charge, claim or defense." When character is actually an essential element of a charge, claim, or defense, it is not subject at all to the basic rule of section 404(A) limiting the use of character as circumstantial evidence.¹¹⁸

4. Methods of Proof When Evidence of a Pertinent Trait of the Character of the Accused Is Offered as Circumstantial Evidence of his Guilt or Innocence (Section 405(A))

Evidence of character which is offered as circumstantial evidence of conduct can only be proven through the methods of proof allowed by section 405(A).¹¹⁹ This section codifies, with one major change, the narrow procedure for proof of character as circumstantial evidence of conduct which has been traditional in American courts.¹²⁰ Under this traditional procedure, a party who called a witness to prove character as circumstantial evidence of conduct could only ask the witness to testify to the reputation of the person whose character was to be proven.¹²¹ The opposing party, however, could bring out on cross-examination relevant specific instances of conduct.¹²² If the opposing party called witnesses of his own to prove character, they would also be restricted to reputation testimony on direct examination and be subject to cross-examination concerning relevant specific instances of conduct.¹²³

118. See note 139 *infra* and accompanying text.

119. Section 405(A). "Where evidence of a person's character or trait of character is admissible, proof may be by testimony as to reputation or by testimony in the form of opinion. Inquiry is allowable on cross-examination into relevant specific instances of conduct."

120. McCORMICK, *supra* note 19, § 191, at 455-59.

121. *Id.* § 191, at 455-56.

122. *Id.* § 191, at 456-58.

123. *Id.* § 191, at 458-59.

Section 405(A) makes one change in the traditional procedure. It authorizes proof of character to be made either "by testimony as to reputation or by testimony in the form of opinion." Reference to specific instances of conduct is still forbidden except on cross-examination.

The enlargement of the traditional procedure to permit testimony in the form of opinion may be important depending upon whether the change is interpreted as also enlarging the kinds of witnesses who may be called to testify as to character. If only the same witnesses who could formerly be called to testify to reputation in the community may now be called to give their opinions, there will be no change for such reputation testimony was at best "opinion in disguise."¹²⁴ As Weinstein and Berger write, "[T]he average witness is unable to understand the admonition not to give his opinion, but that of others. He came to court to give his opinion and, despite some wrangling among attorneys and judges, this is what he usually manages to do."¹²⁵

Louisell and Mueller, however, argue that the expansion of character evidence to include opinion may be a major change because it may authorize a new kind of witness:

In another sense, however, opinion testimony is new and different, for it opens up the possibility of proving character by means of expert witnesses. When Rule 405 is read in conjunction with the provisions in Article VII, there is every reason to suppose that in appropriate cases the accused is entitled to try to establish innocence by means of psychiatric testimony to the effect that his character is such that he could not (or would not be likely to) commit the crime charged. What constitutes appropriate cases remains to be tested: It seems likely that psychiatric testimony would not, within the meaning of Rule 702, "assist the trier of fact to understand the evidence or to determine a fact in issue" in all criminal prosecutions. In cases where such testimony would not be helpful, clearly, it may be excluded, and doubtless the trial judge has a measure of discretion in deciding the question. It seems equally likely, however, in some cases, such as those involving sex offenses, which are of course rare in federal courts, that expert testimony would be very valuable, and entirely admissible pursuant to Rule 405 and the provisions of

124. "It seems likely that the persistence of reputation evidence is due to its largely being opinion in disguise." Advisory Committee's note to proposed federal evidence rule 405, Proposed Federal Rules, *supra* note 21, at 222.

125. 2 WEINSTEIN & BERGER, *supra* note 15, ¶ 405[02], at 405-20.

Article VII.¹²⁶

126. 2 LOUISELL & MUELLER, *supra* note 51, § 149, at 183-84 (footnotes omitted). See 2 WEINSTEIN & BERGER, *supra* note 15, ¶ 405[03]. The Federal Advisory Committee expected the addition of opinion evidence to permit new kinds of witnesses, and the Committee's note to proposed federal evidence rule 405 stated:

If character is defined as the kind of person one is, then account must be taken of varying ways of arriving at the estimate. These may range from the opinion of the employer who has found the man honest to the opinion of the psychiatrist based upon examination and testing. No effective dividing line exists between character and mental capacity, and the latter traditionally has been provable by opinion.

Proposed Federal Rules, *supra* note 21, at 222. See 22 WRIGHT & GRAHAM, *supra* note 52, § 5625, for a strong argument "that Congress was unaware that Rule 405 intended such a mischievous alteration." *Id.* § 5625, at 589. However, Wright and Graham are compelled to admit:

But despite these contrary arguments, it must be conceded that the proponents of expert testimony of character have the better case. Rule 405 is unambiguous, and though Congress may not have understood what it was doing, it would be beyond the legitimate use of "interpretation" to read the rule as admitting only lay opinions of character. Courts will have to struggle as best they can with the difficult problems presented by expert opinions of character.

Id. § 5625, at 590-91 (footnote omitted).

One of the "difficult problems presented by expert opinions" of character is the question of whether the expert will be permitted to explain how he reached his opinion. Such explanations by an expert witness would necessarily consist almost entirely of testimony about specific instances of conduct by the person whose character is in question. While this would clearly be proper on cross-examination of the expert, should it be permitted on direct as well? It would be in keeping with past and present treatment of reputation evidence of character to restrict the direct examination of an expert witness to character to a statement of opinion without any explanation of its basis and to permit the opposing party to choose whether to bring out the basis on cross-examination.

The Federal Advisory Committee provided only ambiguous assistance with this problem. Judge Weinstein (who was a member of the Advisory Committee) and Professor Berger write:

There was some fear expressed on the part of government attorneys that opinion witnesses would be permitted on direct to testify to specific incidents supporting their opinion. This was not the intent of the draftsmen, who expected the witness to be asked only in general terms to describe the nature of the familiarity, as a basis for the opinion. Accordingly, a paragraph was added at the end of the Advisory Committee's Note to make that clear.

2 WEINSTEIN & BERGER, *supra* note 15, ¶ 405[03], at 405-38 (footnote omitted). The paragraph at the end of the Advisory Committee's note to rule 405 states:

The express allowance of inquiry into specific instances of conduct on cross-examination in subdivision (a) and the express allowance of it as part of a case in chief when character is actually in issue in subdivision (b) contemplate that testimony of specific instances is not generally permissible on the direct examination of an ordinary opinion witness to character. Similarly as to witnesses to the character of witnesses under Rule 608(b). Opinion testimony on direct in these situations ought in general to correspond to reputation testimony as now given, *i.e.*, be confined to the nature and extent of observation and acquaintance upon which the opinion is based.

Proposed Federal Rules, *supra* note 21, at 223. This restricted view of how opinion testimony should be given on direct examination in situations controlled by federal evidence rule 405(a) seems to be a reasonable interpretation of federal evidence rule 405, but there is a question of whether the Federal Advisory Committee was speaking about an expert witness to character when it discussed "an ordinary opinion witness to character." See 22 WRIGHT & GRAHAM, *supra* note 52, § 5625, at 593-94. For an Oklahoma court the situation is further complicated by the fact that it must decide the meaning of Oklahoma Evidence Code section 405(A) rather than federal evidence rule 405(a). Section 405(A) is a reworded but apparently unchanged version of rule 405(a). Nevertheless, it may not carry the entire burden of the history of rule 405(a).

Wright and Graham predict, however, an interpretation of the federal rule which would be easy for Oklahoma to follow: "Given the unhappy choice between an interpretation opening the

Finally, it should be noted that section 405(A) may enlarge the kind of evidence that may be used to prove character in another way. The section permits testimony "as to reputation," without stating any limitation on where that reputation must exist. Traditionally the relevant reputation has been described as reputation in the community and thought of as the reputation of the person in his neighborhood of residence.¹²⁷ Section 405(A) leaves the courts free to accept other pertinent communities "from which a useful reputation might be drawn."¹²⁸

5. Exception for Evidence of a Pertinent Trait of the Character of the Alleged Victim of a Crime (Section 404(A)(2))

This exception also applies only in criminal cases. Section 404(A)(2)¹²⁹ permits evidence of a pertinent character trait of the victim to be offered in either of two situations. First, the accused may choose to offer such evidence in any situation in which the trait is pertinent. If the accused chooses to offer such evidence, the prosecution may do so also "to rebut the same." Second, the prosecution may offer evidence of the peaceful character of the victim in a homicide case to rebut evidence that the victim was the first aggressor. The rule does not provide that the accused has a right to rebut the prosecution's evidence, but there is no need to authorize a rebuttal by the accused since he has the option to introduce evidence on the victim's peacefulness regardless of what the prosecution does. As with evidence of pertinent character traits of the accused, the evidence must be introduced in accordance with section 405(A).

The peacefulness or violence of the character of the victim in an

door to inquiry into specific instances of conduct and one leaving the jury with untested expert opinions, most courts will probably opt for the latter as being less time-consuming and less likely to produce prejudice." *Id.* § 5625, at 595.

127. 5 J. WIGMORE, EVIDENCE § 1615 (J. Chadbourn, 1974).

128. It may be that reputation was a word of more meaning, more substance, more certainty, in an age when people lived in smaller geographic communities and changed domiciles less often. Nonetheless, courts have not had much trouble in visualizing the pertinent community as a collection of "relationships with others which arise where a man works, worships, shops, relaxes, and lives," rather than a particular "geographical unit." It is clear enough that reputation need not be confined to the opinions of a "neighborhood" which may well be comprised in a physical sense of nearby apartment units, and that a person's reputation where he works or goes to school may be more telling and useful. In short, the complexities and mobilities of modern living have not destroyed the idea of reputation, nor the concept of a "pertinent community" from which a useful reputation may be drawn.

2 LOUISELL & MUELLER, *supra* note 51, § 149, at 181-82 (footnotes omitted). *See also* 5 J. WIGMORE, EVIDENCE § 1616 (J. Chadbourn 1974).

129. *See* note 115 *supra* for text of § 404(A).

assault or homicide is the only pertinent trait that is ever likely to be the subject of proof under this exception. The only other victim's character trait that criminal defendants have traditionally attempted to prove is the sexual conduct of a rape victim. Oklahoma now prohibits the introduction of evidence concerning the sexual conduct of the complaining witness in a rape prosecution (or a prosecution for assault with intent to commit rape), except "evidence of the complaining witness' sexual conduct with or in the presence of the defendant," or in response to evidence of her sexual conduct introduced by the prosecution.¹³⁰ The statute goes further than the similar rules announced by the Oklahoma Court of Criminal Appeals in *Shapard v. State*¹³¹ in that the statute bars reputation (and opinion) evidence even when consent is an issue in the case.

6. Methods of Proof When Evidence of a Pertinent Trait of the Character of the Alleged Victim of a Crime Is Admissible as Circumstantial Evidence of Conduct (Section 405(A))

Evidence of character which is offered as circumstantial evidence of the conduct of the alleged victim of a crime is also subject to the limitations on methods of proof provided in section 405(A).¹³² That section permits the party who calls a witness for the purpose of showing the character of a victim to introduce reputation or opinion testimony, but it does not permit inquiry into specific instances of conduct except on cross-examination.

The Code thus forbids direct use of specific instances of conduct as circumstantial evidence of a relevant trait of an alleged victim. This is

130. OKLA. STAT. tit. 22, § 750 (Supp. 1978) provides:

A. In any prosecution for rape or assault with intent to commit rape, opinion evidence of, reputation evidence of and evidence as to specific instances of the complaining witness' sexual conduct is not admissible on behalf of the defendant in order to prove consent by the complaining witness. Provided that this section shall not apply to evidence of the complaining witness' sexual conduct with or in the presence of the defendant.

B. If the prosecutor introduces evidence or testimony relating to the complaining witness' sexual conduct, the defendant may cross-examine the witness giving such testimony and offer relevant evidence or testimony limited specifically to the rebuttal of such evidence or testimony introduced by the prosecutor.

131. 437 P.2d 565, 600 (Okla. Crim. App. 1967). The Oklahoma Court of Criminal Appeals has found this statute to be constitutional. *Cameron v. State*, 561 P.2d 118, 121-22 (Okla. Crim. App. 1977). That case did not actually present an issue of consent because there was not "one scintilla of evidence that tended to establish that the prosecuting witness in any way consented to have sexual relations with the defendant." *Id.* at 122.

132. See notes 119-28 *supra* and accompanying text.

apparently the most widely accepted common law rule,¹³³ but it is by no means so universally accepted as the similar exclusion of specific instances of conduct to prove the character of the accused. There is a strong minority of decisions which have permitted proof of specific instances of conduct of a victim, and Wigmore strongly supports the admission of such evidence.¹³⁴ It apparently cannot be said that the Code changes Oklahoma law on this point, but it does cut off a possibility that was open prior to the adoption of the Code.¹³⁵

It should be pointed out that evidence of specific acts of the victim are still admissible under the Code if they are relevant for some purpose other than as circumstantial evidence of character. If the accused knew of them, violent acts and threats by the victim are admissible as evidence of the reasonableness of the accused's fear of attack by the victim.¹³⁶

It does not appear that sections 404(A)(2) and 405(A) will have any application in prosecutions for rape or assault with intent to commit rape. Oklahoma law now prohibits any use of reputation or opinion evidence in such cases, and limits evidence of specific instances of conduct to events involving the defendant.¹³⁷

7. Exception for Evidence of Character of a Witness Offered as Circumstantial Evidence of his Truthfulness (Section 404(A)(3))

A party attacking the credibility of a witness may introduce certain limited kinds of evidence of character in order to prove circumstan-

133. 1 J. WIGMORE, EVIDENCE § 198 n.1 (1940 & Supp. 1977).

134. 1 J. WIGMORE, EVIDENCE § 198 & 198 n.1 (1940 & Supp. 1977).

135. The Code does forbid one similar use of character evidence which has been permitted both in Oklahoma and in many other jurisdictions. This is the use of character evidence in civil actions for assault and battery as circumstantial evidence to prove who was the first aggressor.

Civil actions for assault and battery seem often to be treated as in a class by themselves [W]hen on a plea of self-defense or otherwise there is an issue as to who committed the first act of aggression, most courts (regardless of their alignment on the general question) seem to admit evidence of the good or bad reputation of both plaintiff and defendant for peacefulness as shedding light on their probable acts. This cannot be justified, as is sometimes attempted, on the ground that character is here "in issue"—the issue is clearly one of conduct—but probably there is in these cases a special need even beyond that in most cases of charges of crime in civil actions, for knowing the dispositions of the parties.

McCORMICK, *supra* note 19, § 192, at 460-61 (footnote omitted). See, e.g., *Oller v. Hicks*, 441 P.2d 356, 362-63 (Okla. 1967); *Breckenridge v. Drummond*, 55 Okla. 351, 155 P.2d 555 (1916). See also *Woodmen of the World v. Welch*, 16 Okla. 188, 194, 83 P. 547, 549 (1905).

136. See *United States v. McClure*, 546 F.2d 670 (5th Cir. 1977). See also *Oller v. Hicks*, 441 P.2d 356, 362 (Okla. 1967).

137. OKLA. STAT. tit. 22, § 750 (Supp. 1978). See note 130 *supra*.

tially that the witness is unlikely to tell the truth. These methods of impeachment are covered by sections 609 and 608 which are discussed below.¹³⁸ The most important of these methods of impeachment is the use, under section 609 of evidence of convictions of certain crimes. In addition, section 608 permits the use of "character witnesses" to attack the character of a witness for truthfulness or to reply to such attacks through evidence of opinion or reputation. Section 608 also allows, at the court's discretion, specific instances of conduct to be brought out on cross-examination of either the witness being impeached or a "character witness."

8. Evidence of Character Is Admissible When Character Is an Essential Element of a Charge, Claim, or Defense

The basic rule forbids the use of character evidence as circumstantial evidence of conduct but does not exclude character evidence when character itself is the element to be proven. Cases in which character or a trait of character is an essential element of a charge, claim, or defense are extremely rare. When they do arise, however, it is necessary to permit proof of the character or trait of character which is involved. Examples of such situations include personal injury suits in which the defendant allegedly entrusted an automobile to an incompetent employee, libel or slander suits in which the defendant wishes to prove that charges of bad character were true, and prosecutions for sexual offenses under statutes requiring that the victim have been of chaste character. Oklahoma has such a statute which requires for the crime of statutory rape of a female between sixteen and eighteen years of age that the victim must be "of previous chaste and virtuous character."¹³⁹

9. Methods of Proving Character When Character Is an Essential Element of a Charge, Claim, or Defense (Sections 405(A) and 405(B))

Whenever character or a trait of character is an essential element of a charge, claim, or defense, the parties may attempt to prove that character by using all three of the methods of proof which have been discussed. Section 405(A) continues to authorize proof through "testi-

138. See notes 289-07 *infra* and accompanying text.

139. OKLA. STAT. tit. 21, § 1111 (1971). See generally, McCORMICK, *supra* note 19, § 187, at 443 n.8; 22 WRIGHT & GRAHAM, *supra* note 52, § 5235; and 2 LOUISELL & MUELLER, *supra* note 51, § 141.

mony as to reputation or testimony in the form of an opinion,” and section 405(B)¹⁴⁰ now authorizes evidence of specific instances of conduct even on direct examination.

10. Evidence of Other Crimes or Acts Which Would Be Inadmissible as Circumstantial Evidence of Character Is Admissible for Other Purposes (Section 404(B))

Logically it is obvious that much of the evidence that is relevant to prove various issues in a case will also tend to suggest something about the character of one of the parties or of some other person involved in the case. This is especially true in criminal cases. If the probative value of such an item of evidence is small or its prejudicial effect great, it could be excluded under the section 403 balancing test. There will, however, be many pieces of evidence whose probative value does justify their admission in spite of some prejudicial effect. Thus, if a bank-robber murders an accomplice who is blackmailing him about the robbery, evidence of the robbery should be admissible as part of the prosecution's murder case.

While section 404(B)¹⁴¹ could be read as merely a reminder of this obvious point, it is in fact something more. This section is a summary of the enormous variety of situations in which the courts have held that evidence of other crimes is admissible. Section 404(B) lists “proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident” as examples of purposes for which evidence of other crimes or acts may be admissible. Although many of the cases in some of these situations clearly involve something other than character,¹⁴² many other of these situations (such as proof of identity or absence of mistake) allow evidence of other crimes to prove some propensity very similar to character.¹⁴³ Section 404(B) therefore confirms the common law practice of drawing very close distinctions between the proof of a general criminal propensity and the proof of the narrower propensities which may be proven in many of these situations.

140. Section 405(B): “In cases in which a person's character or a trait of character is an essential element of a charge, claim or defense, proof may be made of specific instances of his conduct.”

141. Section 404(B):

Evidence of other crimes or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

142. See 2 LOUISELL & MUELLER, *supra* note 51, § 140, at 122-25.

143. *Id.* § 140, at 126-37, 140-44; 2 WRIGHT & GRAHAM, *supra* note 52, § 5239, at 459-67.

This aspect does not change existing Oklahoma law,¹⁴⁴ but it does give added force to the suggestion by the Oklahoma Evidence Subcommittee that "the highly prejudicial character of the evidence admissible under [section 404(B)] should suggest great caution in determining whether such evidence should be admissible under [section] 403."¹⁴⁵

11. Evidence of Habit and of Routine Practice Are Admissible as Circumstantial Evidence of Conduct (Section 406)

This section authorizes the use of both evidence of a person's habit and evidence of an organization's routine practice to prove that conduct on a particular occasion was in conformity with that habit or routine practice. Section 406¹⁴⁶ firmly rejects any requirements either that eyewitnesses be unavailable or that corroboration be available.

The Oklahoma Evidence Subcommittee stated that this section changes Oklahoma law with respect to personal habit but confirms existing case law sanctioning use of business custom and routine. However, the subcommittee went on to point out that "[t]here is no direct Oklahoma authority on [methods of proof]."¹⁴⁷ Section 406 therefore raises two questions for Oklahoma courts. First, how is habit to be distinguished from character? Second, how may either personal habit or the routine practice of an organization be proven?

All discussions of the distinction between habit and character return to a statement by McCormick with which the Federal Advisory Committee began its discussion of federal rule 406:

Character and habit are close akin. Character is a generalized description of one's disposition, or of one's disposition in respect to a general trait, such as honesty, temperance, or peacefulness. "Habit," in modern usage, both lay and psychological, is more specific. It describes one's regular response to a repeated specific situation. If we speak of character for care, we think of the person's tendency to act prudently in all the varying situations of life, in business, in family life, in handling automobiles and in walking across the

144. *Proposed Code, supra* note 4, at 2621.

145. *Id.*

146. Section 406. Habit; Routine Practice.

Evidence of a person's habit or of an organization's routine practice, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

147. *Proposed Code, supra* note 4, at 2622.

street. A habit, on the other hand, is the person's regular practice of meeting a particular kind of situation with a specific type of conduct, such as the habit of going down a particular stairway two stairs at a time, or of giving the hand signal for a left turn, or of alighting from railway cars while they are moving. The doing of the habitual acts may become semi-automatic.¹⁴⁸

Clearly there will be situations in which it will be difficult to distinguish habit from character, but section 406 requires an attempt.¹⁴⁹ If a person's conduct can be fairly described as a "regular practice of meeting a particular kind of situation with a specific type of conduct" it is admissible as circumstantial evidence of his behavior.¹⁵⁰

How is the existence of a person's habit or the routine practice of an organization to be proven? The version of federal rule 406 approved by the Supreme Court contained a part 406(b)¹⁵¹ which provided that habit or routine practice might be proven either "by testimony in the form of an opinion or by specific instances of conduct sufficient in number to warrant a finding that the habit existed or that the practice was routine." Congress deleted the provision, but this appears to be another situation in which a change in the language of an evidence rule may not have changed the rule.¹⁵² Both specific instances

148. MCCORMICK, *supra* note 19, § 195, at 462-63. See Proposed Federal Rules, *supra* note 21, at 223; 2 WEINSTEIN & BERGER, *supra* note 15, § 406[01], at 406-7; 2 LOUISELL & MUELLER, *supra* note 51, § 156, at 207-08; S. SALTZBURG & K. REDDEN, *supra* note 48, at 157.

149. See S. SALTZBURG & K. REDDEN, *supra* note 48, at 157.

150. Saltzburg and Redden suggest:

While it is difficult to delineate the difference between character and habit, it is appropriate to note that the more particular and the more regular the performance of an act, the more likely it is to be regarded as habit. In other words, the easier it is to describe with particularity what it is that someone does and the more routine the action, the more likely a court is to hold the activity to be a habit. With respect to a business or other type of organization, greater emphasis is placed on the routine nature of the activity than on its peculiarity; there is not the same problem of drawing a line between general and specific qualities that exist with natural persons.

Id. at 156.

151. Proposed Federal Rules, *supra* note 21, at 223.

152. The decision by the House Committee to delete proposed rule 406(b) was apparently a response to complaints about the authorization of opinion evidence to prove habit, HOUSE REPORT, *supra* note 39, at 5; 2 LOUISELL & MUELLER, *supra* note 51, § 155, at 204-07, but the Committee Report recognized that the effect of the deletion was to leave the question of proof to the courts "to deal with on a day to day basis," HOUSE REPORT, *supra* note 39, at 5, and there is no reason to think that the courts will do anything but continue to permit proof to be made through evidence either of opinion or of specific instances. Both methods of proof are already well established. McCormick states that "testimony of a witness to his conclusion that there was such a habit or practice. . . is the method usually employed," MCCORMICK, *supra* note 19, § 195, at 465 & 465 n. 19, but also states that proof "may also be made by evidence of specific instances." *Id.* § 195, at 465.

and opinion testimony should be admissible to prove habit or routine. Specific instances certainly must be admissible—if there are enough of them to show a habit or routine practice.¹⁵³ But it is more convenient, and usually more persuasive, to admit the testimony of witnesses who are so well acquainted with the habit or practice that the specific instances have blurred in their memories. Their opinions will satisfy the requirement for lay opinions set forth in section 701.¹⁵⁴ Opinion testimony is, and should continue to be, the most frequently used method for proving habit and usual routine.¹⁵⁵

III. COMPETENCY OF WITNESSES

A. *General Rule—Everyone Is Competent (Sections 601, 602, and 603)*

Section 601¹⁵⁶ of the Oklahoma Evidence Code is an example of the wise simplification of evidence law achieved by some sections of the Code and the Federal Rules of Evidence. Except as provided in a few other sections of the Code (which are discussed below),¹⁵⁷ every person is competent to be a witness if they meet two minimum requirements. First, under section 603¹⁵⁸ a witness must, by oath or affirmation, declare that he will tell the truth. Second, under section 602¹⁵⁹ a witness must have personal knowledge of the matter about which he testifies. This requirement of personal knowledge is satisfied if a witness to an

153. Louisell and Mueller state:

The problem of how many specific acts suffice to show habit or custom seems to be inherent in the very idea of habit evidence Certain it is that under Rule 406 proof of habit may take the form of specific instances of conduct, and that such proof may be rejected as irrelevant in the case where it does not suffice to prove habit and has no other bearing in the action. Such proof may also be rejected pursuant to Rule 403, where probative worth is "substantially outweighed" by the danger of unfair prejudice or confusion of issues, etc. LOUISELL & MUELLER, *supra* note 51, § 156, at 211 (footnotes omitted).

154. See notes 322-23 *infra* and accompanying text.

155. MCCORMICK, *supra* note 19, § 195, at 464 n.18; Field, *A Code of Evidence For Arkansas?*, 29 ARK. L. REV. 1, 15 (1975); LOUISELL & MUELLER, *supra* note 51, § 156, at 211-12.

156. Section 601. General Rule of Competency. "Every person is competent to be a witness except as otherwise provided in this Code."

157. For discussion of §§ 604, 605, and 606, see notes 174-78 *infra* and accompanying text.

158. Section 603. Oath or Affirmation. "Every witness shall be required to declare before testifying that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so."

159. Section 602. Lack of Personal Knowledge.

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the testimony of the witness himself. This rule is subject to the provisions of Section 703 of this Code.

admissible hearsay statement has personal knowledge of the making of the statement.¹⁶⁰ This rule does not apply to an expert witness who may be permitted under section 703 to testify concerning some matters without personal knowledge.¹⁶¹

B. Changes in Oklahoma Law

Section 601 makes four changes in Oklahoma law.

1. Abolition of Mental Qualifications for Witnesses

Section 601 rejects the idea that a witness must reach some particular level of mental competency in order to be of any use at a trial. The Federal Advisory Committee note to the corresponding federal evidence rule pointed out, "A witness wholly without capacity is difficult to imagine."¹⁶² It does not appear that this change will make any real differences in the outcome of cases tried in Oklahoma. Although prior Oklahoma law appeared to set minimum levels of sanity and competency for witnesses,¹⁶³ the Oklahoma courts held that the section permitted persons of unsound mind¹⁶⁴ and children¹⁶⁵ to testify if they could understand, remember, and relate well enough to assist the trier of fact.¹⁶⁶

160. The Federal Advisory Committee's note to federal evidence rule 602 states:

This rule does not govern the situation of a witness who testifies to a hearsay statement as such, if he has personal knowledge of the making of the statement. Rules 801 and 805 would be applicable. This rule would, however, prevent him from testifying to the subject matter of the hearsay statement, as he has no personal knowledge of it.

Proposed Federal Rules, *supra* note 21, at 263.

161. See notes 333-38 *infra* and accompanying text.

162. Proposed Federal Rules, *supra* note 21, at 262.

163. The former Oklahoma statute defining incompetency provided in part:

The following persons shall be incompetent to testify;

1. Persons who are of unsound mind at the time of their production for examination.

2. Children under ten (10) years of age who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly.

Act of March 12, 1953, ch. 9, § 1, 1953 Okla. Sess. Laws.

164. *E.g.*, *Watkins v. Watkins*, 206 Okla. 589, 245 P.2d 434 (1952); *Mo-Kan-Tex. R. Co. v. Embrey*, 168 Okla. 433, 33 P.2d 481 (1934). See Holladay, *Evidence: Mental Defects and Witness Competency*, 40 OKLA. B.A.J. 2635 (1969).

165. *E.g.*, *Soap v. State*, 562 P.2d 889 (Okla. Crim. App. 1977); *Patrick v. State*, 502 P.2d 1289 (Okla. Crim. App. 1972). *But see* *Schaff v. Coyle*, 121 Okla. 228, 249 P. 947 (1926).

166. Weinstein and Berger indicate that many other states treated similar requirements in similar fashion:

Eventually, observers noted that although courts continued to insist upon their right to exclude witnesses on the ground of mental incapacity, in practice, virtually all witnesses were permitted to testify despite extreme youth or age or severe psychological and physiological infirmities By the time Rule 601 was drafted, judges without expressly so stating had come around to Wigmore's view that a witness wholly without

2. Abolition of Disqualification for Perjury

The provision of the Oklahoma statutes which made persons convicted of perjury or subornation of perjury incompetent as witnesses is repealed by the Oklahoma Evidence Code.¹⁶⁷ Those convictions can be used, however, to impeach the witness under section 609.¹⁶⁸

3. Abolition of the Dead Man's Statute

The Code also repeals the previous Oklahoma statute which prohibited testimony by living persons about their dealings with deceased persons in suits involving those dealings.¹⁶⁹ It is generally agreed by commentators that such dead man's statutes were unfair to honest litigants, ineffective against dishonest litigants, and a cause of "massive and unnecessary litigation."¹⁷⁰ Burck Bailey stated in support of this change when it was recommended as part of the 1969 proposal for Oklahoma Rules of Evidence:

The change would give relief to honest survivors who find themselves unable, under the present law, to establish their valid claims against an estate. It is clear the dead man statutes do not accomplish their avowed purpose, which is to prevent dishonest claimants from fleecing estates. The reason they cannot be successful is that a person who would, through his own testimony, falsify a claim would not hesitate to suborn perjury. The statutes do not and cannot prevent the survivor from obtaining others who will bear false witness against the estate. It is, therefore, the honest survivor rather than the dishonest one who is defeated by this type of legislation.¹⁷¹

He also went on to state:

Dead man statutes were long ago abolished in England, Connecticut, Louisiana, Massachusetts, Oregon, Rhode Is-

capacity is difficult to imagine and "that each witness' testimony be taken for what it seems to be worth."

3 WEINSTEIN & BERGER, *supra* note 15, ¶ 601[03], at 601-24 & 601-25.

167. Act of May 24, 1965, ch. 126, § 6, 1965 Okla. Sess. Laws.

168. See notes 301-07 *infra* and accompanying text.

169. Act of May 12, 1965, ch. 96, 1965 Okla. Sess. Laws.

170. Oklahoma Evidence Subcommittee's note to proposed rule 601, *Proposed Code, supra* note 4, at 2634. See Callaghan & Ferguson, *Evidence and the New Federal Rules of Civil Procedure*, 2, 47 YALE L.J. 194, 199-200 (1937). They state: "But the indictment of the dead man statutes need not rest solely on considerations of their shortcomings in theory. In practice the statutes have cluttered up the dockets of appellate courts ever since their enactment, and a large number of decisions has been required for their interpretation." *Id.* at 199.

171. Bailey, *A Proposed Evidence Code For Oklahoma*, 40 OKLA. B.A.J. 1837, 1838 (1969)(footnotes omitted).

land, and South Dakota. In these jurisdictions unscrupulous survivors have not been noticeably successful in raiding the estates of deceased persons.¹⁷²

4. Abolition of Most Restrictions on Testimony by Spouses

Formerly, section 385(3) of title 12 of the Oklahoma Statutes limited the right of a husband or wife to testify *for or against* their spouse (subject to several substantial exceptions). Under the Code, this is replaced by section 504 which gives a narrow privilege to a husband or wife who is a defendant in an ordinary criminal case to keep his spouse from testifying to confidential communications between them.¹⁷³

C. *Special Rules For Judges, Jurors, and Interpreters (Sections 604, 605, and 606)*

1. Incompetency of Judge or Juror as Witness During the Trial at Which They Serve

Sections 605¹⁷⁴ and 606(A)¹⁷⁵ make both the judge presiding at a trial and a member of the jury incompetent as witnesses in that trial. No objection need be made to testimony by the judge.

2. Limited Competency of a Juror as a Witness to the Jury's Deliberations

Section 606(B)¹⁷⁶ limits the matters about which a juror may give testimony or an affidavit. Although it is stated as a rule of competency, this is really a rule limiting the ways in which a jury verdict or indictment may be investigated.

172. *Id.* at n.5 (citation omitted).

173. See notes 236-43 *infra* and accompanying text.

174. Section 605. Competency of Judge as Witness. "The judge presiding at the trial shall not testify in that trial as a witness. No objection need be made in order to preserve the error."

175. Section 606(A). Competency of Juror as Witness.

A member of the jury shall not testify as a witness before that jury in the trial of the case in which he is sitting as a juror. If he is called to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

176. Section 606(B). Competency of Juror as Witness.

Upon an inquiry into the validity of a verdict or indictment, a juror shall not testify as to any matter or statement occurring during the course of the jury's deliberations or as to the effect of anything upon his or another juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes during deliberations. A juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. An affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying shall not be received for these purposes.

3. Interpreters

Section 604¹⁷⁷ provides that interpreters are “subject to the provisions of this Code relating to qualification as an expert.” This rule does not refer, however, to any specific requirements for experts but to the broad provisions of section 702 that “a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify” if “specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.”¹⁷⁸

D. Competency of Witnesses in Federal Courts.

The competency of witnesses to testify in federal courts will be determined by federal evidence rules which correspond to the Oklahoma Evidence Code sections which have just been discussed. There is, however, one striking difference between the Oklahoma Code and the Federal Rules. Federal evidence rule 601¹⁷⁹ distinguishes between two situations—those in which federal law controls a claim or defense and those in which state law controls. If federal law controls, witness competency is determined by the federal evidence rules. If state law controls, however, witness competency is determined by state law. This rule and two other federal evidence rules provisions which apply state law to questions of privilege and questions of presumptions whenever state law controls an element of a claim or defense have been described as “mini-Erie rules.”¹⁸⁰ These rules are harder to state than to understand, and, in cases which clearly involve either federal law or state law, these mini-Erie rules will not be hard to apply. Federal cases which involve both federal and state law, however, may present some very complicated problems.¹⁸¹

The abolition of Oklahoma’s dead man’s statute and of past re-

177. Section 604. Interpreters. “An interpreter is subject to the provisions of this Code relating to qualification as an expert and the administration of an oath or affirmation that he will make a true translation.”

178. See notes 323-24 *infra* and accompanying text.

179. Federal evidence rule 601 provides:

General Rule of Competency

Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which state law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.

180. Blakey, *Substantive Use of Prior Inconsistent Statements Under the Federal Rules of Evidence*, 64 KY. L.J. 3, 29 n.91 (1975). The two other “mini-Erie Rules” are federal evidence rule 302 and the second sentence of federal evidence rule 501.

181. See also Berger, *Privileges, Presumptions and Competency of Witnesses in the Federal Court: A Federal Choice-of-Laws Rule*, 42 BROOKLYN L. REV. 417, 443-45 (1976).

strictions on the competency of husband and wife to testify for each other in certain civil cases largely eliminates the importance of this distinction with respect to competency in federal cases involving Oklahoma law. The distinction will still be important, however, in any case tried in federal court which involves the law of any state which still has a dead man's statute.

IV. PRIVILEGES

A. *Completeness*

The Oklahoma Evidence Code, like the Federal Rules of Evidence, is not a complete restatement of the law of evidence. Both the Federal Rules and the Code frequently discuss only points that they change or emphasize. However, Article V of the Code, which deals with privileges, is unusually complete. All Oklahoma statutes dealing with major privileges have been repealed and replaced by sections of Article V. Furthermore, section 501¹⁸² declares, in effect, that there are to be no common law privileges.

Section 501 recognizes, however, that there are several additional possible sources of privileges. These include the Constitutions of Oklahoma¹⁸³ and of the United States, rules promulgated by the Oklahoma Supreme Court, and other Oklahoma statutes. The Oklahoma Evidence Subcommittee points out in its note to section 501 that "special privileges created by act of the Legislature . . . are too numerous to mention"¹⁸⁴ and gives as an example the records of minors.¹⁸⁵ Furthermore, the privileges which Oklahoma is required to recognize by the Constitution of the United States include those created by federal statutory and common law as well as those set forth in the Constitution itself.

182. Section 501. Privileges Recognized Only as Provided.

Except as otherwise provided by constitution, statute or rules promulgated by the Supreme Court no person has a privilege to:

1. Refuse to be a witness;
2. Refuse to disclose any matter;
3. Refuse to produce any object or writing; or
4. Prevent another from being a witness or disclosing any matter or producing any object or writing.

183. OKLA. CONST. art. 2, § 21, creates a privilege against self incrimination.

184. *Proposed Code, supra* note 4, at 2625.

185. OKLA. STAT. tit. 10, § 406 (1971).

B. The Privileges Recognized in the Oklahoma Evidence Code Were Already Law in Oklahoma

Section 506 (newsperson's privilege) of the Code is a rearrangement of sections 385.1, 385.2, and 385.3 of title twelve of the Oklahoma Statutes which had been in effect since 1974.¹⁸⁶ All other sections of Article V had been enacted in section 418 of title twelve of the Oklahoma Statutes which was effective from October 1, 1977, to October 1, 1978.¹⁸⁷ Although there are four differences between section 418 and the new Code sections which took its place on October 1, 1978, only one change is of major importance. Section 503(D)(3) adds a provision that the physician and psychotherapist-patient privilege does not apply to medical conditions in any proceeding in which those conditions are an element of a claim or defense.¹⁸⁸

C. A Comparison of Privileges in the Oklahoma Evidence Code and in Federal Courts

1. Sources

The privileges sections of the Code are based upon the privileges sections of the *proposed* Federal Rules of Evidence. Oklahoma rejected one proposed federal privilege (for required reports) and added one privilege (the newspaper's privilege).¹⁸⁹ All other Oklahoma privilege sections and the corresponding *proposed* federal rules are identical except for a few changes which are discussed below in the discussions of particular privileges.

2. Privileges in Federal Courts in Cases Controlled by Federal Law

The *proposed* Federal Rules of Evidence dealing with privileges did *not* become part of the Federal Rules of Evidence that were finally adopted. Congress rejected them all and adopted instead a one-paragraph, two-sentence rule, rule 501.¹⁹⁰ The following first sentence of rule 501 applies whenever a case is controlled by federal law:

186. Act of March 12, 1953, ch. 9, 1953 Okla. Sess. Laws.

187. Act of June 21, 1977, ch. 265, 1977 Okla. Sess. Laws.

188. The other three changes are: § 503(A)(3)(b) adds slightly to the definition of psychotherapist, § 507 deletes an exception for disclosure of votes pursuant to state election law, and § 510(c)(2) is a completely rewritten version of § 418.9(C)(2).

189. Section 506.

190. See 2 WEINSTEIN & BERGER, *supra* note 15, ¶ 501[02], at 501-02 to 501-04.

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall 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.

The effect of this rule, however, is likely to be the return of federal courts to the privilege rules which Congress rejected for guidance in applying this rule.¹⁹¹

3. Privileges in Federal Courts in Cases Controlled by Oklahoma Law

Federal rule 501 makes a very different provision for federal cases in which state law "supplies the rule of decision" as to an element of a claim or defense. The following second sentence of federal evidence rule 501, another "mini-Erie rule,"¹⁹² states:

However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Thus the Oklahoma Evidence Code will control privilege questions in federal cases in which Oklahoma law controls the underlying substantive issues. These are most likely to be diversity cases involving ordinary issues such as automobile accident personal injury claims. Since Oklahoma law controls the substantive issues in such cases, it will also control the privileges. In cases in which both federal and state substantive law is involved, the privilege situations may become very complicated.¹⁹³

D. Waiver of Privileges

1. Failure to Claim a Privilege

191. *See id.* ¶ 501[02]. Note also that the remainder of that volume of Weinstein & Berger is devoted to analysis of the rejected proposed Federal Rules of Evidence dealing with privileges. Weinstein and Berger call these rejected rules "Supreme Court Standards." *See also* 2 LOUISELL & MUELLER, *supra* note 51, §§ 200-239, which does not go so far in treating the rejected rules as if they were law but does make very extensive use of them.

192. *See* note 180 *supra* and accompanying text.

193. *See* 2 WEINSTEIN & BERGER, *supra* note 15, ¶ 501[02], at 501-18 & 501-19; Berger, *supra* note 181, at 432-34, 448-56. *See also* 2 LOUISELL & MUELLER, *supra* note 51, §§ 205 & 206.

Each of the particular privileges recognized by the Code can be waived by the person for whose benefit the privilege is created. In situations involving any of the privileges for confidential communications, the other person involved may claim the privilege on behalf of the protected person. Thus the lawyer may claim the privilege on behalf of the client, and the priest may claim the privilege on behalf of the communicant. The right to waive the privilege belongs to the protected person, however, and he may waive it despite the wishes of the other person.

2. Voluntary Disclosure

Section 511¹⁹⁴ provides that voluntary disclosure by the protected person waives the privilege unless the disclosure itself is privileged. Under section 512 the privilege is not waived, however, by a disclosure which was compelled erroneously or was made without opportunity to claim the privilege.¹⁹⁵

E. Prohibition of Comment Upon or Inference From Claim of Privilege; Instruction (Section 513)

Section 513¹⁹⁶ forbids comment upon or an inference to be drawn from a claim of privilege. It does not distinguish between privileges claimed by parties and privileges claimed by witnesses. To the extent practicable, the jury is to be kept in ignorance of the fact that any claims of privilege have been made. Additionally, "any party against whom the jury might draw an adverse inference from a claim of privi-

194. Section 511. Waiver of Privilege by Voluntary Disclosure.

A person upon whom this Code confers a privilege against disclosure waives the privilege if he or his predecessor voluntarily discloses or consents to disclosure of any significant part of the privileged matter. This section does not apply if the disclosure itself is privileged.

195. Section 512. Privileged Matter Disclosed Under Compulsion or Without Opportunity to Claim Privilege.

A claim of privilege is not defeated by a disclosure which was:

1. Compelled erroneously; or
2. Made without opportunity to claim the privilege.

196. Section 513. Comment Upon or Inference From Claim of Privilege; Instruction.

A. A claim of privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.

B. In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

C. Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.

lege is entitled to an instruction that no inference may be drawn therefrom.”

These procedures have been constitutionally required in cases involving the privilege against self-incrimination, but the Constitution does not require the application of these procedures to all privileges.¹⁹⁷ Oklahoma was therefore free to adopt some other rule, such as the Maine rule authorizing comments on claims of privilege in civil cases,¹⁹⁸ or no rule at all. The question of what the wisest rule might be, however, turns out to be a very hard question.

The Advisory Committee note to proposed federal evidence rule 513 defended the proposed rule which Oklahoma has now adopted by arguing: “While the privileges governed by these rules are not constitutionally based, they are nevertheless founded upon important policies and are entitled to maximum effect.”¹⁹⁹ Both in this argument and in the provisions of rule 513, however, the Committee viewed all recognized privileges as having equal stature and all claims of privilege as equal problems. Neither of these assumptions is true. The various privileges, created by either the Oklahoma Evidence Code or other sources of law, have different inherent values. More importantly, the effect of a claim of privilege will also depend upon the circumstances in which it is made. This fact suggests two observations about the various ways in which section 513 will actually work.

First, in some situations it will be impossible to keep the jury from drawing an adverse inference from the nonproduction of privileged information, even though the jury is kept in complete ignorance of the claim of privilege. If it is apparent to the jury that witnesses exist who have not been called, that jury will draw logical inferences.²⁰⁰ It may even be possible for counsel to make arguments about the “absence” of evidence on key points.²⁰¹ Prosecutors have frequently been permitted to do this when criminal defendants have exercised their constitutional right not to take the stand.²⁰²

197. See Federal Advisory Committee's note to proposed federal rule 513, Proposed Federal Rules, *supra* note 21, at 260-61.

198. MAINE REV. STAT. tit. 8, Rule 513 (Supp. 1977). This permissive rule applies only to claims of privilege in civil cases by a party. Claims of privilege by a nonparty witness are governed by MAINE REV. STAT. tit. 8, Rule 512 (1977 Supp.), which is similar to Oklahoma Code § 513.

199. Proposed Federal Rules, *supra* note 21, at 260.

200. See 2 WEINSTEIN & BERGER, *supra* note 15, ¶ 513[02], at 513-3 & 513-4.

201. Comment, *Federal Rules of Evidence and the Law of Privileges*, 15 WAYNE L. REV. 1286, 1371 (1969).

202. See *Cameron v. State*, 561 P.2d 118 (Okla. Crim. App. 1977).

Secondly, if the jury is kept in ignorance of the fact that a party or a witness has claimed a privilege, it may draw a logical inference against the wrong party—that is, against a party who had no control over the claim of privilege and against whom the jury would not draw any inference if it knew of the claim of privilege.²⁰³ Weinstein and Berger suggest that the constitutional requirements of due process may resolve some of the problems in the application of section 513:

Nevertheless there may be instances where due process requires that the information of the exercise of privilege be brought to the jury's attention. Where a defendant cannot obtain key information blocked by the government, as for example the name of an informer, a state secret, or testimony of a witness, the jury should probably be informed so it can find a reasonable doubt. The government will not normally be permitted this right. Sometimes the parties can be protected if the court instructs the jury: "Witness X is not available. Do not speculate why." The government should be entitled to such an instruction to prevent the spoliation inference from being drawn against it.²⁰⁴

These observations raise doubts about the wisdom of section 513 but do not suggest a better alternative. The Maine alternative also treats all claims of privilege by civil parties alike even though it changes the procedures to subject all such claims to comments and inferences.²⁰⁵

F. Attorney-Client Privilege (Section 502)

1. Scope

Section 502²⁰⁶ is a privilege for confidential communications be-

203. Professor Field pointed out:

It is arguable that adverse inference from a claim of privilege should be allowed in a civil case and comment permitted. If so, the procedure for making the claim out of the jury's hearing would be wholly inappropriate. Indeed, the failure to ask a question to which a privilege claim could be made might lead to an inference against the party who did not ask it.

Field, *supra* note 155, at 23.

204. 2 WEINSTEIN & BERGER, *supra* note 15, ¶ 513[02], at 513-7.

205. See MAINE REV. STAT. tit. 8, Rule 513 (Supp. 1977).

206. Section 502. Attorney-Client Privilege.

A. As used in this section:

1. An "attorney" is a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation;

2. A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who consults an attorney with a view towards obtaining legal services or is rendered professional legal services by an attorney;

3. A "representative of an attorney" is one employed by the attorney to assist the attorney in the rendition of professional legal services;

tween attorneys and clients. The confidential communication must have been made "for the purpose of facilitating the rendition of professional legal services to the client." This does include inquiries about whether to employ an attorney regardless of whether the attorney is finally employed.²⁰⁷

Section 502 recognizes that a communication with an attorney may be intended to be confidential despite the presence of third per-

4. A "representative of the client" is one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client; and

5. A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

B. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client;

1. Between himself or his representative and his attorney or his attorney's representative;

2. Between his attorney and the attorney's representative;

3. By him or his representative or his attorney or a representative of the attorney to an attorney or a representative of an attorney representing another party in a pending action and concerning a matter of common interest therein;

4. Between representatives of the client or between the client and a representative of the client; or

5. Among attorneys and their representatives representing the same client.

C. The privilege may be claimed by the client, his guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the attorney or the attorney's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

D. There is no privilege under this rule:

1. If the services of the attorney were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

2. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

3. As to a communication relevant to an issue of breach of duty by the attorney to his client or by the client to his attorney;

4. As to a communication relevant to an issue concerning an attested document to which the attorney is an attesting witness;

5. As to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to an attorney retained or consulted in common, when offered in an action between or among any of the clients; or

6. As to a communication between a public officer or agency and its attorney unless the communication concerns a pending investigation, claim or action and the court determines that disclosure will seriously impair the ability of the public officer or agency to process the claim or conduct a pending investigation, litigation or proceeding in the public interest.

207. The Oklahoma Evidence Subcommittee's note states, "[Section 502(A)(1)] does not make actual employment necessary as long as the consultation was with a view to retaining the attorney's professional services." *Proposed Code, supra* note 4, at 2626 (citing *Hunt v. State*, 303 P.2d 476 (Okla. Crim. App. 1956)).

sons, if they are involved in providing legal services to the client.²⁰⁸ If the communication was made in such a fashion as to be confidential, the privilege can be enforced against any person who learned of it, including an eavesdropper.²⁰⁹

2. Representatives

This section also recognizes that confidential communications can be made through representatives of the client or of the lawyer. Subsection 502(A)(4), which defines a "representative of the client," was not part of the corresponding proposed federal rule submitted to the Supreme Court. This definition had been part of the 1969 draft of the proposed Federal Rules and was added to the 1974 version of the Uniform Rules of Evidence.²¹⁰ The definition is important because it offers a narrow answer to the difficult question of which corporate employees will be covered by the attorney-client privilege. Professor Field explained:

[This rule] defines "representative of the client" as one having authority to obtain legal services [or] to act on advice rendered pursuant thereto on behalf of the client. This is an adoption of the so-called "control group" test. It narrows the privilege, confining it to communications by persons of sufficient authority to make decisions for the client. It would not protect communications from lower-level employees to lawyers to enable them to advise a decision-making superior. To illustrate by an example, if a bank teller seeks advice from the bank's attorney whether to accept as sufficient a particular endorsement, the communication would presumably be privi-

208. Section 502(A) and (B). The Oklahoma Evidence Subcommittee's note suggests that "a lawyer's secretary, . . . [l]egal interns, office administrators and the like" are examples of the representatives of the lawyer who would be covered by the privilege. *Proposed Code, supra* note 4, at 2626. The Federal Advisory Committee suggests that "an expert employed to assist in the planning and conduct of litigation" or "an expert employed to assist in rendering legal advice" will also be covered. *Proposed Federal Rules, supra* note 21, at 238. The circle of those who may be involved on behalf of the client is even larger. It includes both representatives of the client and persons covered by the definition of confidential in § 502(5). That section recognizes that a communication is confidential if it is "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." The Federal Advisory Committee suggests that this includes those in such relation to the client as spouse, parent, business associate, or joint client. *Id.*

209. Section 501(B) gives the client a privilege "to prevent any other person from disclosing" confidential communications subject to the rule. This language was chosen to protect the client against eavesdroppers. *Proposed Federal Rules, supra* note 21, at 238.

210. Preliminary Draft, *supra* note 34, at 250. *See also* *Proposed Federal Rules, supra* note 21, at 237.

leged because the teller would have authority to act on the advice. If, however, he gave the attorney a statement about a customer slipping on a foreign object as he was presenting a check to be cashed, there would be no privilege. This would be true even though his decision-making superiors directed him to make the statement.²¹¹

The Advisory Committee that drafted the proposed Federal Rules explained its decision to delete this definition by stating: "This rule contains no definition of 'representative of the client.' In the opinion of the Advisory Committee, the matter is better left to resolution by decision on a case-by-case basis."²¹² Of course, a case-by-case approach would merely postpone the question of which corporate employees would be covered by the attorney-client privilege. Oklahoma has chosen one answer²¹³ to that hard question and is now ready to test that answer.

3. Who May Claim the Privilege?

The privilege belongs to the client and may be claimed by him or by persons such as his guardian or a trustee. The attorney may assert the privilege on behalf of the client and is presumed to have authority to do so. Subsection 502(C) states that this is also true with respect to a representative of the attorney at the time of the communication, but logically any persons whose knowledge does not destroy the privilege should be able to assert the privilege on behalf of the client.

4. Limitations

The attorney-client privilege is subject to the traditional limitations. There is no privilege for communications: (1) involving future crimes or frauds; (2) between parties claiming through the same deceased clients; (3) between an attorney and a client who claim that either has breached a duty to the other; (4) concerning a document as to which the attorney is an attesting witness; (5) in disputes between joint clients.²¹⁴ There is also only a limited privilege for a communication between a public officer or agency and its attorney.²¹⁵

211. Field, *supra* note 155, at 18-19 (misquotation ("and" for "or") corrected).

212. Proposed Federal Rules, *supra* note 21, at 238.

213. See 2 LOUISELL & MUELLER, *supra* note 51, § 212, for a description of the possible answers. See also 2 WEINSTEIN & BERGER, *supra* note 15, ¶ 503(b)[04].

214. Section 502(D).

215. Section 502(D)(6).

G. *Physician and Psychotherapist-Patient Privilege (Section 503)*

1. History and Scope

Section 503²¹⁶ is an enlarged version of a proposed federal evidence rule which dealt only with communications to psychotherapists.²¹⁷ The proposed Federal Rules contained no privilege for communications to physicians who were not psychotherapists because the Advisory Committee had decided that the numerous exceptions to

216. Section 503. Physician and Psychotherapist-Patient Privilege.

A. As used in this section:

1. A "patient" is a person who consults or is examined or interviewed by a physician or psychotherapist;

2. A "physician" is a person authorized to practice medicine in any state or nation, or reasonably believed by the patient to be so authorized;

3. A "psychotherapist" is:

a. a person authorized to practice medicine in any state or nation, or reasonably believed by the patient to be so authorized, while engaged in the diagnosis or treatment of a mental or emotional condition, including alcohol or drug addiction, or

b. a person licensed or certified as a psychologist under the laws of any state or nation, or reasonably believed by the patient to be so licensed or certified, while similarly engaged; and

4. A communication is "confidential" if not intended to be disclosed to third persons, except persons present to further the interest of the patient in the consultation, examination or interview, persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the physician or psychotherapist, including members of the patient's family.

B. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of his physical, mental or emotional condition, including alcohol or drug addiction, among himself, his physician or psychotherapist, and persons who are participating in the diagnosis or treatment under the direction of the physician or psychotherapist, including members of the patient's family.

C. The privilege may be claimed by the patient, his guardian or conservator or the personal representative of a deceased patient. The person who was the physician or psychotherapist at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the patient.

D. The following shall be exceptions to a claim of privilege:

1. There is no privilege under this section for communications relevant to an issue in proceedings to hospitalize the patient for mental illness, if the psychotherapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization;

2. Communications made in the course of a court ordered examination of the physical, mental or emotional condition of a patient, whether a party or a witness, are not privileged under this section when they relate to the particular purpose for which the examination is ordered unless the court orders otherwise; or

3. There is no privilege under this Code as to a communication relevant to the physical, mental or emotional condition of the patient in any proceeding in which the patient relies upon that condition as an element of his claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense.

217. Proposed federal evidence rule 504, Proposed Federal Rules, *supra* note 21, at 240-41.

such privileges made them useless.²¹⁸ Oklahoma has followed the suggestion of the 1974 Uniform Rules of Evidence and added communications to physicians to this rule. "Psychotherapist" is defined to include a psychologist.²¹⁹ Section 503 recognizes that a communication may be intended to be confidential despite the presence of third persons if those third persons are either aiding or participating in the diagnosis or treatment.²²⁰ The privilege belongs to the patient, but the physician or psychotherapist is presumed to have authority to claim the privilege on behalf of the patient.²²¹

2. Application to Observations

This is a privilege for confidential communications. The note prepared by the Oklahoma Evidence Subcommittee seems to suggest that the communications that are protected do *not* include information gained by a doctor through observation or examination. The note states:

503(b) deals with the substance of the privilege. The rule applies only to communications, while the Oklahoma statute includes not only communications, but extends to information gained through observation or examination.²²²

The note is correct that the former Oklahoma physician-patient statute did specifically include "any knowledge obtained by personal examination of any such patient."²²³ The term "communications," however, in Code section 503 may fairly be read to include both statements made to physicians and physical facts that are revealed to them. Wigmore sums up the proper interpretation of "communications" in the doctor-patient relationship in these words:

Communications are the subject of the protection. But communication may be made by exhibition or by submission to inspection, as well as by oral or written narration or utterance. The invitation to the physician to prescribe assumes that he will first obtain the data for the prescription; and since the usual method of obtaining these involves the physician's own observation as well as the patient's narration, the invitation to prescribe is an implied communication of all the data

218. *Id.* at 241-42.

219. Section 503(A)(3)(b).

220. Section 503(A)(4).

221. Section 503(C).

222. *Proposed Code, supra* note 4, at 2628.

223. Act of March 12, 1953, ch. 9, § 1, 1953 Okla. Sess. Laws.

which the physician may by any method seek to obtain as necessary for the prescription.²²⁴

3. Exceptions

The privilege will not apply:²²⁵ (1) in a proceeding to hospitalize the patient for mental illness; (2) with respect to a court ordered examination in so far as the communications relate to the purpose of the examination; (3) with respect to a condition upon which the patient is relying as an element of a claim or a defense; or (4) after the patient's death, with respect to a condition which is an element in litigation.

4. Elimination of the Time of Waiver Problem

The prior Oklahoma statute establishing a patient-physician privilege provided that the privilege would be waived if the patient should "offer himself as a witness."²²⁶ In *Avery v. Nelson*²²⁷ the Oklahoma Supreme Court held that such a waiver could only occur when the patient voluntarily chose to testify. This had the practical effect of delaying the waiver until the trial itself was underway. Under this interpretation, the defendant in a personal injury case had no right to conduct pretrial discovery with respect to the plaintiff's physicians.²²⁸

The Oklahoma Supreme Court did balance the effect of *Avery* somewhat by its holding in *Herbert v. Chicago, Rock Island and Pacific Railroad*.²²⁹ In that case, when the plaintiff patient finally waived the privilege by testifying at trial, the defendant moved for a continuance of the trial to enable it to take a deposition of the absent doctor.²³⁰ The supreme court held that on the particular facts of that case the trial court had committed prejudicial error in refusing to order a continuance.²³¹ The practical effect of that decision would be to encourage plaintiffs to voluntarily waive the privilege before trial.

Section 503(D)(3) of the Code solves the waiver problem by stating: "There is no privilege under this Code as to a communication relevant to the physical, mental or emotional condition of the patient in

224. 8 J. WIGMORE, EVIDENCE 844-45 (J. McNaughton 1961). See also 2 LOUISSELL & MUELLER, *supra* note 51, § 215, at 598-99.

225. Section 503(D).

226. Act of March 12, 1953, ch. 9, § 1, 1953 Okla. Sess. Laws.

227. 455 P.2d 75 (Okla. 1969).

228. *Id.* at 77-79. See also the dissenting opinion of Judge Hodges, *id.* at 81.

229. 544 P.2d 898 (Okla. 1975).

230. *Id.* at 899.

231. *Id.* at 901.

any proceeding in which the patient relies upon that condition as an element of his claim or defense” Although this provision does not use the term “waiver” and speaks instead of the nonexistence of the privilege, the privilege’s existence is determined by the patient’s decision of whether to rely upon the condition as an element of a claim or defense. The decision by the patient is, therefore, a “waiver” because of the effect which 503(D)(3) gives to it.

The most obvious and welcome²³² change in Oklahoma law which will occur under 503(D)(3) is the hastening of the time at which a waiver occurs.²³³ In a case involving a personal injury plaintiff, the reliance which waives the privilege would begin when the patient brings suit alleging personal injuries. Therefore, the defendant would have a right to take pretrial depositions of doctors (and psychologists and psychiatrists) who had treated the plaintiff for the conditions involved in his claims against the defendant. Perhaps because the interpretation is so clear, there are no cases in other jurisdictions directly interpreting similar language in other evidence statutes and codes. The California Supreme Court clearly gave such an interpretation, however, to a similar provision of the California Evidence Code in the case of *In re Lifschutz*.²³⁴ In that case the court held that a psychiatrist was subject to a pretrial deposition because his patient had brought a suit for personal injuries including mental and emotional distress. The court treated the bringing of the suit by the patient as an “automatic” waiver of the patient’s privilege with respect to the conditions involved in his claims and held that the psychiatrist must answer questions reasonably related to the claims in the suit.²³⁵

H. Husband-Wife Privilege (Section 504)

1. Scope of the Privilege

232. See Note, *The Physician-Patient Privilege in Oklahoma*, 7 TULSA L.J. 157, 177-80 (1971); Note, *Evidence: The Physician-Patient Privilege: Alternatives to the Rule as it Now Exists in Oklahoma*, 24 OKLA. L. REV. 380, 386 (1971); and Note, *Discovery: The Physician-Patient Privilege, Waiver, and the Effect of Avery v. Nelson*, 23 OKLA. L. REV. 115, 119 (1970). All advocate legislative action to change the effects of *Avery*.

233. The Oklahoma Evidence Subcommittee’s note on its proposed rule stated: “Hence, the law pertaining to the *timing* of the removal of the privilege under Rule 503(d)(3) would be changed if not the removal of the privilege itself whenever the privileged matter is relied upon by the patient as an element of claim or defense.” *Proposed Code, supra* note 4, at 2629.

234. 2 Cal. 3d 415, 85 Cal. Rptr. 829, 467 P.2d 557 (1970). See also *Cesar v. Mountanas*, 542 F.2d 1064 (9th Cir. 1976).

235. 2 Cal. 3d at 433-38, 85 Cal. Rptr. at 840-44, 467 P.2d at 568-72.

Section 504²³⁶ applies only in criminal cases and only to confidential communications between the spouses.²³⁷ This last point may create some difficulties because the type of things that spouses know about each other that might be brought out as evidence against their spouses will frequently not fit very well into the ordinary definition of confidential communications. Oklahoma has no past experience with a communications privilege for spouses in criminal cases because prior Oklahoma law protected a husband or wife from any testimony against them by their spouse in a criminal case.²³⁸ Courts in states which do have husband-wife privileges similar to section 504 have sometimes interpreted the term communications very broadly.²³⁹ Such acts as hiding stolen property²⁴⁰ and driving a get-away car²⁴¹ have been held to be "communications."

Furthermore, those courts may well have been correct in their de-

236. Section 504. Husband-Wife Privilege.

A. A communication is confidential for purposes of this section if it is made privately by any person to his spouse and is not intended for disclosure to any other person.

B. An accused in a criminal proceeding has a privilege to prevent his spouse from testifying as to any confidential communication between the accused and the spouse.

C. The privilege may be claimed by the accused or by the spouse on behalf of the accused. The authority of the spouse to do so is presumed.

D. There is no privilege under this section in a proceeding in which one spouse is charged with a crime against the person or property of:

1. The other;
2. A child of either;
3. A person residing in the household of either; or
4. A third person when the crime is committed in the course of committing a crime against any other person named in this section.

237. Whether § 504 applies to any cases whatsoever is open to argument. The legislature did not expressly repeal or amend OKLA. STAT. tit. 22 § 702 (1971), which provides:

Except as otherwise provided in this and the following chapter, the rules of evidence in civil cases are applicable also in criminal cases; Provided, however that neither husband nor wife shall in any case be a witness against the other except in a criminal prosecution for a crime committed one against the other, or except in a criminal prosecution against either the husband or wife, or both, for a felony committed by either, or both, against the minor children of either the husband or the wife, but they may in all criminal cases be witnesses for each other, and shall be subject to cross-examination as other witnesses, and shall in no event on a criminal trial be permitted to disclose communications made by one to the other except on a trial of an offense committed by one against the other or except on a trial of a felony committed by one, or both, against the minor children of either the husband or the wife.

If this statute has not been superseded by the adoption of the Code, it continues to give a criminal defendant a greater privilege to prevent any testimony against himself by his spouse than § 504 provides. The discussion of § 504 proceeds upon the assumption that § 504 either does supersede the proviso in § 702 or that the legislature will quickly remedy the oversight.

238. There was an exception for a felony against the spouse or a child of either. See note 236 *supra*.

239. 2 LOUISELL & MUELLER, *supra* note 51, § 219, at 642-47; McCORMICK, *supra* note 19, § 79; 8 J. WIGMORE, EVIDENCE § 2337 (J. McNaughton 1961).

240. *People v. Daghita*, 299 N.Y. 194, 86 N.E.2d 172 (1949).

241. *Shepherd v. State*, 275 Ind. 229, 277 N.E.2d 165 (1971).

cisions. If there is any justification for a husband-wife privilege, it is very different from the justification for such privileges as the privilege between attorney and client. In the attorney-client situation, it is the process of communication itself that deserves protection. Surely, protection of some husband-wife communications is not meant merely to encourage husbands and wives to tell each other their crimes. It is the family relationship which merits protection, and in that context communication may well mean something different from what it means in the law office.

2. New Freedom of Spouses to Testify

Under the Code spouses can now testify for and against each other in civil cases, for each other in criminal cases, and against each other in criminal cases except with respect to confidential communications.

3. Limitations

The privilege with respect to confidential communications in a criminal case belongs to the accused spouse, but the other spouse is presumed to have authority to claim the privilege on behalf of the accused.²⁴² There is no privilege in a prosecution charging a crime against the person or property of (1) the other spouse; (2) a child of either spouse; (3) a person residing in the household of either spouse; or (4) any other person injured by a crime committed in the course of committing a crime against any of these persons.²⁴³

I. Religious Privilege (Section 505)

Section 505 creates a privilege for confidential communications to a clergyman.²⁴⁴ This is broader than the former privilege which ap-

242. Section 504(C). The spouse of the accused does not have, however, any privilege of his or her own. If the accused spouse should waive the privilege, the other spouse must testify.

243. Section 504(D).

244. Section 505. Religious Privilege.

A. As used in this section:

1. A "clergyman" is a minister, priest, rabbi, accredited christian science practitioner or other similar functionary of a religious organization, or any individual reasonably believed to be a clergyman by the person consulting him; and

2. A communication is "confidential" if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

B. A person has a privilege to refuse to disclose and to prevent another from disclosing his confidential communication made to a clergyman acting in his professional capacity.

plied to a "confession made to" a clergyman or priest "in the course of discipline enjoined by the church to which he belongs."²⁴⁵ Section 505 includes such confessions but also applies to confidential communications that were not made as confessions or that were made to clergymen whose churches do not have a confession discipline. The privilege belongs to the person who made the confidential communication, but the clergyman is presumed to have authority to claim the privilege on behalf of that person.

J. Newsman's Privilege (Section 506)

1. Already Oklahoma Law

Section 506²⁴⁶ is a rearrangement of former Oklahoma law which

C. The privilege may be claimed by the person, by his guardian or conservator, or by his personal representative if he is deceased. The clergyman is presumed to have authority to claim the privilege but only on behalf of the communicant.

245. Act of March 12, 1953, ch. 9, § 1, 1953 Okla. Sess. Laws.

246. Section 506. Newsman's Privilege.

A. As used in this section:

1. "State proceeding" includes any proceeding or investigation before or by any judicial, legislative, executive or administrative body in this state;

2. "Medium of communication" includes any newspaper, magazine, other periodical, book, pamphlet, news service, wire service, news or feature syndicate, broadcast station or network, or cable television system;

3. "Information" includes any written, oral or pictorial news or other material;

4. "Published information" means any information disseminated to the public by the person from whom disclosure is sought;

5. "Unpublished information" includes information not disseminated to the public by the person from whom disclosure is sought, whether or not related information has been disseminated, and includes, but is not limited to, all notes, outtakes, photographs, tapes or other data of whatever sort not itself disseminated to the public through a medium of communication, whether or not published information based upon or related to such material has been disseminated;

6. "Processing" includes compiling, storing and editing of information; and

7. "Newsman" means any man or woman who is a reporter, photographer, editor, commentator, journalist, correspondent, announcer, or other individual regularly engaged in obtaining, writing, reviewing, editing, or otherwise preparing news for any newspaper, periodical, press association, newspaper syndicate, wire service, radio or television station, or other news service. Any individual employed by any such news service in the performance of any of the above-mentioned activities shall be deemed to be regularly engaged in such activities. However, "newsman" shall not include any governmental entity or individual employed thereby engaged in official governmental information activities.

B. No newsman shall be required to disclose in a state proceeding either:

1. The source of any published or unpublished information obtained in the gathering, receiving or processing of information for any medium of communication to the public; or

2. Any unpublished information obtained or prepared in gathering, receiving or processing of information for any medium of communication to the public; unless the court finds that the party seeking the information or identity has established by clear and

has recognized the newsman's privilege since 1974.²⁴⁷

2. The Privilege Belongs to Each Individual Newsman

The effect of the privilege is to permit the newsman to protect his sources. The sources, however, have no rights of their own under the privilege, and the newsman may decide for himself whether to claim the privilege.

3. Scope

The privilege protects the source of any published or unpublished news information as well as the content of any unpublished news information. "Newsman" includes any man or woman with a news job or regularly engaged in preparing news.²⁴⁸

4. Limitations

The privilege does not apply in a civil action for defamation to the content or source of allegedly defamatory information if the defendant has based a defense on the content or source of such information. The privilege also does not apply if "the court finds that the party seeking the information or identity has established by clear and convincing evidence that such information or identity is relevant to a significant issue in the action and could not with due diligence be obtained by alternate means."

K. Other Privileges (Sections 507-510)

The Code also provides privileges for political votes (section 507), trade secrets (section 508), governmental privileges such as secrets of state (section 509), and the identity of informers (section 510).

V. WITNESSES

A. Introduction: The Absence of Significant Changes

The sections of the Code which will be discussed herein (sections

convincing evidence that such information or identity is relevant to a significant issue in the action and could not with due diligence be obtained by alternate means.

This subsection does not apply with respect to the content or source of allegedly defamatory information, in a civil action for defamation wherein the defendant asserts a defense based on the content or source of such information.

247. See Act of March 12, 1953, ch. 9., § 1, 1953 Okla. Sess. Laws.

248. Section 506(A)(7).

611, 612, 614, and 615) provide for procedures for the examination of witnesses which are essentially the same as the procedures which have previously been followed in Oklahoma. There are two features of these new rules which may raise doubts about whether the Oklahoma procedures for witness examination have remained unchanged. First, these sections sometimes use new terms for old concepts. Second, these sections heavily emphasize the discretion of the trial judge to control the order and manner of witness examination. But the new terms are not intended to change the old concepts, and Oklahoma trial judges already had almost all the discretion which these rules give them.

B. Direct Examination

Section 611(D)²⁴⁹ provides that leading questions shall not be used on direct examination of a witness "except as may be necessary to develop his testimony." This exception refers to the traditional situations in which leading has been permitted on direct examination: undisputed preliminary matters, children, and witnesses who have mental or language problems or whose recollection has been exhausted.²⁵⁰ Leading questions are also permitted in examining hostile witnesses, adverse parties, and witnesses identified with an adverse party.²⁵¹

249. Section 611. Mode and Order of Interrogation and Presentation.

A. Subject to subsection B of Section 611 of this Code, the court shall exercise control over the manner and order of interrogating witnesses and presenting evidence so as to:

1. Make the interrogation and presentation effective for the ascertainment of the truth;
2. Avoid needless consumption of time; and
3. Protect witnesses from harassment or undue embarrassment.

B. Any party to a civil action or proceeding may compel any adverse party or person, or any agent, servant or employee of such party or person, for whose benefit such action or proceeding is instituted, prosecuted or defended, to testify as a witness, at the trial, or by deposition, in the same manner and subject to the same rules as other witnesses, provided that any such adverse party, his agent, servant or employee called as a witness by the opposing party shall be deemed a hostile witness and may be cross-examined by the party calling him to the same extent as any opposition witness.

C. Cross-examination shall be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may permit inquiry into additional matters as if on direct examination.

D. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Leading questions should ordinarily be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, leading questions may be used on direct examination.

250. See Federal Advisory Committee's note to federal evidence rule 611, Proposed Federal Rules, *supra* note 21, at 275-76.

251. Section 611(D).

C. *Cross-Examination*

1. Scope

Section 611(C) restricts cross-examination to “the subject matter of the direct examination and matters affecting the credibility of the witness.” The court may also “permit inquiry into additional matters as if on direct examination.” This section does not change Oklahoma law. Note, however, that the scope of cross-examination is *not* restricted to matters brought out on direct alone. Cross-examination may cover any matter affecting the credibility of the witness. It therefore may include “any question which reasonably tends to explain, contradict, or discredit his testimony.”²⁵²

2. Leading Questions May Be Used on Cross-Examination

Section 611(D) states that this is the rule “ordinarily”, but comments by both the Oklahoma Evidence Subcommittee²⁵³ and the Federal Advisory Committee²⁵⁴ state that this language is intended to continue the traditional rule that the use of leading questions on cross-examination is a matter of right. The Advisory Committee’s note to federal evidence rule 611 states:

The purpose of the qualification “ordinarily” is to furnish a basis for denying the use of leading questions when the cross-examination is cross-examination in form only and not in fact, as for example the “cross-examination” of a party by his own counsel after being called by the opponent (savoring more of re-direct) or of an insured defendant who proves to be friendly to the plaintiff.²⁵⁵

D. *Calling the Adverse Party As a Witness*

Section 611(B) is identical to former Oklahoma law.²⁵⁶ It provides that any party to a civil action or proceeding may call the adverse party or any agent, servant, or employee of the adverse party as a witness and cross-examine that witness “to the same extent as any opposition witness.”

252. *Rhoades v. Young*, 479 P.2d 570, 571 (Okla. 1971) (quoting *Frierson v. Hines*, 426 P.2d 362, 363 (Okla. 1967)).

253. *Proposed Code*, *supra* note 4, at 2639.

254. *Proposed Federal Rules*, *supra* note 21, at 276.

255. *Id.*

256. Act of May 12, 1965, ch. 96, 1965 Okla. Sess. Laws.

E. Obtaining a Writing Used to Refresh the Memory of a Witness (Section 612)

1. Writings Used to Refresh the Memory of a Witness While Testifying

Section 612²⁵⁷ provides that the adverse party may have a writing produced, inspect it, cross-examine the witness with respect to it, and introduce portions of it which are relevant to the testimony of the witness *if* the witness uses the writing to refresh his memory *while testifying*. This is commonly accepted evidence law.²⁵⁸

2. Writings Used to Refresh the Memory of a Witness Before Testifying

Code section 612 also gives the adverse party the same rights to obtain and to use writings which were used by the witness to refresh his memory *before testifying*. This portion of the rule does make a substantial change in existing law.²⁵⁹ Court decisions in a few states have adopted similar rules.²⁶⁰ The draftsmen of the Proposed Federal Rules of Evidence proposed a rule 612²⁶¹ nearly identical to Oklahoma Evidence Code section 612. Congress amended federal rule 612 to provide that a writing used to refresh the memory of a witness before he testifies need be produced only "if the court in its discretion determines it is necessary in the interest of justice."²⁶² Oklahoma has returned to the idea of the proposed federal rule.

257. Section 612. Writing Used to Refresh Memory.

If a witness uses a writing to refresh his memory either while testifying or before testifying, the court shall allow an adverse party to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed by an opposing party that the writing contains matters not related to the subject matter of the testimony, the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved, made part of the record, and shall be available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order, the court in a civil case shall make any order justice requires. In criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or declaring a mistrial.

258. MCCORMICK, *supra* note 19, § 9, at 17; 3 WEINSTEIN & BERGER, *supra* note 15, ¶ 612[01], at 612-13.

259. Oklahoma Evidence Subcommittee's note to proposed rule 612, *Proposed Code, supra* note 4; 3 WEINSTEIN & BERGER, *supra* note 15, ¶ 612[01].

260. MCCORMICK, *supra* note 19, § 9, at 17-18 n.60.

261. Proposed Federal Rules, *supra* note 21, at 276-77.

262. 3 WEINSTEIN & BERGER, *supra* note 15, ¶ 612[01], at 612-2 to 612-5.

3. Safeguard

If a party claims that the writing contains unrelated matters, the court shall examine the writing in camera and excise such matters.

4. Failure to Produce

In a civil case in which the writing is not produced pursuant to order, the court "shall make any order justice requires." In a criminal case in which the writing is not produced pursuant to order, the court shall strike the testimony of the witness or declare a mistrial.

F. Exclusion of Witnesses (Section 615)

Section 615²⁶³ provides for the exclusion of witnesses so that they cannot hear the testimony of other witnesses. It does not apply to either a party who is a natural person or a designated representative of a party which is not a natural person. The language of the section appears to give a party an absolute right to have all other witnesses excluded. Clearly it is a change from previous practice in which exclusion of witnesses was considered to rest "in the sound discretion of the trial court."²⁶⁴ Weinstein and Berger argue persuasively that the corresponding federal evidence rule does not require "that all witnesses must be excluded and that all application of judicial discretion has been foreclosed."²⁶⁵ They conclude:

It would be more accurate to characterize the rule as having effected a change in the burden of proof. Formerly, a party desiring exclusion had to convince the court to exercise its discretion in his favor. Now exclusion will be granted unless the party opposing sequestration can convince the court to exercise its discretion to except a particular witness from its order. Rule 615, therefore, still gives the judge some discretion—discretion to exclude essential witnesses from the sequestration order.²⁶⁶

263. Section 615. Exclusion of Witnesses.

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses. The court may make the order of its own motion. This rule does not authorize exclusion of:

1. A party who is a natural person; or
2. An officer or employee of a party which is not a natural person designated as its representative by its attorney.

264. 6 J. WIGMORE, EVIDENCE § 1839 (J. Chadbourn 1976); Harrell v. State, 36 Okla. Cr. 225, 228, 253 P. 516, 517 (1927).

265. 3 WEINSTEIN & BERGER, *supra* note 15, ¶ 615[01], at 615-7.

266. *Id.* ¶ 615[01], at 615-8.

However, Weinstein and Berger base much of their argument²⁶⁷ on a provision of the federal evidence rule which the Oklahoma legislature removed from section 615. That provision provided that an exclusion order would not apply to "a person whose presence is shown by a party to be essential to the presentation of his case." The revised Evidence Subcommittee's note to this section states, "The question now arises whether the law has been changed by the Legislature eliminating [this provision]."²⁶⁸ Certainly the desirable answer to that question is that the judge still has some discretion to permit some witnesses to remain. The language of section 615 makes it somewhat difficult to give that answer with complete confidence, but three arguments strongly support a reading of section 615 that will allow the judge some discretion.

The first argument is that it seems unlikely that the legislature intended to adopt a rule which is contrary to the *unanimous* opinion of all the courts and of all the commentators who have considered the question. Weinstein and Berger,²⁶⁹ Moore and Bendix,²⁷⁰ Saltzburg and Redden,²⁷¹ Wigmore,²⁷² the Federal Advisory Committee,²⁷³ the Senate Judiciary Committee,²⁷⁴ the Oklahoma Evidence Committee,²⁷⁵ and the Oklahoma Criminal Court of Appeals²⁷⁶ all agree that the trial judge should have "the power to except one or more witnesses from the operation of the rule."²⁷⁷ Wigmore summarizes the case law with the statement: "It seems to be universally conceded that the trial court may authorize individual omissions."²⁷⁸

Second, it is not necessary to deny any discretion to the trial judge to permit some witnesses to remain to explain the language of section 615. That language was necessary to change Oklahoma law to give a party any "right" at all to have any witnesses excluded from the trial. An assumed but unstated discretion on the part of the trial court to make exceptions for witnesses for whom there are reasons to make ex-

267. *Id.* ¶ 615[01], at 615-8 to 615-9.

268. OKLA. STAT. ANN. tit. 12, § 2615, Evidence Subcommittee's note (West Supp. 1978).

269. 3 WEINSTEIN & BERGER, *supra* note 15, ¶ 615[01], at 615-8 to 615-9.

270. 10 MOORE & BENDIX, *supra* note 49, § 615.02.

271. S. SALTZBURG & K. REDDEN, *supra* note 48, at 403.

272. 6 J. WIGMORE, EVIDENCE § 1841 (J. Chadbourn 1976).

273. *Proposed Federal Rules*, *supra* note 21, at 281.

274. SENATE REPORT, *supra* note 41, at 26.

275. *Proposed Code*, *supra* note 4, at 2641.

276. Harrell v. State, 36 Okla. Cr. 225, 228, 253 P. 516, 517 (Okla. Crim. App. 1927).

277. *Id.* at 228; 253 P. at 517.

278. 6 J. WIGMORE, EVIDENCE §§ 1841-42. (J. Chadbourn 1976).

ceptions is not inconsistent with the creation of that right. Even Wigmore, who was a vigorous champion of exclusion of witnesses as a matter of right,²⁷⁹ assumes that a discretion in the judge to permit some witnesses to remain is perfectly consistent with a general principle that exclusion of witnesses is a matter of right. Wigmore states:

Persons to be included in the order. (1) The *party demanding the sequestration* may not as of right insist upon the court's *inclusion of all* persons, without exception, in the rule. No doubt the inclusion of all may sometimes be vital to his plan; but no doubt also it usually is not; and the possibilities of abuse, by indiscriminate exclusion, would be so great that the omission of individuals from the rule may properly be left to its trial court's discretion, without doing violence to the doctrine that sequestration, as a general principle, is demandable of right.²⁸⁰

The only reason for thinking that the legislature might forbid such discretion is that it rejected the provision in the federal rule which describes the nature of the trial court's discretion. That rejection, however, can be explained much more reasonably as a rejection of that particular description of the trial judge's discretion²⁸¹ than as a rejection of all discretion.

The third, and final, argument is based upon the fact that the legislature adopted section 703.²⁸² That section liberalizes the basis upon which an expert witness may testify in several ways, one of which being an express authorization for the expert to rely upon the facts made known to him at the hearing. Both the Federal Advisory Committee's note to the federal rule²⁸³ and the Oklahoma Evidence Subcommittee's note to section 703²⁸⁴ point out that this would allow a party to have the expert attend the trial and hear the testimony establishing the facts.

279. *Id.* § 1839.

280. *Id.* § 1841, at 472 (citation omitted).

281. The provision in rule 615 that the rule does not authorize the exclusion of "a person whose presence is shown by a party to be essential to the presentation of his cause" has been criticized because it does not make clear when a trial judge should permit a witness to stay in the courtroom. See SENATE REPORT, *supra* note 41, at 26; P. ROTHSTEIN, *supra* note 47, at 340 (Supp. 1975). But any standard which describes when discretion may be used is necessarily vague and acquires its real content from use. The "essential" standard is, in fact, good enough as a starting point. See S. SALTZBURG & K. REDDEN, *supra* note 48, at 403, for a convincing illustration of how "essential" can be turned into a balancing test. Nevertheless, the vagueness of the term and its lack of explanatory history made it a target for objection and a candidate for rejection.

282. See notes 333-338 *infra* and accompanying text.

283. Proposed Federal Rules, *supra* note 21.

284. *Proposed Code*, *supra* note 4, at 2640.

It makes no sense to read section 615 as giving the opposing party an absolute right to exclude such an expert from the trial.

Section 615 also gives the court the power to make an order excluding witnesses on its own motion.

G. Control of the Trial by the Trial Judge (Sections 611(A) and 614)

The trial judge has broad discretion over the manner in which the trial is conducted. Section 611 provides:

The court shall exercise control over the manner and order of interrogating witnesses and presenting evidence so as to:

1. Make the interrogation and presentation effective for the ascertainment of the truth;
2. Avoid needless consumption of time; and
3. Protect witnesses from harassment or undue embarrassment.

Under section 614²⁸⁵ the trial judge may call witnesses either on his own motion or at the suggestion of a party. If the trial judge calls a witness, all parties have the right to cross-examine that witness. Oklahoma did not adopt a section corresponding to federal evidence rule 706 which provides for the appointment, use, and compensation of court appointed experts.²⁸⁶ May the trial judge nevertheless appoint and call such experts under the authority of section 614(A)? The absence of express authority to provide compensation would be a problem, but the trial judge appears to have the power to impose such a witness upon the parties.

The trial judge also may interrogate all witnesses including those called by himself. Objections to the calling of witnesses by the trial judge or to his questions may be made at the next available opportunity when the jury is not present.

The Oklahoma Evidence Subcommittee added this caution in its note to proposed rule 614:

The Subcommittee, while recognizing the inherent power of the court to call and interrogate witnesses of its own choosing when the interests of justice require, believes that this is a

285. Section 614. Calling and Interrogation of Witnesses by Court.

A. The court may, on its own motion or at the suggestion of a party, call witnesses, provided that all parties shall have the right of cross-examination of those witnesses.

B. The court may interrogate any witness whether called by itself or by a party.

C. Objections to the calling or interrogating of witnesses by the court may be made at the time or at the next available opportunity when the jury is not present.

286. See notes 322-23 and accompanying text.

power which should be exercised sparingly, particularly in jury cases where the jury might be unduly influenced by the court's participation in the presentation of evidence.²⁸⁷

VI. IMPEACHMENT OF WITNESSES

A. *Only A Few Aspects of Witness Impeachment Are Covered in the Code*

Of course, any codification of an area of law as complex as evidence must depend upon additional rules which are not set forth in the Code. This is especially noticeable in the sections of the Code dealing with witness impeachment. All methods of impeachment of a witness which were available prior to the Code continue to be available,²⁸⁸ but the Code refers to only a few of them.

B. *Impeachment of a Witness Through Evidence of Character or Conduct (Section 608)*

Evidence that a witness has been convicted of a crime may be admissible under section 609.²⁸⁹ No other evidence offered to prove the character of a witness is admissible unless it qualifies under section 608²⁹⁰ which restricts such evidence as follows.

1. Character for Truthfulness or Untruthfulness

The only aspect of character of a witness which may be proven is character for truthfulness or untruthfulness.

287. *Proposed Code, supra* note 4, at 2641.

288. See S. SALTZBURG & K. REDDEN, *supra* note 48, at 313-14.

289. See notes 301-07 *infra* and accompanying text.

290. Section 608. Evidence of Character and Conduct of Witness.

A. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, subject to these limitations:

1. The evidence may refer only to character for truthfulness or untruthfulness; and
2. Evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked.

B. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Section 609 of this Code, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness if they:

1. Concern his character for truthfulness or untruthfulness;
2. Concern the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

C. The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

2. General Statements by "Character Witnesses"

General statements of opinion or of reputation²⁹¹ may be given by witnesses called for such testimony and who are therefore known as "character witnesses." Such testimony of a witness's good character for truthfulness cannot be offered until his character for truthfulness has been attacked, by character witnesses or otherwise.

The provision that character witnesses may testify to their own opinions as well as to the reputation of the witness being impeached is in theory an enlargement of the character evidence that is admissible. In fact, reputation character evidence is usually at best only "opinion in disguise."²⁹² However, the change may also permit a totally new kind of opinion evidence on character for truthfulness or untruthfulness—expert opinion evidence. Weinstein and Berger argue: "Expert witnesses—i.e., psychiatrists and psychologists—may now be called to express their opinion of the witness' veracity, thereby raising much the same problems that ensue when these experts testify about a witness' mental capacity."²⁹³ The use of expert testimony is always subject, however, to the requirement that it must "assist the trier of fact to understand the evidence or to determine a fact in issue."²⁹⁴ Whether any experts can tell anything useful about whether a particular witness is likely to be telling the truth is doubtful. There are, of course, cases in which the witness is insane or partially incompetent, and the trier of fact should certainly be told about those conditions. But those facts have long been, and undoubtedly will continue to be, admissible as impeachment evidence.²⁹⁵ Except for those situations involving such mental incapacity, however, an expert would probably not have anything useful to say about whether a witness was likely to be telling the truth. If an expert could be found, however, who could assist the trier

291. See 3 WEINSTEIN & BERGER, *supra* note 15, ¶ 608[03], for a summary of several arguments about whether reputations for truthfulness exist.

292. See notes 124-25 *supra* and accompanying text.

293. 3 WEINSTEIN & BERGER, *supra* note 15, ¶ 608[05], at 608-21. They go on to suggest:

Whether there will be greater unanimity among the experts about a witness' character for lying than about his capacity for telling the truth seems highly improbable. A possible benefit stemming from the incorporation of an opinion technique into Rule 608 is that the psychiatric expert will no longer have to adhere to the artificial rule of couching his opinions in terms of mental capacity; he may speak freely in terms of traits of character, to the extent that the concept is meaningful in his discipline, without fear of running into the restrictions of the opinion rule.

Id. See also S. SALTZBURG & K. REDDEN, *supra* note 48, at 147.

294. FED. R. EVID. 702.

295. MCCORMICK, *supra* note 19, § 45; 3A J. WIGMORE, EVIDENCE §§ 931 & 932 (J. Chadbourn 1970).

of fact to evaluate the truthfulness of a witness, that expert's testimony would be subject to both the balancing tests of section 403²⁹⁶ and to the other rules that apply to opinion testimony by character witnesses.²⁹⁷

3. Specific Instances of Conduct

The trial judge has discretion to exclude all specific evidence of conduct offered to show character for truthfulness.²⁹⁸ Even if the trial judge allows inquiry concerning specific instances of conduct, questions concerning them may be asked only on cross-examination of either a character witness or of the very witness whose character is in issue.²⁹⁹ No other evidence ("extrinsic evidence") of specific instances of conduct will be admitted.³⁰⁰

It would appear that those "bad acts" that are also unpunished crimes cannot even be brought out to the limited extent described above. Section 608(C) states that a witness does not by giving testimony waive his privilege against self-incrimination for purposes of an examination of his credibility. Furthermore, section 513(B) provides that "proceedings shall be conducted, to the extent practicable, so as to

296. Weinstein and Berger point out:

As in the case of impeachment by proof of mental incapacity, because of the pronounced danger of confusion, protraction of the trial and prejudice, the trial judge must retain a flexible attitude towards utilizing the expert where he might aid the jury. He should not feel inhibited in rejecting expert testimony when its probative value is outweighed by these dangers. Counsel must be prepared to furnish the court at the pretrial hearing with sufficient information so that it can assess the necessity of the proffered testimony.

3 WEINSTEIN & BERGER, *supra* note 15, ¶ 608[05], at 608-21. See notes 62-82 *supra* and accompanying text.

297. See note 125 *supra* and accompanying text.

298. The rule does not state any standards to guide the exercise of this discretion. This is in sharp contrast to the elaborate provisions of § 609 controlling the use of criminal convictions to impeach a witness, and this contrast raises the question of whether a court should look to § 609 for some guidance in applying § 608(B). There is nothing in the language of the Code that would require the application of § 609 standards to the use of specific bad acts to impeach under § 608(B), but it does seem reasonable for the court to ask whether there is some good reason to permit cross-examination concerning the act under § 608(B) if § 609 would prohibit cross-examination concerning a conviction for that act.

299. The language of § 608(B) could easily be read as prohibiting any inquiry into specific instances of conduct by the party calling the witness even if the other party brings out specific instances on cross-examination. Saltzburg and Redden argue that fairness will sometimes require that the party who called the witness be permitted to respond to specific instances brought out on cross-examination by bringing out further details on re-direct examination. S. SALTZBURG & K. REDDEN, *supra* note 48, at 312-13.

300. It should be kept in mind, however, that many specific acts of a witness which might prove something about his character for truthfulness will be admissible to prove bias, corruption, interest and the like. See S. SALTZBURG & K. REDDEN, *supra* note 48, at 318-19. There is no Code section dealing with the use of evidence of bias to impeach a witness but such evidence continues to be admissible. Bias may be proven by extrinsic evidence. MCCORMICK, *supra* note 19, § 40; 3A J. WIGMORE, EVIDENCE §§ 943-44 (J. Chadbourne 1970).

facilitate the making of claims of privilege without the knowledge of the jury.”

C. Impeachment of a Witness Through Evidence of Conviction of Crime (Section 609)

Convictions of crimes are admissible under section 609³⁰¹ to attack the credibility of a witness if those convictions satisfy the requirements discussed below.

1. Type of Crime

The crime must either (1) have been a crime punishable by death or imprisonment in excess of one year, and the trial judge determines that “the probative value of admitting the evidence outweighs its prejudicial effect to the detriment of the defendant” or (2) have been a crime involving dishonesty or false statement.³⁰² Note that if the crime involved dishonesty or false statement section 609 does not give the trial

301. Section 609. Impeachment by Evidence of Conviction of Crime.

A. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime:

1. Involved dishonesty or false statement, regardless of the punishment; or
2. Was punishable by death or imprisonment in excess of one (1) year, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the detriment of the defendant.

B. Evidence of a conviction under this section is not admissible if a period of more than ten (10) years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is later, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. Evidence of a conviction more than ten (10) years old, as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

C. Evidence of a conviction is not admissible under this Code if:

1. The conviction has been the subject of a pardon, annulment, certificate of rehabilitation or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one (1) year; or

2. The conviction has been the subject of a pardon, annulment or other equivalent procedure based on a finding of innocence.

D. Evidence of juvenile adjudications is not admissible under this Code. The court in a criminal case may, however, allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

E. The pendency of an appeal from the conviction does not render evidence of that conviction inadmissible. Evidence of the pendency of an appeal is admissible.

302. See note 73 *supra* and accompanying text for the Congressional Conference Committee's explanation of this term.

court discretion to exclude such evidence. Section 403, however, may give the trial court discretion to exclude even convictions for crimes involving dishonesty and false statement.³⁰³

2. Ten Year Time Limitation

If ten years have elapsed since the later of either the date of conviction or the date the witness was released from confinement, evidence of the conviction is not admissible unless the adverse party has received written notice of intent to use the conviction in time to provide him with a fair opportunity to contest the use of such evidence. Such evidence is not admissible in any case unless the trial judge determines that the probative value of the conviction evidence substantially outweighs its prejudicial effect.

3. Weighing by the Trial Judge

Both the general rule concerning convictions for crimes involving death or imprisonment in excess of one year and the special rule for convictions beyond the ten-year time limit may require the trial judge to weigh probative value against prejudicial effect. The weighing with respect to the general rule involves prejudice to “the defendant”—a criminal defendant. It is difficult to see how that rule could be applied in a civil case. The second weighing of the special rule is described in more general terms, and this rule would appear to apply to both civil and criminal cases.

4. Pardons

Evidence of a conviction is not admissible if the witness either (1) has received a pardon (or equivalent procedure) based on rehabilitation *and* has not been convicted of a subsequent crime punishable by death or by imprisonment in excess of one year, or (2) has received a pardon based upon a finding of innocence.

5. Juvenile Adjudications

Evidence of juvenile adjudications is not admissible except that the trial judge has discretion in a criminal trial to admit such evidence to impeach a witness other than the defendant. This rule requires that

303. See notes 71-81 *supra* and accompanying text.

the conviction of the offense would have been admissible to impeach an adult witness.

6. Pendency of an Appeal

The fact that an appeal is pending will not prevent proof of a conviction, but the fact that the appeal is pending is also admissible.

7. Methods of Proof of Convictions

During the cross-examination of the witness, the conviction may be proven either by obtaining an admission of the fact from the witness himself or by offering into evidence a public record of the conviction. Except for a provision that the pendency of an appeal may be shown, section 609 says nothing about whether either the party impeaching the witness or the party calling the witness may introduce any details of the conviction. This silence might be read as a prohibition of such evidence. One federal court has held that the cross-examination should be confined to "the number, date and nature of previous convictions."³⁰⁴ McCormick argues that the silence of federal evidence rule 609 will permit the trial judge to exercise discretion either to limit the inquiry on cross-examination³⁰⁵ or to permit the witness to offer explanations of the conviction on re-direct examination.³⁰⁶ Of course if the witness does offer explanations either on direct or on re-direct examination, he may be cross-examined on those explanations.³⁰⁷

D. Religious Beliefs or Opinions (Section 610)

Evidence concerning the religious beliefs of a witness is not admissible either for the purpose of attacking or for the purpose of enhancing credibility.³⁰⁸

304. *United States v. Tumblin*, 551 F.2d 1001, 1004 (5th Cir. 1977). It is not clear, however, whether this decision should be read as holding that federal evidence rule 609 requires this restriction, which was already the rule in the Fifth Circuit.

305. MCCORMICK, *supra* note 19, § 43 & 1978 Supp. n.82.

306. *Id.* § 43 & 1978 Supp. n.85. See also 4 J. WIGMORE, EVIDENCE § 1117 (J. Chadbourn 1972).

307. *United States v. Wolf*, 561 F.2d 1376, 1381-82 (10th Cir. 1977).

308. Section 610. Religious Beliefs or Opinions. "Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature his credibility is impaired or enhanced."

*E. Foundations Required for Use of Prior Inconsistent Statements
(Section 613)*

1. Limited Scope

Neither section 613³⁰⁹ nor any other section of the Code deals directly with when a prior inconsistent statement may be used or admitted in evidence. Section 613 deals only with whether any foundations must be laid before either (1) a witness may be asked about his own prior inconsistent statement or (2) extrinsic evidence of such a statement may be introduced.

2. Questioning the Witness Concerning his Own Prior Inconsistent Statement—Abolition of the Rule of the Queen's Case

Section 613(A) abolishes all requirements that a prior inconsistent statement must be disclosed to a witness before he is cross-examined concerning it. The rule requiring that this be done is usually called the Rule of the Queen's Case.³¹⁰ Opposing counsel do have a right to have the statement shown or disclosed to them at their request. The Code provides that this disclosure shall be made "just prior to the cross-examination of the witness." However, if a witness is being impeached by the party who called him, this rule should be interpreted as requiring that disclosure be made prior to that impeachment.

3. Requirements for Introducing Extrinsic Evidence of a Prior Inconsistent Statement

Extrinsic evidence of a prior inconsistent statement includes all evidence that the statement was made except the witness's own testimony. Parties who wished to introduce such extrinsic evidence have traditionally been required first to give the witness an opportunity to remember and to explain the statement by calling his attention to it and to the time, place, and persons involved. Oklahoma has followed this

309. Section 613. Prior Statements of Witnesses.

A. In examining a witness concerning a prior statement made by him whether written or not, the statement need not be shown nor its contents disclosed to him at that time but on request the same shall be shown or disclosed to opposing counsel just prior to the cross-examination of the witness.

B. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon. This provision does not apply to admissions of a party opponent as defined in subparagraph B of paragraph 4 of Section 801 of this Code.

310. See 3 WEINSTEIN & BERGER, *supra* note 15, ¶ 613[02].

practice.³¹¹

Code section 613(B) allows extrinsic evidence of a prior inconsistent statement to be introduced if "the witness is afforded an opportunity to explain or deny" the statement, and "the opposite party is afforded an opportunity to interrogate him thereon." The difference between the prior rule and the new one is that no time is set for these opportunities. As long as the other party is able to recall the witness for further examination, the party offering the extrinsic evidence need not lay any foundation at all.³¹²

How does this rule apply to statements that are admissible on other grounds? Section 613(B) states that no foundation is needed for a statement that qualifies as an admission of a party-opponent under section 801(4)(b). While that is correct, it seems misleadingly narrow. Any statement that qualifies for admission through any exception to the rule against hearsay or through any "non-hearsay" category should be admissible without regard to whether it might also be offered as a prior inconsistent statement.³¹³

Oklahoma changed the form of this rule by rejecting one exception found in the federal rule. Despite the ease with which the requirements of section 613(B) may ordinarily be met, the federal version provides an exception to even those requirements if "the interests of justice" so require. Oklahoma did not adopt this exception.

F. When May a Party Impeach His Own Witness with a Prior Inconsistent Statement?

1. Abolition of the Rule Against Impeaching One's Own Witness (Section 607)

The Code overturns the common law rule that a party may not impeach his own witness. Section 607 provides, "The credibility of a witness may be attacked by any party, including the party calling him."

2. Problems of Relevancy and Hearsay When a Party Attempts to Impeach his Own Witness with a Prior Inconsistent Statement

311. *Wing v. State*, 280 P.2d 740 (Okla. Crim. 1955).

312. *United States v. Barrett*, 539 F.2d 244 (1st Cir. 1976); WEINSTEIN & BERGER, *supra* note 15, ¶ 613[04].

313. Hearsay and the rules governing it will be the subject of the second segment of this series to be published later.

Attempts by a party to impeach his own witness with a prior inconsistent statement are usually—and probably always—intended to bring to the jury's attention a statement which would otherwise be inadmissible hearsay. Courts which have allowed parties to "impeach" their own witnesses on grounds such as the surprise exception recognized in Oklahoma insist that such statements are not substantive evidence.³¹⁴ Many lawyers doubt, however, that a jury can obey an instruction not to use statements as substantive evidence. Despite the adoption of section 607, any attempt to introduce evidence of a prior inconsistent statement will require the trial judge to weigh the possibility that it will be used for an improper hearsay purpose against its value as impeachment. When a party is impeaching his own witness, the prior inconsistent statement may have little or no impeachment value to weigh against the danger of misuse.

3. The Search for a Rule

Section 607 does not help to decide when to permit a party to impeach his own witness with a prior inconsistent statement. Part of the reason for this is historical. The problem did not exist at the time the proposed Federal Evidence Rules were drafted because the proposed Federal Rules made all prior inconsistent statements admissible as substantive evidence.³¹⁵ It was not until Congress made only certain sworn prior inconsistent statements admissible as substantive evidence that the hearsay and relevancy problems arose.³¹⁶ The federal courts have not yet found a solution to the problem.³¹⁷ Some of the suggested solutions which Oklahoma may now consider are discussed below.

Weinstein and Berger argue for a weighing of the value of the impeaching statement which emphasizes the probative value of the statement.³¹⁸ This test seems to call for the judge as well as the jury to ignore the fact that the prior statement is inadmissible as substantive evidence. Some commentators have suggested a return to the requirement of surprise and affirmative damage.³¹⁹ However, there is nothing in the actual language of either the Federal Rules or of the Oklahoma

314. *See, e.g., Southern Ry. Co. v. Gray*, 241 U.S. 333, 337 (1916).

315. Proposed Federal Rules, *supra* note 21, at 293.

316. Blakey, *supra* note 180, at 8-9 & 24-25.

317. *Compare* *United States v. Long Soldier*, 562 F.2d 601 (8th Cir. 1977), *with* *United States v. Morlang*, 531 F.2d 183 (4th Cir. 1975). *See also* *Rhodes v. Harwood*, 273 Ore. 903, 544 P.2d 147 (1975).

318. 3 WEINSTEIN & BERGER, *supra* note 15, ¶ 607[01], at 29-34 & Supp. 1978 at 29-34.

319. Graham, *The Relationship Among Federal Rules of Evidence 607, 801(d)(1)(A), and 403: A*

Evidence Code that requires that a prior inconsistent statement be admissible even if surprise is shown.³²⁰ Even in that situation, the actual value of the impeachment may be so small that it is outweighed by the danger of misuse of the statement.³²¹

VII. OPINIONS AND EXPERT TESTIMONY

A. Introduction

The sections of the Code which deal with opinions and expert testimony are almost identical to federal evidence rules 701 through 705. They therefore share the philosophy of those rules that opinion and expert testimony should be available whenever it would be useful to the trier of fact. These sections restate the requirements for the use of lay and expert opinion testimony and for the qualifications of expert witnesses in terms that are not actually new, but which carefully avoid creating any artificial barriers to the introduction of useful opinion testimony. They abolish two longstanding rules limiting the use of opinion testimony—the rule forbidding (or limiting) opinion testimony on ultimate issues and the rule requiring the use of hypothetical questions in examining an expert who is giving an opinion based on facts not within his personal knowledge. Section 705 also abolishes the rule that the expert's opinion must be based upon facts proven by the evidence and allows the expert to base his opinion on facts that may not even be admissible in evidence.

B. Use of Opinion Testimony

1. Lay Opinion (Section 701)

Section 701³²² provides that a lay witness may testify to an opinion if it is based on personal knowledge and “helpful to a clear understanding of his testimony or the determination of a fact in issue.” The effect of this rule is that even a lay opinion should be admitted if it is useful.

Reply to Weinstein's Evidence, 55 TEX. L. REV. 573 (1977). See also Ordover, *Surprise! That Damaging Turncoat Witness Is Still With Us*, 5 HOFSTRA L. REV. 65, 70 (1976).

320. McCORMICK, *supra* note 19, § 38, at n.74 (Supp. 1978).

321. Blakey, *supra* note 180, at 24-25.

322. Section 701. Opinion Testimony by Lay Witnesses.

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are:

1. Rationally based on the perception of the witness; and
2. Helpful to a clear understanding of his testimony or the determination of a fact in issue.

This permits both “shorthand statements of facts” which the witness cannot be expected to break down into the actual facts he had observed and any other opinion which has enough value to be useful.

2. Expert Opinion (Section 702)

Expert opinion and other expert testimony may be used under section 702³²³ whenever “scientific, technical, or other specialized knowledge” would “assist the trier of fact to understand the evidence or to determine a fact in issue.” Again the test is usefulness. Note that the expert is not required to base his opinion on personal knowledge.

C. *Qualification as an Expert Witness (Section 702)*

Under section 702 any witness “qualified as an expert by knowledge, skill, experience, training or education” may testify if his knowledge “will assist the trier of fact to understand the evidence or to determine a fact in issue.” Note the wide reach of this definition. Under this definition an “expert” may be some quite ordinary person whose experience gives him knowledge concerning some matter involved in the trial.³²⁴

D. *Abolition of the Rule Against Opinion Dealing with the Ultimate Issue (Section 704)*

Under section 704³²⁵ opinion testimony that is otherwise admissible cannot be excluded because it embraces “an ultimate issue to be decided by the trier of fact.” In order to be admissible at all, an opinion must be offered through either a lay person with personal knowledge of the facts or an expert witness with special qualifications *and* must be found to be helpful to the trier of fact. There is no good reason why such an opinion should be excluded or restated because it deals with a question the jury (or other factfinder) must ultimately decide.

This provision does not mean that meaningless opinions on the

323. Section 702. Testimony by Experts. “If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify in the form of an opinion or otherwise.”

324. Federal Advisory Committee’s note to federal evidence rule 702, Proposed Federal Rules, *supra* note 21, at 282.

325. Section 704. Opinion on Ultimate Issue. “Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.”

issues to be tried are now admissible. They are excluded by the requirement that opinions must be helpful to the trier of fact.

E. Oklahoma Did Not Adopt a Code Section on Court Appointed Experts

The Federal Rules of Evidence contain one rule concerning expert witnesses which was not adopted as part of the Oklahoma Evidence Code. This is rule 706 which deals with court appointed expert witnesses. The Federal Advisory Committee's note to that rule argued that provision for court appointed expert witnesses was both highly desirable and within the inherent power of a trial judge:

The practice of shopping for experts, the venality of some experts, and the reluctance of many reputable experts to involve themselves in litigation, have been matters of deep concern. Though the contention is made that court appointed experts acquire an aura of infallibility to which they are not entitled, the trend is increasingly to provide for their use. While experience indicates that actual appointment is a relatively infrequent occurrence, the assumption may be made that the availability of the procedure in itself decreases the need for resorting to it. The ever-present possibility that the judge *may* appoint an expert in a given case must inevitably exert a sobering effect on the expert witness of a party and upon the person utilizing his services.

The inherent power of a trial judge to appoint an expert of his own choosing is virtually unquestioned. Hence the problem becomes largely one of detail.³²⁶

The Oklahoma Evidence Subcommittee decided, however, "not to propose such a rule for Oklahoma,"³²⁷ and the legislature followed that suggestion. Section 614(A) of the Oklahoma Evidence Code does provide, however, that the trial judge may call witnesses either on his own motion or at the suggestion of a party. It would appear that the trial judge could appoint and call an expert witness either under that section or by his inherent authority. The absence of express authority to include reasonable compensation for the expert as part of the court costs, however, might be a problem.

326. Proposed Federal Rules, *supra* note 21, at 287 (citations omitted).

327. *Proposed Code*, *supra* note 4, at 2643-44.

F. Two Related Changes—Abolition of the Requirement that the Basis of the Expert's Opinion Be Stated and Abolition of the Requirement that the Expert's Opinion Be Based Upon Facts in Evidence (Sections 705 and 703)

1. Introduction

Sections 705 and 703 make major changes both in the methods that may be used to examine expert witnesses and in the kinds of opinions and other information that may be introduced through the testimony of expert witnesses. The ease with which such major changes have been adopted both by the Federal Rules of Evidence and by the Oklahoma Evidence Code may be explained by three facts. First, all of the changes these sections make in prior law expand the kinds of evidence which may be used and the methods which may be used to introduce them. Second, all of the procedures which could be used to examine expert witnesses at common law are still available, and Oklahoma lawyers will discover that in many situations those old procedures are the best ones to use even under the Code. Third, the requirements which sections 705 and 703 abolish were frequently either ignored or treated as useless formalities in many cases tried under the common law and the abolition of these requirements may not have seemed to be very important. However, the means by which sections 705 and 703 achieve the abolition of these requirements involve the creation of radically new theories concerning the nature and purpose of expert testimony. These new theories lead to some totally new problems.

2. Abolition of the Requirement that the Basis of the Expert's Opinion Be Stated (Section 705)

This section³²⁸ permits an expert witness to give an opinion "without prior disclosure of the underlying facts or data." The effect of this provision is to permit an expert witness simply to state his opinion without stating the facts upon which it is based and without the use of any hypothetical question. The use of this form of testimony is subject to the qualification "unless the court requires otherwise," but section

328. Section 705. Disclosure of Facts or Data Underlying Expert Opinion.

The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may be required to disclose the underlying facts or data on cross-examination.

705 does not suggest any standard or other guide for the trial court to apply in deciding whether to "require otherwise." The discussion below suggests some circumstances in which the trial court might be persuaded to use this power, but the federal experience appears to be that the trial judge will not normally require that the basis of the opinion be shown. If the trial court does not require the basis to be shown, each of the parties will have an opportunity to decide whether to bring it out in their examination of the witness. If the party calling the witness does not bring it out on direct examination of the witness, the opposing party may bring it out on cross-examination. But if neither party chooses to go into the basis for an opinion, the testimony of a qualified expert may consist of nothing more than a naked statement of his opinion.³²⁹

This probably will not occur very often. Section 705 does not prohibit either the use of hypothetical questions or the introduction of other testimony explaining the basis of the expert's opinion. The parties will usually choose to introduce evidence showing the basis for expert opinions in order to persuade the judge or jury to believe those opinions.

However, it is possible under section 705 that a judge or jury might be asked to decide a disputed question on the basis of unexplained assertions by expert witnesses. Proponents of this change would argue that this frequently did happen under common law procedures also except that, instead of being denied explanations, judge and jury were buried under explanations which they could not understand.³³⁰ This was especially apt to be true if it was necessary to use a hypothetical question in order to ask the expert to state an opinion based upon facts of which he did not have personal knowledge.

Section 705 attempts to solve the problem of excessive and incomprehensible evidence concerning expert opinion by abolishing (unless the court requires otherwise) the requirement that the party offering the expert must "make a record" during the trial showing the basis for the opinion.

Section 705 abolishes only the requirement that the basis of an expert opinion must be stated and not the requirement that there must

329. See 3 WEINSTEIN & BERGER, *supra* note 15, ¶ 705[01], at 705-1 & 705-2 for an illustration.

330. MCCORMICK, *supra* note 19, § 16; 3 WEINSTEIN & BERGER, *supra* note 15, ¶ 705[01], at 705-7; J. WIGMORE, EVIDENCE § 686 (3d ed. 1940); Federal Advisory Committee's note to federal evidence rule 705, Proposed Federal Rules, *supra* note 21, at 285.

be a basis for the opinion. Section 705 creates several problems, however, with respect to the questions of when and how the actual existence of an adequate basis must be shown. The provision in section 705 that authorizes the admission of an expert opinion without any revelation of its basis must be read as applying to both questions of admissibility and sufficiency. Whenever an expert opinion has been introduced without any inquiry into the basis for that opinion, the court must presume that an adequate basis exists unless evidence disproving the basis is introduced. A trial judge who is unwilling to presume the existence of a basis for a particular expert opinion may exercise his discretion to require the party offering the opinion to prove a basis when the opinion is offered, but if an expert opinion is admitted without evidence as to its basis, the existence of an adequate basis must be presumed (in the absence of evidence disproving the basis). Any other reading of section 705 would turn that section into a trap for those who rely upon it.

The problems grow even more difficult in cases in which one party attempts to offer an expert opinion without showing a basis, and the other party does wish to dispute the adequacy of the basis. The trial judge could exercise his discretion under section 705 and require the party offering the expert to show the existence of an adequate basis whenever the opposing party objects to an expert opinion. It seems unlikely that it could ever be error to require that the basis be shown, and it certainly could never be prejudicial error. Nevertheless, it is clear that the draftsmen of section 705 did not expect that the trial court would require the basis for an expert opinion to be shown whenever the opposing party objected. Section 705 gives the trial court, not the opposing party, the discretion to require that the basis be shown. Clearly, the draftsmen of section 705 contemplated that in at least some cases the opposing party should be required to do something more than merely object to an expert opinion in order to require that a basis be shown. In such cases the *opposing* party will now be required to raise the question of the adequacy of the basis. The opposing party may try to do so in four different ways. First, the opposing party has an automatic right to attack the adequacy of the basis through cross-examination of the expert, and if cross-examination shows that the basis is inadequate, the opinion will be stricken from the record. But this method of attack cannot be used until after the opinion has been introduced. Second, the opposing party may seek to keep the expert opinion from ever being introduced by requesting that the trial judge exercise

his discretion under section 705 to order the party offering the expert opinion to lay a foundation for that opinion by showing a basis for it. Third, the opposing party may ask the court to exercise its general discretion and allow a voir dire examination of the expert witness before he gives his opinion.³³¹ To make any effective use of any of these methods of attack, the opposing party must already recognize the questionable aspect of the basis of the expert's opinion.³³² It is unlikely that the trial judge will order either a demonstration of the basis for the opinion or a voir dire of the expert unless the opposing party can show that there is likely to be something questionable about the basis for the opinion. Apparently the opposing party will be expected to prepare its attacks through pretrial discovery. A party who does prepare through such pretrial discovery of the expert's possible basis will also be able to use a fourth method of attack—a pretrial motion to exclude improper opinion testimony.

It seems clear that the burden of persuading the court that there is an adequate basis for an expert opinion remains with the party who offers the opinion as evidence. The burden of raising a bona fide question about the adequacy of that basis, however, has apparently been shifted to the party seeking to oppose the introduction of that opinion. However, this might be more accurately described as a "burden of discovery" than as a burden of coming forward. In a case in which the opposing party can justify its failure to conduct adequate discovery, the trial court probably should exercise its discretion to require that the basis for an expert opinion be shown by the party offering the opinion.

How does the abolition of the requirement that the basis be disclosed affect the use of partial hypotheticals and other partial revelations of the basis of an expert opinion? The common law requirement that all such questions must be fair still applies because section 702 requires all expert testimony to be helpful. If, however, the trial court is permitting the expert to be examined without a full disclosure of the basis for his opinion it may be difficult for the trial court to tell when such a question is unfair. Once again the opposing party will have to be

331. Maine added a second paragraph to its version of rule 705 which requires that an adverse party who objects to testimony by an expert on the ground that the expert does not have an adequate basis for an opinion be allowed to conduct a voir dire examination in the absence of the jury. MAINE REV. STAT. tit. 8, Rule 705(b) (Supp. 1978).

332. See 11 MOORE & BENDIX, *supra* note 49, at VII-70; 3 WEINSTEIN & BERGER, *supra* note 15, ¶ 705[01], at 705-8 & 705-9. *But see, id.* ¶ 705[01], at 705-9, pointing out that in criminal cases "an attorney will be less likely to have sufficient advance knowledge for effective cross-examination."

prepared to explain to the court what is wrong with the expert's testimony.

3. Abolition of the Requirement that the Expert's Opinion Be Based Upon Facts in Evidence (Section 703)

One of the reasons that section 705 abolishes the requirement that the basis of an expert's opinion must be shown is that section 703³³³ abolishes the requirement that the expert must base his opinion on the facts in evidence. Section 703 authorizes an expert to base the opinion to which he testifies on facts in the case itself which he has either "perceived" or had "made known to him at or before the hearing." It is clear that this section authorizes the expert to base his opinion upon facts that are not in evidence, for it authorizes him to use facts that are not even admissible in evidence if they are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject."

It is still permissible to ask an expert for an opinion based upon a hypothetical question which asks him to assume certain facts which the jury could find from the evidence actually presented. It is no longer necessary to do so, however, because the expert may now base his opinion on facts that are not in evidence.

Section 703 introduces two new problems. The first is determining when a particular piece of information relied upon by an expert is "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." Professor McElhaney points out the difficulty of transferring a standard of decision from some other field into the courtroom:

What other fields regard as reliable ought to concern us. We should consider their norms in assessing our own. But the standards of reliability in any particular field must take into account the special situation in which it arises. A medical doctor making an emergency diagnosis at the scene of an accident will not use the same standards of reliability as he did in the research laboratory he left just before starting home. Trials are supposed to provide an opportunity for calm delibera-

333. Section 703. Bases of Opinion Testimony by Experts.

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

tion, appropriately taking longer to review events than the events themselves may have taken to transpire. The standard of reasonableness that the judge should apply is the judicial one, looking at the expert's field for guidance but not for ultimate decision.³³⁴

Therefore, it is the trial judge who must decide when the expert's reliance on information not in evidence is so reasonable that he should be permitted to base his testimony upon it.

Once again, the fact that under section 705 the expert may not be required to explain the basis for his opinion may make it difficult for the trial court to determine what the expert is doing. And once again the opposing party must be prepared through discovery to be able to point out to the trial court what the expert is doing.

The second problem is the extent to which such reliance by the expert on information not in evidence makes such information usable in the trial itself. Of course, all that section 703 purports to do is to authorize the use of an opinion based upon such information.³³⁵ Any dispute about the correctness of that opinion, however, will surely require a discussion of the information upon which it is based.³³⁶ It is generally argued that this is a limited use exception,³³⁷ but since the limited use is to support the expert's opinion, McElhaney is correct when he calls federal evidence rule 703 "virtually a major new exception to the hearsay rule."³³⁸

334. McElhaney, *Expert Witnesses and the Federal Rules of Evidence*, 28 MERCER L. REV. 463, 486 (1977).

335. *Id.* at 482; P. ROTHSTEIN, *supra* note 47, at 82-83.

336. S. SALTZBURG & K. REDDEN, *supra* note 48, at 426-27.

337. *Id.* See also McElhaney, *supra* note 334, at 481-82.

338. McElhaney, *supra* note 334, at 481. See *United States v. Sims*, 514 F.2d 147, 149 (9th Cir. 1975); *Bryan v. John Bean Div. of FMC Corp.*, 566 F.2d 541, 545-46 (5th Cir. 1978).

APPENDIX

A COMPARISON OF OKLAHOMA EVIDENCE CODE SECTIONS AND THE FEDERAL RULES OF EVIDENCE

This chart disregards some differences between Code sections and federal evidence rules that do not affect the meaning. These ignored differences are: (1) The Code uses the terms “section” and “Code” instead of “rule” and “these rules”, (2) The Code uses “court” instead of “judge”, (3) The Code omits the boldfaced subtitles for subdivisions which are used in the rules, and (4) The Code changes details of punctuation and grammar that do not affect meaning, such as whether an “or” is used before each of several alternatives.

There are also many sections of the Code that contain other changes in language that do not appear to affect their meaning. These sections are described in this chart as “reworded.” Many sections of the Code were slightly reworded and repunctuated during the process of legislative adoption. The changes appear to have been intended to achieve improvements in style rather than to make changes in meaning. A close reading of section 407, however, reveals that the rewording and repunctuation may have changed the meaning of part of that rule. This is discussed in the article and indicated in the chart. It may be that other changes have crept into other sections in the same fashion, but the author has not discovered any such changes in the sections described in the chart as reworded.

The Oklahoma Evidence Code contains sections corresponding to the Federal Rules of Evidence except for two rules. These are federal rule 302, whose only function is to create a “mini-Erie” rule to be applied to the effect of a presumption in a case tried in a federal court when state law supplies the controlling substantive law, and rule 706, which authorizes court appointed expert witnesses. However, section 614(A) may give the trial court the same powers which it would have been given by adoption of rule 706.

There are twenty-one Oklahoma Evidence Code sections that have no corresponding federal evidence rules. Three of these are miscellaneous mechanical provisions (sections 1101, 1102, and 1103). The other eighteen apply to subjects which the Code covers more thoroughly than the Federal Evidence Rules: judicial notice, presumptions, and privileges.

Finally, there are some differences in the ways in which the Code and the Federal Rules have marked subdivisions within sections and

rules. These differences may cause some slight confusion, for section 801(4)(a)(1) is identical to rule 801(d)(1)(a), but section 804(B)(3) equals rule 804(b)(3), and section 803(24) equals rule 803(24). This should only result in mild confusion, however, for Code sections that correspond to federal rules are organized exactly like those rules. Identical, or nearly identical, language appears in exactly the same positions in such corresponding sections and rules; therefore, corresponding subdivisions can be found easily.

OKLAHOMA EVIDENCE CODE SECTION	CORRESPONDING FEDERAL RULE OF EVIDENCE (OR COR- RESPONDING PROPOSED RULE)
101	New.
102	Same as Federal Rule 102.
103	Corresponds to Federal Rules 101 and 1101.
104	Rule 103 in Federal Rules. Slightly reworded.
105	Rule 104 in Federal Rules. Subsection (a) is slightly changed and the remainder is slightly reworded.
106	Same as Federal Rule 105.
107	Same as Federal Rule 106.
201	New.
202	Rule 201 in Federal Rules. Slightly changed.
203	New. Combines Rule 10(2) of Uniform Rules of Evidence (1953) and Federal Rule 201: (e) and (f).

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- 301 New. (Derived from Rule 701 of the Model Code of Evidence (1942)).
- 302 New. (Derived from Rule 702 of the Model Code of Evidence (1942)).
- 303 New. (Derived from Rule 14 of the Uniform Rules of Evidence (1953)).
- 304 New. (Taken in part from Proposed Federal Rule 303).
- 305 New. (Identical to Rule 15 of the Uniform Rules of Evidence (1953)).
- 401 Same as Federal Rule 401.
- 402 Slightly changed from Federal Rule 402.
- 403 Slightly changed from Federal Rule 403.
- 404 Slightly reworded from Federal Rule 404.
- 405 Reworded from Federal Rule 405.
- 406 Slightly reworded from Federal Rule 406.
- 407 Slightly reworded and perhaps changed from Federal Rule 407.
- 408 Slightly reworded from Federal Rule 408.
- 409 Same as Federal Rule 409.
- 410 Same as Federal Rule 410, as amended in 1975.

- 411 Reworded and slightly changed from Federal Rule 411.
- 501 Slightly reworded from Proposed Federal Rule 501.
- 502 Rule 503 in Proposed Federal Rules. Slightly changed.
- 503 Rule 504 in Proposed Federal Rules. Substantially changed.
- 504 Rule 505 in Proposed Federal Rules. Substantially changed.
- 505 Rule 506 in Proposed Federal Rules. Slightly reworded.
- 506 New (From OKLA. STAT. tit. 12, § 385.1).
- 507 Slightly reworded from Proposed Federal Rule 507.
- 508 Slightly reworded from Proposed Federal Rule 508.
- 509 Substantially changed from Proposed Federal Rule 509.
- 510 Same in substance as Proposed Federal Rule 510.
- 511 Reworded from Proposed Federal Rule 511.
- 512 Reworded from Proposed Federal Rule 512.
- 513 Same as Proposed Federal Rule 513.
- 601 Same as first sentence of Federal Rule 601.

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- 602 Slightly changed from Federal Rule 602.
- 603 Slightly reworded from Federal Rule 603.
- 604 Same as Federal Rule 604.
- 605 Slightly reworded from Federal Rule 605.
- 606 Slightly reworded from Federal Rule 606.
- 607 Same as Federal Rule 607.
- 608 Slightly reworded from Federal Rule 608.
- 609 Slightly reworded from Federal Rule 609.
- 610 Same as Federal Rule 610.
- 611 Substantially changed from Federal Rule 611. (Incorporates reworded OKLA. STAT. tit. 12, § 383).
- 612 Slightly changed from Federal Rule 612.
- 613 Slightly changed from Federal Rule 613.
- 614 Slightly reworded from Federal Rule 614.
- 615 Slightly changed from Federal Rule 615.
- 701 Same as Federal Rule 701.
- 702 Same as Federal Rule 702.
- 703 Same as Federal Rule 703.
- 704 Same as Federal Rule 704.

705	Slightly reworded from Federal Rule 705.
801	Slightly reworded and changed from Federal Rule 801.
802	Substantially same as Federal Rule 802.
803	Slightly reworded and changed from Federal Rule 803.
804	Slightly reworded from Federal Rule 804.
805	Same as Federal Rule 805.
806	Same as Federal Rule 806.
901	Slightly reworded from Federal Rule 901.
902	Slightly reworded from Federal Rule 902.
903	Slightly reworded from Federal Rule 903.
1001	Same as Federal Rule 1001.
1002	Slightly reworded from Federal Rule 1002.
1003	Slightly changed from Federal Rule 1003.
1004	Same as Federal Rule 1004.
1005	Slightly changed from Federal Rule 1005.
1006	Slightly reworded from Federal Rule 1006.
1007	Same as Federal Rule 1007.
1008	Same as Federal Rule 1008.
1101	New.
1102	New.
1103	New.