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INTRODUCTION, BACKGROUND, AND OVERVIEW

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This symposium issue of the *Oklahoma Law Review* is dedicated, at least in major part, to the recently completed redraft of the Uniform Rules of Evidence. It is my pleasant task as Chair of the Drafting Committee of the National Conference of Commissioners on Uniform State Laws (the Conference) to discuss the justification for this project and to provide a review of the itinerary followed in taking this journey.

In the late 1960s and early 1970s, separate groups of drafters worked to identify, unify, and codify rules of evidence that had been largely, but not totally, formulated through judicial decision. While earlier efforts had attempted to compile model or uniform rules, the works were largely ignored by lawyers and the courts. In 1965, the Chief Justice of the United States, under authority of the Rules Enabling Act,[1] appointed an Advisory/Drafting Committee which was, in part, assigned the task of writing evidence rules for use in the federal courts. This group received administrative support from the Judicial Conference of the United States and the Administrative Office of the United States Courts.

Almost simultaneously, the evidence rules codification idea was successfully presented to the leadership of the Conference. This resulted in the formation of a committee of lawyers, academicians, and judges charged with codifying a set of evidence rules for use in the *state* courts. Through the work of this group, the Conference promulgated the Uniform Rules of Evidence of 1974. These rules were substantively similar to the newly minted Federal Rules, which were eventually approved by Congress for use in the federal courts on and after July 1, 1975.

After the Federal Rules were approved in 1975, the Advisory/Drafting Committee disbanded. In 1992, after it received considerable outside pressure, a Federal Evidence Advisory Committee was created by the Judicial Conference to review the need, if any, for amendments to the rules and to guide in the promulgation of any necessary changes.

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1. 28 U.S.C. §§ 331, 2071-2077 (1999).

The Conference moved with a bit more dispatch, at least as it sought to address the admissibility of sexual-behavior evidence and attempted to deal with intervening court opinions involving privileges, bias, and document authentication. In 1983, a Study Committee, turned Drafting Committee, analyzed the need for additions or amendments to the Uniform Rules. One of the hallmarks of this effort was an attempt to bring the Uniform Rules into compliance with comparable Federal Rules, at least where there were insignificant policy differences, but no particular emphasis was placed on how well the rules, federal or uniform, were working in the courtroom. The rationale for this uniformity approach was that, given the increasing interstate nature of the practice of law, the trial practitioner need only master one set of rules to comfortably practice in both federal and state forums in various states, districts, and circuits. In 1986, the Conference approved several recommended changes developed under this paradigm.

As it turns out, these codification efforts proved to be more "work in progress" enterprises than was originally contemplated by the drafters of either the Federal or Uniform Rules. Fundamental societal changes, spectacular scientific advances, and the arrival and rapid development of computer technology served, upon the passage of time, to unbalance the efficacy of the existing rules.

Moreover, universal application was better in theory than in practice. In operation, the very same words were often construed differently by different courts, even including sister federal and state appeals tribunals. Thus, the prudent trial lawyer was forced to continue to research evidence rules on an opinion-by-opinion basis as she moved between cases from one precedent-establishing forum to another.

Responding to requests from judges, law professors, and practitioners to address these emerging evidentiary problems, the Conference appointed a new Study Committee in 1993 and then a Drafting Committee in 1995. This time, however, the assignment was to conduct a comprehensive review and revision of the Uniform Rules without any controlling reference to the language of the Federal Rules.

As a result, the Drafting Committee, in an effort to sufficiently address all perceived needs and problems, endeavored to draft uniform rules in clear and understandable terms without precise regard to any other existing work product. The Conference adopted the revised Uniform Rules of Evidence in 1999 and the results were approved by the House of Delegates of the American Bar Association at its midwinter 2001 meeting. These revised Uniform Rules, with Comments, are set forth at length following this introduction.

Beyond some reorganization of the Uniform Rules, which was a substantial step toward their more effective use, important modifications were fashioned for dealing with, among other things, information technology, presumptions, privileged communications, hearsay exceptions, expert opinions, and the balance of interests between relevant but unduly prejudicial testimony.

The Drafting Committee specifically created a "definitions rule," a revised Rule 101. It defines terms that are used in several different rules. The Committee also adopted a new approach to electronic evidence. The term "record" is used throughout the rules in lieu of the terminology "writings," "recordings," and

"photographs," and the word is appropriately defined in Rule 101(3). Numerous stylistic changes are likewise incorporated within the rules.

Revisions were made to Uniform Rule 404(c), narrowing the scope of the procedural requirements applicable in criminal cases when evidence of other crimes, wrongs, or acts is offered against an accused. Rule 407 now clarifies the meaning of an "event" when the term is used to determine the applicability of the rule in excluding evidence of subsequent remedial measures. Rules 803(6) and 803(8) now provide that public records, which are inadmissible under Rule 803(8), are also inadmissible as business records under Rule 803(6). Rule 807 tightens the criteria for determining the admissibility of statements of children relating to neglect, or physical or sexual abuse.

Congress added Rules 413 through 415 to the Federal Rules of Evidence on September 13, 1994,[2] effective July 9, 1995. These rules permit, respectively, (1) the admissibility of the commission of prior offenses of sexual assault when, in a criminal proceeding, a person is accused of a sexual assault; (2) the admissibility of the commission of prior offenses of child molestation when, in a criminal proceeding, a person is accused of such an offense; and (3) the admissibility of the commission of prior sexual assaults, or of child molestation when, in a civil proceeding, a claim for damages or other relief is sought against a party who is alleged to have committed an act of sexual assault or child molestation.

The overwhelming majority of those who responded to the Federal Advisory Committee's call for public response opposed the enactment of Rules 413 through 415. There were two principal objections. First, the rules permit the admission of unfairly prejudicial evidence by focusing on convicting a criminal defendant because of who the defendant *is* rather than what the defendant *has done* in the present instance. Second, the rules contain drafting problems apparently not intended by their authors. For example, they seem to mandate the admissibility of evidence without regard to other rules of evidence, such as the Rule 403 balancing test and the hearsay rule. It was thought that serious constitutional questions could arise in criminal proceedings under the proposals.

For these and related reasons, the Advisory Committee on the Federal Rules of Evidence, the Standing Committee on Federal Rules of Practice and Procedure, and the Judicial Conference of the United States opposed the enactment of Rules 413 through 415. Alternatively, the Standing Committee and the Judicial Conference recommended amending Rules 404 and 405 of the Federal Rules to provide for admitting such evidence under limited circumstances. Congress rejected the recommendation, and Rules 413 through 415 became effective on July 9, 1995.

In spite of concerns about the constitutionality of Rules 413 through 415, federal courts have given them surprising vitality. These courts have held that the rules do not violate the Due Process Clause, subject to the balancing of relevancy against unfair prejudice under Rule 403 of the Federal Rules.[3]

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2. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (found in section 40141 of the Act).

3. *See* United States v. Mound, 149 F.3d 799 (8th Cir. 1998); United States v. Castillo, 140 F.3d

However, there is still lingering concern as to constitutionality.[4] Circuit Judge M. Arnold, dissenting from an order denying a rehearing en banc in *United States v. Mound*,[5] argued that the en banc court ought to consider the constitutionality of Rule 413 because the rule "'presents [so] great a risk that the jury will convict a defendant for his past conduct or unsavory character' that it violates due process."[6]

In any event, the propriety of including Federal Rules 413 through 415 in the Uniform Rules was considered and found questionable at best. No state has adopted these rules to date. Their adoption was considered by the Supreme Court of Arizona, but rejected largely for the reasons outlined by the Judicial Conference of the United States.[7] Connecticut has reprinted Federal Rules 413 and 415 in its Trial Lawyers Guide to Evidence, but they are inapplicable in state court proceedings. Indiana has a rule similar to Federal Rule 414, but it is more carefully drawn with procedural safeguards.[8] California also has statutes authorizing the introduction of prior sexual offenses or acts of domestic violence subject to balancing relevancy against unfair prejudice.[9] Missouri also has a blanket rule admitting evidence of prior acts of child molestation similar to Federal Rule 414.[10]

The Drafting Committee to Revise the Uniform Rules of Evidence decided not to adopt such rules. Likewise, the Drafting Committee did not adopt the Federal Advisory Committee's proposed amendments to Rules 404 and 405.

These decisions have now been reinforced by the holding of the Supreme Court of Missouri in *State v. Burns*[11] that section 566.025 of the Missouri Statutes[12] contravenes the Missouri Constitution. The Missouri court found that section 566.025 violated article 1, section 17, which provides "[t]hat no person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information" and article 1, section 18(a) providing "[t]hat in criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation."[13] The Missouri court's reasoning is, of course, outlined in more detail in the opinion.

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874 (10th Cir. 1998); United States v. Guardia, 135 F.3d 1326 (10th Cir. 1998); United States v. Enjady, 134 F.3d 1427 (10th Cir. 1998); United States v. Summer, 119 F.3d 658 (8th Cir. 1997); United States v. Larson, 112 F.3d 600 (2d Cir. 1997).

4. *See* United States v. Mound, 157 F.3d 1153 (8th Cir. 1998).

5. *Id.*

6. *Id.* at 1154 (quoting Mark A. Sheft, *Federal Rule of Evidence 413: A Dangerous New Frontier*, 33 AM. CRIM. L. REV. 57, 76 (1995) (alteration in original)).

7. *See* Robert L. Gottsfield, *We Just Don't Get It: Improper Admission of Other Acts Under Evidence Rule 404(b) as Needless Cause of Reversal in Civil and Criminal Cases*, ARIZ. ATT'Y, Apr. 1997, at 24.

8. IND. CODE ANN. § 35-37-4-15 (West 1997).

9. CAL. EVID. CODE §§ 1108, 1109 (West 1997).

10. MO. ANN. STAT. § 566.025 (West 1978).

11. 978 S.W.2d 759 (Mo. 1998).

12. MO. ANN. STAT. § 566.025 (West 1978).

13. *Burns*, 978 S.W.2d at 760.

This general discussion concerning the work of the Drafting Committee concludes my overview. I will leave to others a more detailed analysis of several of the new and revised rules.

The Uniform Rules of Evidence, as last revised in 1999, were thoughtfully and carefully produced. Their use, to quote part of Rule 102(c), will "promote the growth and development of the law of evidence, to the end that truth may be ascertained and issues justly determined." Indeed, in my view, this end result, at least in subjects such as presumptions, privileges, and expert testimony, is clearly superior to any work product available at this time. Accordingly, I hope that you will give the revised Uniform Rules due consideration and, if you find them acceptable, that you will put them to use.

As an epilogue to this introduction, and on behalf of the entire Drafting Committee, I enthusiastically acknowledge and laud the work of our reporter, Dr. Leo H. Whinery, Alfred P. Murrah Professor of Law at the University of Oklahoma College of Law. Without Professor Whinery's in-depth research, drafting skills, boundless energy, punctual responses, and wise counsel, the quality of the drafting effort certainly would have been considerably attenuated. Indeed, at each working session, Leo and his assistants provided committee members and observers with up-to-date research and analysis on how each Federal and Uniform Rule was at the time being interpreted, if at all, by the United States Supreme Court, each United States Circuit Court, and the highest court of each state. Before the Uniform Rules were adopted by the Conference as a whole, each commissioner was given copies of this background information, which, I might add, was instantly useable by every lawyer, judge, and academician in the Conference whose daily lives in some fashion involve, directly or indirectly, trial court evidence. No Conference committee has ever had better assistance and we salute Professor Whinery for this significant contribution to American evidence law.