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Highlights of the Proposed Federal Rules of Evidence

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HIGHLIGHTS OF THE PROPOSED FEDERAL RULES OF EVIDENCE

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I. INTRODUCTION

THE first reasoned analysis of the law of evidence is attributed by Wigmore to Evans' 1806 *Notes to Pothier on Obligations.*[1] This drew attention to the reasons for evidentiary rules and to the existence of a set of principles underlying them. Later Bentham's writings emphasized needed changes.[2] Some years thereafter an able Georgia judge criticized certain aspects of evidence law. Joseph Henry Lumpkin said: "I have long been satisfied that we are too hide-bound and restricted in our practice, with regard to the admissibility of evidence."[3] In a later opinion he added:

> Truth, common sense, and enlightened reason, alike demand the abolition of all those artificial rules which shut out any fact from the jury, however remotely relevant, or from whatever source derived, which would assist them in coming to a satisfactory verdict.[4]

Today general agreement exists as to the necessity for improving

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1 1 J. WIGMORE, EVIDENCE § 8, at 238 (3d ed. 1940).

2 J. BENTHAM, RATIONALE OF THE LAW OF EVIDENCE (J. Mill ed. 1827).

3 Franklin v. Mayor of Macon, 12 Ga. 257, 261 (1852). Judge Lumpkin was the first Chief Justice of the Supreme Court of Georgia and the first head of the University of Georgia School of Law. E. COULTER, COLLEGE LIFE IN THE OLD SOUTH 39 (1951); R. BROOKS, THE UNIVERSITY OF GEORGIA UNDER SIXTEEN ADMINISTRATIONS 1785-1955, at 48 (1956). Wigmore, who referred to Lumpkin's opinions as models, spoke highly of him. 1 J. WIGMORE, *supra* note 1, § 8(a), at 242, 246.

4 Johnson v. State, 14 Ga. 55, 62 (1853).

the rules.[5] Professor Thayer, the great nineteenth century evidence scholar, recognized this need; he believed that judges were better qualified than legislators to meet it. Thayer suggested use of the courts' rule-making power to simplify, clarify, and modernize the law of evidence.[6] Subsequently a number of jurisdictions have adopted rules of court, singly or in small numbers.[7] One state, New Jersey, has promulgated a comprehensive set of evidence rules of court.[8]

In 1938, when the Federal Rules of Civil Procedure were being drafted, the Advisory Committee considered including a revision of evidence law. Although the Committee decided that the Supreme Court had the power to issue evidence rules, it chose not to draft provisions dealing specifically with the grounds of disqualification of witnesses, hearsay, opinion, or relevancy but rather to describe the sources from which evidence law for the United States District Courts would be derived.[9] Chairman William D. Mitchell, former Attorney General, spoke of the "tremendous pressure brought on the Advisory Committee by those familiar with the subject of evidence insisting that there was a need for reform."[10] Mr. Mitchell said, "Some day,

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5 *See* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE xi (1954); Ladd, *Uniform Evidence Rules in the Federal Courts*, 49 VA. L. REV. 692, 715 (1963); Weinstein, *The Uniformity-Conformity Dilemma Facing Draftsmen of the Uniform Federal Evidence Rules*, 69 COLUM. L. REV. 353, 354-55 (1969). *See also* McCormick, *Tomorrow's Law of Evidence*, 24 A.B.A.J. 507, 508 (1938); Morgan & Maguire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909, 910 (1937).

6 J. THAYER, PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 529-88 (1898).

7 *See* Green, *To What Extent May Courts Under the Rule-Making Power Prescribe Rules of Evidence?*, 26 A.B.A.J. 482, 487-88 (1940).

8 N.J.R. EVID., N.J. STAT. ANN. § 2A:84A (Supp. 1968) (codification of statutory and court-adopted rules). Several other jurisdictions have adopted evidence codes by statute. CAL. EVID. CODE §§ 1-1605 (West 1965). KAN. GEN. STAT. ANN. §§ 60-401 to -470 (1964); C.Z. CODE tit. 5, §§ 2731-2996 (1963); 5 V.I. CODE ANN. §§ 771-956 (1957).

9 Thus, FED. R. CIV. P. 43(a) provides:

> Form and Admissibility. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner.

FED. R. CRIM. P. 26 is similar in that it does not attempt to codify evidence law but relies on common law, as interpreted by the federal courts, as the source for criminal rules.

10 CLEVELAND INSTITUTE ON FEDERAL RULES, PROCEEDINGS 186 (1938).

some other advisory committee should tackle the task of revising the rules of evidence and composing them into a new set of rules to be promulgated by the Supreme Court."[11] Approximately a half dozen similar proposals were made by commentators during the next twenty years.[12]

In 1957 the Judicial Conferences of the Third and Sixth Circuits each recommended the promulgation of uniform rules of evidence for the federal courts.[13] The House of Delegates of the American Bar Association adopted a similar recommendation in 1958.[14] Yet the Judicial Conference of the United States, which advises the Supreme Court in connection with the Court's rule-making function,[15] approached the problem with more caution than had been exercised prior to undertaking the drafting of other Federal Rules of Procedure. A special committee was formed to consider the advisability and feasibility of drafting uniform rules of evidence for federal courts.[16] The committee spent twenty months studying the matter and obtaining the views of the bench and bar. The committee concluded that the rules of evidence applicable in federal courts should be improved and that uniform rules of evidence for federal courts are both advisable and feasible.[17]

To prepare a draft of proposed rules, the Chief Justice of the United States, as chairman of the Judicial Conference, appointed an Advisory Committee of fifteen members. Membership is comprised of eight trial attorneys, the former chief of the criminal appeals unit of the Department of Justice, four federal judges, and two members of law school faculties.[18] A third academician, Edward W. Cleary, who before teaching had 11 years of active practice, is Reporter for the Committee, furnishing many of the ideas, doing or directing most of the research,

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11 *Id.*

12 For citations, see Green, *Preliminary Study of the Advisability and Feasibility of Developing Uniform Rules of Evidence for the Federal Courts*, 30 F.R.D. 73, 81-82 (1962).

13 1957 Jud. Conf. Rep. 43.

14 44 A.B.A.J. 1113 (1958).

15 Panel Discussion, *The Rule-Making Function and the Judicial Conference of the United States*, 44 A.B.A.J. 42 (1958).

16 30 F.R.D. 73 (1962). The author was Reporter for the committee and made the study which accompanied the Special Committee's Preliminary Report.

17 COMM. ON RULES OF PRAC. AND PROC., JUD. CONF. OF THE U.S., PRELIMINARY DRAFT OF PROPOSED RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS AND MAGISTRATES 5 (March 1969) [hereinafter cited as PROPOSED FED. R. EVID.].

18 36 F.R.D. 128 (1965). Eight of the members are Fellows of the American College of Trial Lawyers and two are members of the International Association of Insurance Counsel. PROPOSED FED. R. EVID., at 6. Three are district court judges. *Id.*

and usually doing the original drafting.[19] After three and a half years of work, a Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates was printed and distributed for consideration by the bench and bar.[20]

II. State Evidence Law in Federal Courts

Prior to adoption of the Federal Rules of Civil Procedure there was some confusion whether in civil cases federal courts should conform to state law on questions of evidence.[21] Now, however, Rule 43(a) of the Federal Rules of Civil Procedure provides for conformity in certain circumstances.[22] For criminal cases Rule 26 of the Federal Rules of Criminal Procedure describes the general source of evidence rules for federal courts as "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."[23] This language makes no change in prevailing doctrine; it simply continues a view adopted by the Supreme Court in a 1933 decision.[24] Thus, conformity to the state law of evidence has not been required by the Federal Rules of Criminal Procedure.

In 1938, the same year in which the Civil Rules were promulgated, *Erie R.R. v. Tompkins*,[25] a landmark decision concerning federal courts adherence to state law, was handed down. There the Court held that, except in matters governed by the United States Constitution or acts of Congress, the applicable law is state law, whether enacted by the state legislature or declared by its highest court in decisions.[26] Language in the Supreme Court's opinion led to general belief that its holding concerned substantive, not procedural, law. In a later case, however, the question was held to be whether the state law is a matter of substance in regard to the specific problem; namely, whether disregard of the state law by a federal court would significantly affect

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19 Initial drafts were prepared by the Reporter then discussed by the Committee. Sometimes changes suggested resulted in a revised draft, and, after review by the Committee, a third draft was prepared.

20 The Preliminary Draft of the Proposed Federal Rules of Evidence has already been cited by the courts. *E.g.*, Twin City Plaza, Inc. v. Central Surety & Ins. Corp., 409 F.2d 1195, 1201 (8th Cir. 1969).

21 Green, *supra* note 12, at 83.

22 *See* note 9 *supra*.

23 Fed. R. Crim. P. 26.

24 Funk v. United States, 290 U.S. 371 (1933). *See also* Wolfle v. United States, 291 U.S. 7 (1934).

25 304 U.S. 64 (1938).

26 C. Wright, Federal Courts 214 (1963).

the result of litigation.[27] Since almost any procedural precept may significantly affect the outcome of a case, there seemed to be very little, if any, room left for the application of the Federal Rules of Civil Procedure in diversity cases.[28] A new dimension was added, however, to the *Erie* picture by *Byrd v. Blue Ridge Rural Electric Co-op*,[29] in 1958. This decision held that the outcome-determinative test does not apply if countervailing considerations in the particular case are of sufficient importance. *Byrd* indicated that "outcome" is not the sole test where state doctrine does not involve substantive rights and obligations but may determine the outcome of the particular litigation. Any pertinent countervailing federal policy may be weighed against the broad policy which opposes contradictory procedural determinations by state and federal courts sitting in the same state.[30] This decision furnished new hope for the validity of existing federal rules of procedure and for the products of future exercise of the rule-making power.

Hanna v. Plumer[31] further enhanced the validity of rules issued by the Supreme Court for district courts, even those in conflict with state law, as long as the rules deal with subjects within the power of Congress and within the scope of the Enabling Acts delegating authority to the Court.[32] The majority of the Court held that the *Erie* doctrine is not the appropriate test of the validity of a Federal Rule of Civil Procedure:

> For the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between

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27 Guaranty Trust Co. v. York, 326 U.S. 99 (1945).

28 C. WRIGHT, *supra* note 26, at 192.

29 356 U.S. 525 (1958); *see The Supreme Court—1957 Term*, 72 HARV. L. REV. 77, 147 (1958).

30 356 U.S. at 537. Some contend that there should be no assumption that *Byrd* should be applied to cases involving different facts. *See, e.g.*, Degnan, *The Law of Federal Evidence Reform*, 76 HARV. L. REV. 275, 292 (1962). *But see* Hanna v. Plumer, 380 U.S. 460 (1965) (citing *Byrd*).

31 380 U.S. 460 (1965).

32 28 U.S.C. § 2072 (1964) (civil rules); 18 U.S.C. § 3771 (1964) (criminal rules); 28 U.S.C. § 2073 (1964) (admiralty rules); 28 U.S.C. § 2075 (1964) (bankruptcy rules). Section 2073 was repealed in 1966. *See* Act of Nov. 6, 1966, § 2, 80 Stat. 1323. Authority for admiralty rules is now included in 28 U.S.C. § 2072 (1966).

> substance and procedure, are rationally capable of classification as either.[33]

Congress may exercise the power to regulate by delegating similar authority to the Supreme Court.[34] This has been done in the Enabling Acts. Their terms, however, confer power only over procedure and not substance.[35] The meaning of procedure under these acts differs from that established for the *Erie* doctrine in *Guaranty Trust Co. v. York*.[36] The test under the Enabling Acts, as stated in *Sibbach v. Wilson & Co.*,[37] is: "whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."[38]

Hanna held that the constitutionality of specific Federal Rules is to be decided in the light of *Sibbach*. This seems to follow because the constitutional principle involved is that our national government is one of delegated powers; the express power which supports the Court's rule-making is the authority in Article III to establish and maintain federal courts. If a state undertakes to make the subject matter of a Federal Rule substantive for state purposes, the Rule nevertheless remains paramount in the United States courts because of the supremacy clause of the Constitution.[39] Thus, the particular distinction in *Sibbach* between substance and procedure plays a part in the application of the Enabling Acts and also in the determination of the constitutional validity of the Rules.[40]

Able writers have suggested that, even if the Supreme Court can legally issue Federal Rules of Evidence which conflict with state policy in areas which are properly the concern of the states, it should not do so.[41] The appropriate approach for draftsmen of federal procedural

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33 380 U.S. at 472.

34 Sibbach v. Wilson & Co., 312 U.S. 1, 9 (1941).

35 Acts cited note 32 *supra*.

36 326 U.S. 99 (1945). For the *York* test, see text accompanying note 27 *supra*.

37 312 U.S. 1 (1940).

38 *Id.* at 14.

39 U.S. CONST. art. VI, § 2; *see* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819).

40 For explanation see text accompanying note 35 *supra*.

41 Weinstein, *The Uniformity-Conformity Dilemma Facing Draftsmen of Federal Rules of Evidence*, 69 COLUM. L. REV. 353, 357, 372-73, 375-76 (1969); Wright, *Procedural Reform: Its Limitations and its Future*, 1 GA. L. REV. 563, 569, 571-72 (1967); *accord*, Degnan, *The Law of Federal Evidence Reform*, 76 HARV. L. REV. 275, 300-01 (1962) (regarding privileges). Judge Weinstein proposes a provision for the Rules substantially as follows: With respect

rules was discussed by the American Bar Association's Special Committee on Federal Rules of Procedure in its August 1965, report. In part, the statement concluded:

> Rulemakers must, therefore, weigh, in much the same way as Congress might, the desirability of uniformity and efficiency in federal litigation against the desirability of permitting the states, wherever possible, to exercise power and enforce their own policy in areas normally regulated by the states.[42]

Assuming that this is the proper method for the Supreme Court and its advisers to use in preparing and promulgating evidence rules, the approach manifested in the Advisory Committee's proposals is believed consistent with it. "[I]n no instance has any substantial impact [on state policy] been made which is not far outweighed by a probable beneficial result on Federal Practice and judicial administration."[43]

How slight the proposals' impact on state policy is apt to be is shown by analysis of specific suggestions.[44] Some of the matters which various commentators deem appropriate for state control, with respect to state-created rights, are: burden of proof, presumptions, parol evidence, Dead Man Statutes, constitutional provisions, privileges,

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to a material proposition as to which state law has fashioned a rule of decision, the state evidence law, based on policies not bearing solely on the reliability of evidence, shall prevail over the Federal Rules. He would exclude from the provision matters of form and mode and would require pretrial notice of reliance on a state rule of evidence, except in instances of surprise. Weinstein, *supra*. Professor Wright argues no objectionable interference with state policy occurs, if the federal court recognizes a privilege that the state would reject. He comments:

> The appropriate solution, I suggest, would be to provide in the federal rules for those privileges thought justified, but then to have a further provision, applicable to diversity cases only, making privileged any other matter that would be privileged by applicable state law.

Wright, *supra* at 573.

42 ABA Special Comm. on Fed. R. Proc., *Report*, 38 F.R.D. 95, 103 (1965). Professor Jack Weinstein, now Judge Weinstein, chaired the subcommittee which prepared this part of the report. Weinstein, *supra* note 41, at 357 n.18.

43 ABA Special Comm. on Fed. R. Proc., *supra* note 42, at 104. The ABA Committee was discussing what were then proposed changes in FED. R. CIV. P. 23. The conclusion seems completely applicable to the proposed Federal Rules of Evidence in regard to the conformity problem.

44 Judge Weinstein concedes that "truth determining rules"—which include most general rules of evidence such as qualification and credibility of witnesses, hearsay, opinion authentication, etc.—are "clearly amenable to uniform treatment through federal rules of evidence." Weinstein, *supra* note 41, at 361. Professors Wright and Degnan seem to agree. *See* Degnan, *supra* note 41; Wright, *supra* note 41.

required reports privileged by state statute, exclusion of admissions made in compromise negotiations, and evidence of post-accident repairs.[45] Burden of proof is not considered in the proposed Rules, except in connection with presumptions. As to the latter in civil actions, Rule 3-02 provides that, when a fact is an element of a claim or defense for which state law supplies the rule of decision, the effect of any pertinent presumption will be determined in accordance with state law.[46] The same result apparently would be reached in regard to existence of a presumption,[47] although the issue is not resolved explicitly in the proposed Rules.

The extrinsic evidence doctrines are covered by Rule 4-02, which declares: "Evidence which is not relevant is not admissible." Where substantive state law controls in federal court, it includes in appropriate instances the parol evidence rule's substantive aspects. The state substantive rule thus makes the extrinsic evidence inadmissible because the proposition at which it is directed is not provable in the case.[48]

Constitutional privileges and rights are not disturbed by the proposed Rules. Consequently no problem arises.

Rule 4-07 deals conventionally with a doctrine which is accepted in every state that has ruled on the issues—the inadmissibility of evidence of subsequent remedial measures to prove negligence or culpable conduct.[49]

Evidence of compromise or of offer to compromise would not be admissible under Rule 4-08 to prove liability or nonliability. Such inadmissibility is widely recognized. However, the generally held view regarding admissions of fact made in the course of negotiations is that they are not excluded unless hypothetical, expressly stated to be without prejudice, or inseparably connected with the offer.[50] This view is believed to inhibit free communication with regard to compromise and consequently to conflict with public policy favoring compromise

45 Weinstein, *supra* note 41, at 363; *accord*, Degnan, *supra* note 41; Wright, *supra* note 41.

46 PROPOSED FED. R. EVID. 3-02 provides:

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

47 *See* Dick v. New York Life Ins. Co., 359 U.S. 437, 446 (1959).

48 C. MCCORMICK, *supra* note 5, at 315-316; James, *Relevancy, Probability and the Law*, 29 CALIF. L. REV. 689, 691 (1941).

49 *E.g.*, KAN. GEN. STAT. ANN. § 60-451 (1964); *see* Annot., 64 A.L.R.2d 1296, 1299 (1959).

50 *See* Annot., 80 A.L.R. 919 (1932).

and settlement of disputes.[51] It also tends to cause controversy concerning whether a given item is within one of the categories of excluded declarations.[52] For these reasons the proposal protects not only the offer and the completed compromise, but also all evidence of conduct or statements made in compromise negotiations. This expansion of protection is not unique; California has similar provisions.[53] Does proposed Rule 4-08 treat the states unwisely in view of our concepts of federalism when it excludes in diversity cases evidence which many state courts would receive? Professor McCormick classified as a privilege the doctrine excluding evidence of an offer to compromise.[54] Under the suggested expansion, admissions of fact made in the negotiations would also be privileged. Professor Wright has said:

> The interference with state policy that seems to me objectionable occurs only if the federal court fails to recognize a state-created privilege. There is no similar interference if the federal court recognizes a privilege that the state would reject. Accordingly I see no problem if a federal privilege is broader than the state privilege, but only if it is narrower. The appropriate solution, I suggest, would be to provide in the federal rules for those privileges thought justified, but then to have a further provision, applicable to diversity cases only, making privileged any other matter that would be privileged by applicable state law.[55]

Ostensibly the proposed federal "compromise privilege" would be as broad as, or broader than, a similar privilege in any state.[56] In some situations discussed so far, the matters are either left to state law or the United States Constitution or are given the same treatment by state law and proposed Federal Rules. In others, the proposed privilege is as broad as, or broader than, similar state privileges and more in keeping with the theoretical basis of the privilege. There remain for consideration other privileges classified as such by general usage and the Dead Man Doctrine.

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51 PROPOSED FED. R. EVID. 4-08, Advisory Comm.'s, Note, at 67.

52 *Id.*

53 CAL. EVID. CODE §§ 1152, 1154 (West 1966); *see* UNIFORM RULES OF EVIDENCE 52, 53.

54 C. MCCORMICK, *supra* note 5, § 76, at 158. This doctrine is not treated in the proposed Federal Rules' Article V (privileges) but in Article IV (relevancy and its limits). Consequently only a party may object to evidence of an offer to compromise. The holder of a privilege denominated as such may claim the privilege whether or not he is a party in the case. PROPOSED FED. R. EVID. 5-03(c), 5-04(c), 5-06(c).

55 Wright, *supra* note 41, at 573.

56 For discussion see text at notes 50 and 53 *supra*.

At least one able commentator has asserted that federal courts are required by the Constitution to apply state privileges in all civil cases.[57] There is little support for this assertion in nondiversity cases.[58] Nor is it sound with regard to diversity cases. After this view was promulgated, the Supreme Court decided *Hanna v. Plumer*. This case held that power to make rules governing procedure in the federal courts includes power to regulate matters which fall within the uncertain area between substance and procedure and are rationally capable of classification as either.[59] It can hardly be said that privileges for confidential communications may not be rationally categorized as procedural; in fact, Professor E. M. Morgan has suggested that they should be so classified.[60] That opposing views exist merely indicates that either classification is rational. Thus, Supreme Court rules for district courts which reject state privileges would be valid, even in diversity cases.

The proposed Rules do not contain a blanket recognition of state privileges,[61] but many state privileges will gain substantial recognition in federal courts, if the Rules are promulgated. The proposal provides for many generally recognized privileges. Thus, there will be, both in federal courts and in many states, privileges for confidential communications between attorney and client, for confidential communications to clergymen, for political votes, for trade secrets, and for concealing the identity of an informer.[62] As set forth in Rule 5-01, constitutional privileges, such as that against self-incrimination, will be respected. Privileges created by a state to encourage the filing of returns and reports are protected by proposed Rule 5-02. In those instances where federal law does not recognize state privileges, the state cannot give complete protection because it cannot require exclusion of evidence in a federal criminal proceeding, a federal question case in the federal court, or in bankruptcy.[63] Therefore, federal procedural uniformity

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57 Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101 (1956).

58 C. WRIGHT, *supra* note 26, at 360 (1963).

59 380 U.S. at 472.

60 Morgan, *Rules of Evidence—Substantive or Procedural?*, 10 VAND. L. REV. 467, 483 (1957). Morgan expressly limits his conclusion to the meaning in an enabling act, the very question presented in Sibbach v. Wilson & Co., 312 U.S. 1 (1941), as to the word "substantive."

61 Except as provided or required by the Constitution or acts of Congress or the Rules of Evidence or Civil or Criminal Procedure, there are no privileges. PROPOSED FED. R. EVID. 5-01.

62 PROPOSED FED. R. EVID. art. V, *Privileges*, at 71-112.

63 *See* Weinstein, *supra* note 41, at 371-72.

can be attained in this regard without serious deprivation of states' rights.

Two privileges which are in force in many states but are not recognized by the proposed Federal Rules are those concerning confidential communications between husband and wife and between physician and patient. Ostensibly their purposes are to promote family solidarity and to encourage patients to disclose all relevant facts to doctors, a necessitity for effective treatment.[64] Actually they do not serve these purposes, because the patient and the spouse usually remain unaware of the privilege. If evidentiary privileges had social effects, we would never write letters and would live in constant fear of eavesdroppers.[65] Nevertheless, most of us do write letters and do not live in any such state of fear. "[P]ractically no one outside the legal profession knows anything about the rules regarding privileged communications between spouses."[66] The situation involving the patient's privilege is similar. Professor Morgan has said:

> . . . The ordinary citizen who contemplates consulting a physician not only has no thought of a lawsuit, but he is entirely ignorant of the rules of evidence. He has no idea whether a communication to a physician is or is not privileged. If he thinks at all about the matter, he will have no hesitation about permitting the disclosure of his ailments except in case of a disease which he considers disgraceful. The diseases which a patient would be most reluctant to disclose are the very ones which the physician is obliged to report to public authority . . . .
>
> If the patient is to be credited with knowing the law of privilege, he must be taken to know also that in case his physical or mental condition is relevant in an action, he is subject to be called as a witness. If called, he must under oath give all the relevant information which he could give to his physician as to his subjective symptoms and his past history. . . .
>
> There is no evidence that the existence of the privilege has any relation to the progress of medical science or to the public health. Has either suffered in England where no such privilege has ever existed? In Maryland there never has been such a privilege. Has that fact kept Maryland in the rear in medical science or public

64 Ladd, *supra* note 5, at 714.

65 Hutchins & Slesinger, *Some Observations on the Law of Evidence: Family Relations*, 13 MINN. L. REV. 675, 681-82 (1929).

66 *Id.* at 682; *accord*, Weinstein, *supra* note 41, at 372; Wright, *supra* note 41, at 573.

> health? Have patients from other states and countries been deterred from seeking surgical aid in Baltimore?[67]

Others, including an American Bar Association Committee, have expressed strong criticism of this privilege:

> The writers on the law of evidence almost unanimously agree that the physician-patient privilege should be abolished, for it serves no useful legal purpose and instead does real harm in numerous cases by preventing the discovery of the truth.[68]

> . . . And yet the odd thing about the privilege is that it is usually invoked to protect from disclosure a bodily condition which has not been kept secret at all from friends and neighbors, and which only the tribunal of justice must not learn about. In personal injury claims particularly is the privilege ridiculously incongruous; for the plaintiff comes into court alleging a specific injury and then refuses to let the court listen to testimony concerning that injury.
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> The amount of truth that has been suppressed by this statutory rule must be extensive.[69]

> . . . For example, it seems hard to dispute that the doctor-patient privilege operates primarily as an instrument of fraud, in the sense that it is employed to suppress matter not in any way disgraceful or embarrassing to the patient but which would, if revealed, defeat dishonest claims or defenses. Only a wrongheaded system would retain a rule which does so much demonstrable harm to achieve so little conjectural good.[70]

Wigmore said that the privilege as it exists is one of the most farcical measures of needless obstruction. He added: "That any sensible system of trials should have so long retained in its law so obstructive a rule of Evidence will some day be difficult to believe."[71] Thus, the Rules' failure to require that these two privileges be honored by federal courts sitting in a state which recognizes them for use in its own

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67 Morgan, *Foreword* to MODEL CODE OF EVIDENCE 28-30 (1942).

68 CALIF. LAW REVISION COMM'N, TENTATIVE RECOMMENDATION AND A STUDY RELATING TO THE UNIFORM RULES OF EVIDENCE, art. V, *Privileges* 422 (1964).

69 ABA COMM. ON IMPROVEMENTS IN THE LAW OF EVIDENCE, REPORT, reprinted in A. VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 558, 578 (1949).

70 Degnan, *supra* note 41, at 300.

71 1 J. WIGMORE, *supra* note 1, § 8(c), at 284.

courts, will not defeat state policy. The same disclosure will exist within protected relationships after adoption of the proposed Rules as before, because the communicating party probably has no idea whether or not his communication is privileged.[72]

At common law parties to the case and persons directly interested were not competent witnesses. The absurdity of this situation led to abolition of these grounds. However, in this country an exception was made: statutes preserved the incompetency of a party or interested person to testify concerning a transaction or communication with a deceased person, in an action prosecuted or defended by the executor or administrator.[73] By such exclusion the legislatures hoped to deprive survivors of the opportunity to exploit the fact that the decedent's lips were sealed. Dead Man Statutes, as they came to be called, were thus a remnant of the common-law disqualification of witnesses.[74] As rules of disqualification they are procedural[75] and "amenable to uniform treatment through federal rules of evidence."[76] May they also be viewed as having substantive implications on the theory that they are designed to protect the estate of the deceased by creating difficulties for claimants?[77] If so, the difficulties must be intended primarily to guard against false claims. A legislative plan to prefer widows, heirs, legatees, or devisees over creditors or claimants in all circumstances with no other purpose in view seems unlikely.[78] As a plan to protect against perjury by disqualifying certain persons having a reason to falsify, it is considered a failure.[79]

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72 C. MCCORMICK, *supra* note 5, at 179, 221-22, 224. For additional reasons why the patient's privilege does not serve purported policy, see reference to practically all-inclusive exceptions in statutes granting privilege in text following note 151 *infra*, and see text accompanying note 67 *supra* (Patient can be called as witness and required to testify as to his subjective symptoms and his history, etc.).

73 *E.g.*, GA. CODE ANN. § 38-1603 (1954); MINN. STAT. ANN. § 595.04 (1947); N.Y. CIV. PRAC. § 4519 (McKinney 1963).

74 Weinstein, *supra* note 41, at 365.

75 Ladd, *supra* note 5, at 714-15.

76 Weinstein, *supra* note 41, at 361.

77 Weinstein, *supra* note 41, at 365, answers affirmatively.

78 "Since the only basis for retaining a dead man statute in a state or eliminating it under federal rules would be a philosophy or attitude as to the best method of obtaining the true facts, the federal courts ought to be free to make their own determination." Ladd, *supra* note 5, at 715.

79 5 J. WEINSTEIN, H. KORN & A. MILLER, NEW YORK CIVIL PRACTICE ¶ 4519.01 (1968) (statement of Professor Jack Weinstein, now Judge Weinstein); *see* Cheek, *Testimony as to Transactions with Decedents*, 5 TEX. L. REV. 149, 172 (1927); Ray, *The Dead Man's Statute—A Relic of the Past*, 10 SW. L.J. 390 (1956); Taft, *Comments on Will Contests in New York*, 30 YALE L.J. 593, 605 (1921).

> Most commentators agree that here again the expedient of refusing altogether to listen to the survivor is, in the words of Bentham, a "blind and brainless" technique. In seeking to avoid injustice to one side, the statute-makers have ignored the equal possibility of injustice to the other. The temptation to the survivor to fabricate a claim or defense is obvious enough, so obvious indeed that any jury will realize that his story must be cautiously heard. A searching cross-examination will usually, in case of fraud, reveal discrepancies inherent in the "tangled web" of deception. In any event, the survivor's disqualification is more likely to balk the honest than the dishonest survivor. One who would not stick at perjury will hardly hesitate at suborning a third person, who would not be disqualified, to swear to the false story.[80]

Summarizing the subject of evidence in the context of federalism, we have seen that the possibility of the proposed Rules' impact on state substantive policy is reduced with regard to many topics, either by omitting them or by providing for application of state law in instances of state-created rights. Another factor which should reduce conflict is the fact that often the rule in a large majority or in all of the states is substantially the same as the proposed Rule for federal courts.

Of the remaining topics covered by the proposed Rules, none which cannot rationally be classified as procedure[81] has been manifested. Consequently, if the Supreme Court promulgates the proposed provisions, and Congress does not veto them,[82] they very probably will withstand attacks based on the Enabling Acts (which prohibit abridging, enlarging, or modifying "any substantive right")[83] or on the *Erie* doctrine.[84]

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80 C. McCORMICK, *supra* note 5, at 143.

81 *See, e.g.*, text accompanying notes 33, 60, 75 and 76 *supra*.

82 The adoption procedure is set forth in the enabling statutes for the rules in bankruptcy, 28 U.S.C. § 2075 (1964), for civil procedure, 28 U.S.C. § 2072 (1966), and for criminal procedure prior to and including verdict, 18 U.S.C. § 3771 (1964). Following this procedure, the rules do not take effect until 90 days after they have been reported to Congress by the Chief Justice. They must be reported during a regular session and not later than May 1. *See* Maris, *Federal Procedural Rule-Making: The Program of the Judicial Conference*, 47 A.B.A.J. 772, 773 (1961). Bankruptcy is omitted from his list because the statute governing those proceedings was not amended until after the article was published.

83 28 U.S.C. § 2072 (1966) (civil); 28 U.S.C. § 2075 (1964) (bankruptcy). The criminal provision lacks this limitation, but it is implied. 18 U.S.C. § 3771 (1964) (criminal). The admiralty provision was repealed in 1966. Act of Nov. 6, 1966, Pub. L. No. 89-773, § 2, 80 Stat. 1323. The authority to promulgate admiralty rules is now included in 28 U.S.C. § 2072 (1966).

84 McCoid, *Hanna v. Plumer: The Erie Doctrine Changes Shape*, 51 VA. L. REV. 884

Those who oppose what they consider too little attention to state law in federal evidence law, concede that most evidence doctrines are proper subjects for federal rules.[85] They contend, however, that in some instances even if valid federal rules could be promulgated, it should not be done.

An answer to this is that as to those matters which are used to illustrate their arguments and which are covered by the Advisory Committee's proposal, state substantive policy remains substantially intact. Some of the proposed Rules provide for use of state law.[86] Some of the privileges suggested by the Committee are broader than similar privileges in some states and thus give greater protection to state policy. In policies concerning privileged communications, the Dead Man Statutes, and certain other evidentiary precepts, there are two aspects—one substantive, one procedural.[87] The state envisions a policy—fostering marital relationships, encouraging patients to confide in physicians to aid treatment, or preventing false claims against estates[88]—and to promote the policy selects a procedural device which does not work. In rejecting the procedure the federal rules will have little, if any, effect on state policy; because the assumed efficacy of the device, exclusion of evidence, does not exist. Available information indicates that holders of the privileges are not concerned about disclosure when communicating,[89] and that the statutes disqualifying survivors are obstacles to honest claims but do not prevent perjury.[90]

The special committee of the American Bar Association said in the report cited earlier[91] that rulemakers must weigh, as Congress might, the desirability of uniform and efficient federal procedure against the

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(1965); Miller, *Federal Rule 44.1 and the "Fact" Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine*, 65 MICH. L. REV. 615, 702-15 (1967); Stason, *Choice of Law Within the Federal System: Erie Versus Hanna*, 52 CORNELL L.Q. 377 (1967); Comment, 1966 DUKE L.J. 142 (1966); Comment, 51 IOWA L. REV. 236 (1965); Note, 42 N.Y.U.L. REV. 1139 (1967); Note, 44 TEXAS L. REV. 560 (1966); Note, 40 TUL. L. REV. 202 (1965). Some of these authors do not approve *Hanna* but recognize its significance.

85 Degnan, *supra* note 41, at 294-96; Weinstein, *supra* note 41, at 361-62; Wright, *supra* note 41, at 571-74. Professor Wright agrees that *Hanna v. Plumer* is sound and that by its authority even federal privilege rules conflicting with state law would be valid. He contends, nevertheless, that such rules of evidence should not be promulgated.

86 *E.g.*, PROPOSED FED. R. EVID. 3-02, 5-02.

87 Substance is subsidiary in Dead Man Statutes' policy.

88 In reality this is merely the justification for an exception to a rule of evidence dealing with qualification of witnesses. *See* note 87 *supra*.

89 Hutchins & Slesinger, *supra* note 65.

90 *See* note 78 *supra*.

91 Note 69 *supra*.

desirability of avoiding, wherever possible, interference with the states' exercise of power and enforcement of their own policies. The desirability of giving way to the state diminishes where the state exercise of power consists of establishing and maintaining a procedural device, a rule of evidence, which respected authorities agree is not a sound or effective way to effectuate state policy.[92] In such a situation, the desirability of allowing state law to prevail is outweighed by the desirability of establishing federal efficiency and uniform procedure.

Furthermore, with respect to privileges any deprivation of "states' rights" is ameliorated, because any protection against disclosure given by a state evidentiary privilege is necessarily incomplete. The state privilege does not require mandatory enforcement in federal courts in connection with rights created by federal law.

There are indications that the privileges for confidential communications exist principally because of the activities of pressure groups.[93] Do these privileges actually represent public policy? If adopted by state legislatures which were not influenced by considerations of general welfare or of the welfare of any group other than themselves, do these laws represent a policy which the Supreme Court should respect? Such unreasonable actions suggest that these legislators were bothered by the prospect of voter retaliation if they did not succumb to the pressure.

Another argument perhaps merits consideration but weakens when its inconsistency is discerned. Some critics argue that many persons who disapprove changes in privileges will form powerful opposition groups to create a significant impact.[94] In the same breath, however, they say that a federal rule dealing with privileges is worth drafting, if this rule applies only in litigation over rights created by federal law.[95] Opposition, however, may prove substantial even if limited change is suggested.[96] Moreover, the argument's speculative character is obvious. Comments and criticisms of the bench and bar are currently being sought and such speculation may prove ill-founded. The general

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92 An historical anomaly does not represent state substantive policy. *See* Degnan, *supra* note 41, at 297; Weinstein, *supra* note 41, at 368.

93 C. McCORMICK, *supra* note 5, at 165-66; Weinstein, *supra* note 41, at 373.

94 Weinstein, *supra* note 41, at 373.

95 *Id.*

96 Louisell, *supra* note 57; Stopher, *The Uniform Rules of Evidence: Government by Man Instead of by Law*, 29 INS. COUNSEL J. 405, 412-13 (1962); *cf.* Weinstein, *supra* note 41, at 373 (confusion in having two systems of privileges).

public, too, may recognize these rules for what they are—privileges to suppress the truth. If not, their views should be carefully considered. In the meantime the sage advice of Gen. Jan Smuts to the Oxford students comes to mind: "When enlisted in a good cause, never surrender, for you can never tell what morning reinforcements in flashing armor will come marching over the hilltop."[97]

A great fallacy in the position of those who say that state evidence rules having some substantive connection should be applied to the trial of any issue involving a state-created right, appears in the necessary contention that there is not enough federal interest in the trial of such an issue to justify a policy of nonconformity.[98] The contention is fallacious because the United States Government, especially the judicial branch, has a constitutionally based interest in efficient trial of all issues in federal courts.[99] Just as Article III and the necessary and proper clause of the Constitution[100] furnish justification for upholding valid federal evidence rules against an *Erie* attack, these constitutional provisions establish a Governmental duty and responsibility which is the basis of a continuing public policy. The policy points to adoption of sound rules of evidence, including privileges, for district courts, even though they may conflict with unsound state evidence rules which rationally may be classified as either substantive or procedural. Dean Mason Ladd has explained:

> Outcome of cases is sure to be different in state and federal courts where there are concurrent jurisdictions with separate systems of trial. It is far better that each system seeks to improve its methods of obtaining the just decision of causes than it is for one system to block the path of the other with the goal of identity of outcome whatever that outcome may be. The influence of the Federal Rules of Civil Procedure demonstrates this conclusion.[101]

III. THE PROPOSED RULES

A discussion of each rule would make this article too lengthy. Only a reference to the highlights of the proposal will be undertaken.

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97 A. VANDERBILT, *supra* note 69, at xix.

98 Degnan, *supra* note 41, at 300; Wright, *supra* note 41, at 573.

99 *See* Hanna v. Plumer, 380 U.S. 460 (1965); Monarch Ins. Co. v. Spach, 281 F.2d 401 (5th Cir. 1960); Iovino v. Waterson, 274 F.2d 41, 48 (2d Cir. 1959), *cert. denied*, 362 U.S. 949 (1960); *cf.* C. WRIGHT, *supra* note 26, at 198; Weinstein, *supra* note 41, at 363.

100 U.S. CONST. art. I, § 8.

101 Ladd, *supra* note 5, at 710.

A. *Preliminary Questions of Admissibility*

Subdivisions (a) and (b) of Rule 1-04 warrant some attention. The provisions of (a) are:

> (a) GENERAL RULE. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the judge, subject to the provisions of subdivison (b). In making his determination he is not bound by the rules of evidence except claims of privilege.[102]

This adopts the traditional view that the judge decides such preliminary questions, whether of law or fact.[103] The proposal, however, rejects qualifications, established presently in a number of jurisdictions, relating to questions of fact concerning the voluntary character of a confession[104] and to questions of fact upon which a dying declaration's admissibility depends.[105] Where the qualifications exist; these preliminary questions of fact are, at least in part, for the jury.[106] The only apparent explanation for the two modifications is undue tenderness for accused persons, but it is doubtful that the limitations actually benefit defendants. Their elimination is thus fully justified and is simply a return to orthodox doctrine.[107] Applied to confessions, the Rule is consistent with *Jackson v. Denno*.[108] A third qualification is expressly preserved by the Rule in subdivison (b):

> (b) RELEVANCY CONDITIONED ON FACT. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the judge shall admit it upon the introduction of evidence sufficient to support a finding of the fulfillment of the condition. If under all the evidence upon the issue the jury might reasonably find that the fulfillment of the condition is not established, the judge shall instruct the jury to consider the issue and to disregard the evidence unless they find the condition was fulfilled. If under all the evidence upon the issue the jury could not reasonably

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102 PROPOSED FED. R. EVID. 1-04(a).

103 *See* 1 E. MORGAN, BASIC PROBLEMS OF EVIDENCE 42 (1954).

104 Apparently a majority of jurisdictions recognize this exception. *See* Annot., 85 A.L.R. 870 (1933).

105 Example: Whether dying declarant was aware of his condition.

106 Notes 104 & 105 *supra; see* C. MCCORMICK, *supra* note 5, at 123-24.

107 C. MCCORMICK, *supra* note 5, at 123-24.

108 378 U.S. 368 (1964) (requirement of specific finding that confession was voluntary).

find that the condition was fulfilled, the judge shall instruct the jury to disregard the evidence.[109]

The difference between the situations covered by the general rule and this qualification is that (a) deals with technical requirements which a juror is not interested in observing; he may be unable to carry out instructions to disregard certain evidence if he does not find the preliminary facts. On the other hand, he should be better able to obey the same instructions in the situation described in (b), since he understands the significance of relevancy and will find the task of putting irrelevant evidence out of his mind easier.[110] For example, admissibility (relevance) of writings often depends on whether the purported author actually signed or authorized the writing. On this issue the judge decides whether there is sufficient evidence to go to the jury; and, if there is, the preliminary issue of fact is left to the jury.[111]

Another modification, recognized in some jurisdictions, applies to cases when the preliminary question of fact on which competency of a witness or evidence depends is also an ultimate issue on the merits.[112] Where the exception is in force, the trial judge, if there is evidence on the preliminary question from which a finding could be made in favor of the offering party, is to receive the proffered evidence or allow the witness to testify.[113] Federal courts seem to be one of the jurisdictions which do not limit the power of the trial judge in this regard. Even here they hold the traditional view that the judge decides finally the preliminary issue.[114] Rule 1-04 does not qualify or modify subdivison (a) on this point; it leaves federal law unchanged.

B. *Judicial Notice of Adjudicative Facts*

Treating the subject of judicial notice, the Advisory Committee, in its Note and title to Rule 2-01, uses terminology developed by Professor Kenneth Culp Davis.[115] The Rule is intended to apply to adjudi-

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109 PROPOSED FED. R. EVID. 1-04(b).

110 Morgan, *Functions of Judge and Jury in the Determination of Preliminary Questions of Fact*, 43 HARV. L. REV. 165, 166-75 (1929).

111 *E.g.*, Patton v. Bank of Lafayette, 124 Ga. 965, 53 S.E. 664 (1906); Coleman v. McIntosh, 184 Ky. 370, 211 S.W. 872 (1919).

112 C. MCCORMICK, *supra* note 5, at 124-25.

113 Note, *Preliminary Questions of Fact in Determining the Admissibility of Evidence*, 40 HARV. L. REV. 392, 415-18 (1927).

114 *See* Miles v. United States, 103 U.S. 304 (1880); Matz v. United States, 158 F.2d 190, 191 (D.C. Cir. 1946).

115 Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55

cative, but not to legislative, facts. The former are facts of the particular case or, as Professor Davis put it, "who did what, where, when, how, and with what motive or intent."[116] Legislative facts, however, are usually general and do not concern particular parties. They are the facts which courts use in creating their law-making decisions. Courts are readier to assume legislative facts without requiring identifying evidence to be formally introduced or to appear in the record.[117] Such facts may be noticed without being indisputable.[118] Professor Davis said that, even as to adjudicative facts, judicial notice is appropriate whenever it is convenient to assume their existence, except that convenience should always yield to the requirement of procedural fairness. The principal ingredient of the requirement, in his view, is the parties' opportunity to meet all facts that influence disposition of the case.[119] The Committee and Davis disagreed with respect to what adjudicative facts should be noticed without evidence. Under 2-01(b), notice of a fact is authorized only if it is not subject to reasonable dispute. The Committee concedes that this provision is too strict for legislative facts, so the doctrines under which such facts are assumed without proof are left to decisional law. In other words, Rule 2-01 applies neither to legislative facts, nor to law, as distinguished from facts.[120]

C. *Presumptions*

The provisions for presumptions are contained in Rule 3-01 (presumptions against an accused); 3-02 (applicability of state law concerning effect of presumptions to elements of a claim or defense for which state law supplies the rule of decision);[121] and 3-03 (Any other presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.). The effect given presumptions by Rule 3-03 is approved by many leading commentators.[122] In criminal cases,

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HARV. L. REV. 364, 402-07 (1942); Davis, *A System of Judicial Notice Based on Fairness and Convenience*, in PERSPECTIVES OF LAW 69, 82 (1964).

116 Davis, *Judicial Notice*, 55 COLUM. L. REV. 945, 952 (1955).

117 Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 HARV. L. REV. 1281, 1295 (1952).

118 *See* 1 J. WIGMORE, *supra* note 1, § 41.

119 Davis, *A System of Judicial Notice Based on Fairness and Convenience*, *supra* note 115, at 94.

120 For limited coverage of judicial cognizance of law, see FED. R. CIV. P. 44.1; FED. R. CRIM. P. 26.1. Both deal with foreign law.

121 *See also* note 46 *supra*.

122 C. MCCORMICK, *supra* note 5, at 671-72; Bohlen, *The Effect of Rebuttable Pre-*

presumptions against an accused, recognized at common law or created by statute, would be governed by Rule 3-01. These provisions are based largely on ALI Model Penal Code § 1.12(5), Proposed Official Draft (1962), and *United States v. Gainey*.[123] The proposed Rule, however, is unlike the Model Penal Code in that it provides for the common law effect of presumptions. Subdivisions (b) and (c) of 3-01 provide:

> (b) SUBMISSION TO JURY. The judge is not authorized to direct the jury to find a presumed fact against the accused. When the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge may submit the question of guilt or of the existence of the presumed fact to the jury, if, but only if, a reasonable juror on the evidence as a whole, including the evidence of the basic facts, could find guilt or the presumed fact beyond a reasonable doubt. Under other presumptions, the existence of the presumed fact may be submitted to the jury if the basic facts are supported by substantial evidence, or are otherwise established, unless the evidence as a whole negatives the existence of the presumed fact.
>
> (c) INSTRUCTING THE JURY. Whenever the existence of a presumed fact against the accused is submitted to the jury, the judge shall give an instruction that the law declares that the jury may regard the basic facts as sufficient evidence of the presumed fact but does not require it to do so. In addition, if the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge shall instruct the jury that its existence must, on all the evidence, be proved beyond a reasonable doubt.[124]

D. *Relevancy*

Relevancy is the subject of Article IV. Relevancy is a relation of an item of evidence to a matter properly provable in the action. This relationship is described by Rule 4-01 as a tendency of the particular evidence "to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Any higher standard of probability would be unsound. It is often necessary to use many items of circumstantial ev-

sumptions of Law upon the Burden of Proof, 68 U. PA. L. REV. 307 (1920); Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5 (1959); Morgan, *Presumptions*, 12 WASH. L. REV. 255, 265 (1937); Morgan & Maguire, *supra* note 5, at 913.

123 380 U.S. 63 (1965).

124 PROPOSED FED. R. EVID. 3-01(b), (c).

idence in order to make sufficient proof of a claim or defense.[125] The phrase, "fact that is of consequence to the determination of the action," was borrowed from the California Evidence Code.[126]

Rules 4-04 and 4-05 deal with evidence of character. Generally speaking, character evidence is susceptible of use in two ways. First, character may be an element of a crime, claim, or defense. Here relevancy is obvious, and the only question which arises under 4-05 deals with methods of proof. The second possible use of character evidence is to infer that the person behaved consistently with his character on the occasion in question. Rule 4-04 deals with this second, or circumstantial, use of such evidence by declaring that evidence of a person's character or a trait of his character is not admissible to prove that he acted in conformity therewith on a particular occasion. Three exceptions are stated in the Rule:

> (1) CHARACTER OF ACCUSED. Evidence of his character or a trait of his character offered by an accused, and similar evidence offered by the prosecution to rebut the same;
>
> (2) CHARACTER OF VICTIM. Evidence of the character or a trait of character of the victim of the crime offered by an accused and similar evidence offered by the prosecution to rebut the same;
>
> (3) CHARACTER OF WITNESS. Evidence of the character of a witness, offered to attack or support his credibility.[127]

Stating the doctrine as a rule of exclusion which applies to both civil and criminal cases, with three exceptions, accords with McCormick's views in all but one aspect:[128] the second exception was described by McCormick as admitting evidence of deceased's character in homicide on issue of aggression in connection with a plea of self-defense.[129] The general rule of exclusion is usually stated as limited to

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125 C. MCCORMICK, *supra* note 5, § 152, at 317-319. The limiting expression, found in Uniform Rule of Evidence 1(2), "in reason," is not used in proposed Rule 4-01. The phrase in the Uniform Rule, "any tendency in reason," seems to ignore the part played by experience or by science in supporting many inferences which triers of fact are asked to draw. *Compare* UNIFORM RULE OF EVIDENCE 1(2), *with* PROPOSED FED. R. EVID. 4-01. For a full and able discussion of the provisions on relevancy, see Weinstein & Berger, *The Basic Rules of Relevancy in the Proposed Federal Rules of Evidence*, 4 GA. L. REV. 43 (1969).

126 CAL. EVID. CODE § 210 (West 1966) (effective Jan. 1, 1967).

127 PROPOSED FED. R. EVID. 4-04.

128 C. MCCORMICK, *supra* note 5, at 324-25 & nn.4-5.

129 C. MCCORMICK, *supra* note 5, § 160, at 339; *cf.* Williams v. Fambro, 30 Ga. 232 (1860). It is not clear why Professor McCormick disregards the admissibility of the char-

civil cases.[130] Although Rule 4-04 uses a different form of statement, in result it adopts the majority rule.[131] A minority allows a party charged by his adversary with committing a crime involving moral turpitude to introduce evidence of his own character in a civil case.[132] Believing that character evidence is of slight probative value and may be very prejudicial, the Advisory Committee joined California in rejecting the minority view in civil cases and in having a single general rule of exclusion subject to well established exceptions.[133]

Rule 4-05 deals with ways of proving character. Two methods of proof are made available, whenever evidence of character or a trait of character is admissible. These are testimony as to reputation and testimony in the form of opinion. Rule 6-08(b), however, proposes to exclude evidence of reputation offered to impeach. Permitting the witness to give his own opinion, the rule would allow evidence based on observation by the witness of the person in question. Such permission reverts to earlier English practice and to a doctrine adopted in a number of early American cases.[134] In at least four states of the Union the doctrine allowing opinion concerning character is followed today. The four are California, Iowa, Kansas, and New Jersey.[135] All, except Iowa, have recently adopted codes of evidence law, as have the Panama Canal Zone and the Virgin Islands. The latter two allow opinion testimony as to character;[136] thus, all five recent evidence codes permit this proof. Receiving such evidence does not violate the opinion rule, since the opinion of the witness is helpful to the trier of fact. Indeed, it is necessary if the witness' testimony is to be based entirely on his own knowledge. It is necessary because it would be very difficult, perhaps impossible, for him to articulate the facts from which

acter of the alleged victim in rape on the issue of consent. *See* 1 J. WIGMORE, *supra* note 1, §§ 62-63.

130 1 J. WIGMORE, *supra* note 1, § 64.

131 *See id.*, §§ 54-68.

132 *E.g.*, Mays v. Mays, 153 Ga. 835, 113 S.E. 154 (1922); Dalton v. Jackson, 66 Ga. App. 625, 18 S.E.2d 791 (1942) (damages for alleged rape, dictum as to fraud); Hein v. Holdridge, 78 Minn. 468, 81 N.W. 522 (1900); Waggoman v. Ft. Worth Well Mach. & Supply Co., 124 Tex. 325, 76 S.W.2d 1005 (1934); Hess v. Marinari, 81 W. Va. 500, 94 S.E. 968 (1918); *see* C. MCCORMICK, *supra* note 5, at 338.

133 CAL. EVID. CODE § 1101 (West 1966); *see* 6 CAL. LAW REVISION COMM'N, *supra* note 63, at 615.

134 7 J. WIGMORE, *supra* note 1, §§ 1981, 1983 n.1.

135 State v. Scalf, 254 Iowa 983, 119 N.W.2d 868 (1963); CAL. EVID. CODE § 1100 (West 1966); KAN. GEN. STAT. ANN. § 60-466 (1964); N.J. STAT. ANN. § 2A:84A, Rule 41 (Supp. 1968).

136 C.Z. CODE tit. 5, § 2896 (1963); 5 V.I. CODE ANN. § 886 (1957).

he drew his conclusions. We all develop some beliefs based upon observations which we do not consciously apprehend and, therefore, cannot describe. Observations of another person's character are generally of this kind. Allowing opinion testimony on the subject has been strongly advocated by Wigmore[137] and supported by other leading authorities, such as Ladd and McCormick.[138] Rules admitting this testimony have been approved by the National Conference of Commissioners on Uniform State Laws, the American Bar Association, and the American Law Institute.[139] Wigmore referred to reputation as "the secondhand, irresponsible product of multiplied guesses and gossip."[140] Wigmore explained the view that hearsay in the form of reputation should be received and opinion based on the personal knowledge and belief of the witness himself should be excluded as induced by a mistake of law by Chief Justice Swift of Connecticut, who produced the first American treatise on Evidence, and by Phillips' readers' failure to distinguish between character—what a man is—and reputation—what people say he is.[141] The proposed Rules revive the original common law, which admitted opinion testimony of character. As previously stated similar proposals have been adopted in all five jurisdictions which have made a systematic revision of their evidence law in the last few years.[142] Furthermore, as the Advisory Committee's Note to Rule 4-05 suggests, character may be defined as the type of person one is. So defined, no effective dividing line exists between character and mental capacity.[143] Traditionally proof of the latter is by opinion.[144]

Subdivision (b) of Rule 4-05 also would allow, in cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof of specific instances of his conduct. This is now the general rule. Evidence of specific conduct is inadmissible to prove character for the purpose of inferring that the person

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137 7 J. WIGMORE, *supra* note 1, § 1986.

138 C. MCCORMICK, *supra* note 5, § 154, at 324; Ladd, *Techniques and Theory of Character Testimony*, 24 IOWA L. REV. 498, 511-513, 536 (1939); *see* J. MAGUIRE, EVIDENCE, COMMON SENSE AND COMMON LAW (1947); J. MORGAN, BASIC PROBLEMS OF EVIDENCE (1957). *See also* MODEL CODE OF EVIDENCE (1942).

139 Green, *Drafting Uniform Federal Rules of Evidence*, 52 CORNELL L.Q. 177, 182 (1967).

140 7 J. WIGMORE, *supra* note 1, § 1986.

141 *Id.*, § 1985.

142 See notes 135 & 136 *supra*.

143 PROPOSED FED. R. EVID. 4-05, Advisory Comm.'s Note, at 60.

144 Brock v. State, 206 Ga. 397, 57 S.E.2d 279 (1950); Grismore v. Consolidated Prods. Co., 232 Iowa 328, 5 N.W.2d 646 (1942); *see* Green, *Proof of Mental Incompetency and the Unexpressed Major Premise*, 53 YALE L.J. 271 (1944).

acted on a certain occasion in accordance with established character.[145]

Turning to Rule 4-08, the better reason for the Rule against the admissibility of offers of compromise and completed compromises is promotion of public policy favoring compromise and settlement of disputes. That policy is fostered by the second sentence of Rule 4-08 which makes evidence of conduct or statements taking place in compromise negotiations inadmissible. A party's fear of making admissions of fact may hamper compromise negotiations in a manner similar to fear of making offers or completing compromises. None of these should be used against him in court, although the exclusion of *all* such admissions of fact is a change from the common law.[146] A comparable change has been made by the California Evidence Code, adopted after years of preparation and the publication of a series of studies.[147] The change embodied in the federal proposal not only makes the Rule internally consistent, but also tends to eliminate controversy over whether given statements fall within the Rule's protection.

E. *Privileges*

Constitutional principles relating to the admission and exclusion of evidence are not incorporated in Article V, Privileges. These do not readily lend themselves to codification. The constitutional provisions and the decisions construing them should control. The questions left unanswered by these sources should be answered by the courts, when they arise in adversary litigation. In this manner Rule 5-01 disposes of the matter.

The notable feature of Rule 5-03's treatment of the lawyer-client privilege is the renunciation of those decisions allowing intercepted letters to be introduced or eavesdroppers to repeat communications. Heretofore, the privilege's protection extended to confidential communications between the lawyer and his client, their representatives, or any of them, and by the client or his lawyer to a lawyer representing another in a matter of common interest. A communication disclosed by the client to an outsider who was not a necessary transmitter, and to whom disclosure was not in furtherance of the rendition of professional legal services to the client, was outside the privilege. If the

145 Ladd, *supra* note 138, at 507.

146 Annot., 80 A.L.R. 919 (1932).

147 CAL. EVID. CODE § 1152 (West 1966). The studies are contained in 6 CAL. LAW REVISION COMM'N, *supra* note 68.

client's disclosure to the third person was intentional, the communication to the lawyer was not confidential. If the disclosure was unintentional, the communication would be confidential, but, according to many authorities, still would not be fully protected. This view places responsibility upon the client for insuring that no eavesdroppers overhear and no letter containing a lawyer-client communication is intercepted. If he fails to discharge the responsibility, he loses the benefit of the privilege, and testimony by the eavesdropper or use of the letter as evidence is permitted.[148] With regard to letters, this put an extremely heavy burden on the client. Today this view is also unjust as to eavesdroppers' evidence because of scientific development of listening devices. A rule like 5-03 alleviates this burden. The test would be intent to disclose; failure or inability to guarantee security against interception of the communication would not defeat the client's privilege.

There is no proposal here for a general physician-patient or a journalist privilege.[149] Some states have never had either. Georgia is an example,[150] and neither physicians nor journalists complain. Apparently physicians obtain from their patients the information needed to treat them. Nevertheless, Rule 5-04 provides for a privilege to protect confidential communications between a psychotherapist and his patient. By definition, a psychotherapist is a medical doctor who devotes a substantial portion of his time to psychiatry, or a person reasonably believed to be in this category, or a licensed psychologist who devotes a substantial portion of his time to clinical psychology. The psychologist must be licensed in fact, whereas it is sufficient if the person practicing psychiatry is believed by the patient to be a psychiatrist.[151] Statutes granting a privilege to prevent disclosure of confidential communications between physicians and their patients usually contain so many exceptions that little, if anything, remains covered by the privilege. Conversely the psychotherapist-patient privilege has a very

148 McKie v. State, 165 Ga. 210, 140 S.E. 625 (1927); Richards v. State, 56 Ga. App. 377, 192 S.E. 632 (1937); Commonwealth v. Wakelin, 230 Mass. 567, 120 N.E. 209 (1918); People v. Dunnigan, 163 Mich. 349, 128 N.W. 180 (1910) (intercepted letters admitted); Clark v. State, 261 S.W.2d 339 (Tex. Crim. App. 1953). *See also* Annot., 63 A.L.R. 107 (1929).

149 See the American Bar Association recommendation that no privilege for communications to journalists, accountants, or social workers be created in A. VANDERBILT, *supra* note 69, at 583-84. *See* note 61 *supra*.

150 T. GREEN & C. HARPER, GEORGIA LAW OF EVIDENCE § 153 (1957).

151 Practical justification for the requirement that the psychologist be licensed exists in the number of persons, other than psychiatrists, who undertake psychotherapeutic assistance under various theories. PROPOSED FED. R. EVID. 5-04, Advisory Comm.'s Note, at 89.

strong basis for existence: the psychiatrist and the clinical psychologist have a special need to maintain confidentiality. Their efficacy depends upon the willingness of their patients to talk freely.[152] After studying the matter, the California Law Revision Commission concluded that the conditions needed to justify the existence of a privilege are fully satisfied. As a result of the Commission's recommendation, the privilege appears in the California Evidence Code.[153] It also exists by statute in Georgia, Connecticut and Illinois.[154]

The privilege proposed by Rule 5-05 which precludes one's spouse from testifying against him in a criminal case is law today in the federal courts. *Hawkins v. United States*[155] recognized and upheld the privilege; the case did not find any exception for Mann Act violations. However, in prosecutions alleging importation of aliens for immoral purposes, Congress has created an exception, denying the privilege.[156] Rule 5-05 effects consistency by treating Mann Act violations and importation of aliens identically, denying the privilege in both situations. Now some 30 states allow the accused to prevent his or her spouse from testifying, usually with exceptions similar to subsections (1) and (2) in Rule 5-05.[157]

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152 Slovenko, *Psychiatry and a Second Look at the Medical Privilege*, 6 WAYNE L. REV. 175, 184 (1960). However, the committee of lawyers and psychiatrists who drafted the Connecticut statute concluded that disclosure was so greatly needed in three instances as to justify the risk of impairing the relationship. Goldstein & Katz, *Psychiatrist-Patient Privilege: The GAP Proposal and the Connecticut Statute*, 36 CONN. B.J. 175 (1962). A strong argument against exceptions to the privilege is made in Louisell, *The Psychologist in Today's Legal World: Part II*, 41 MINN. L. REV. 731, 746 (1957). But after careful consideration three exceptions are included in the CONN. GEN. STAT. ANN. § 52-14a (Supp. 1969). Similarly the proposed Federal Rule would deny the privilege: (1) In a commitment proceeding if the psychotherapist has determined that the patient is in need of hospitalization; (2) as to communications made in the course of a court-ordered mental or emotional examination; and (3) in litigation into which the patient or, after his death, any party injects the patient's mental or emotional condition. Exception (2) applies only with respect to the purpose for which the examination is ordered. *See* PROPOSED FED. R. EVID. 5-04.

153 CAL. EVID. CODE §§ 1010-1026 (West 1966); 6 CAL. LAW REVISION COMM'N, *supra* note 68, at 417.

154 CONN. GEN. STAT. ANN. § 52-164a (Supp. 1969); GA. CODE ANN. §§ 38-418, 84-3118 (Supp. 1968); ILL. ANN. STAT. ch. 51, § 5.2, ch. 91½, § 406 (Smith-Hurd 1967); Pub. Act No. 597, § 13 (June 24, 1969), 4 CONN. LEGISLATIVE SERV. 737 (1969).

155 358 U.S. 74 (1958).

156 8 U.S.C. § 1328 (1964).

157 Note, *The Marital "For and Against" Privilege in California*, 8 STAN. L. REV. 420, 423-25 (1956). Proposed Rule 5-05 reads:

> (a) GENERAL RULE OF PRIVILEGE. An accused in a criminal proceeding has a privilege to prevent his spouse from testifying against him.

The proposed Rules do not provide a privilege for confidential communications between spouses. The drafters believe that laymen will be unaware of the existence or nonexistence of such a provision. Consequently their marital conduct and attitudes will not be affected.

Rule 5-06 proposes a privilege for clergymen, protecting confidential communications in their professional character as spiritual advisers. The protection is not limited to doctrinally required confessions; and a clergyman is defined as a minister, priest, rabbi, or other similar functionary of a religious organization or one reasonably believed so to be by the person consulting him.

The privilege concealing the identity of an informer is extended, so that it may be asserted by a state or subdivision thereof in federal courts. Under Rule 5-10, if the legality of the means by which evidence was obtained and the propriety of evidence received from an informer reasonably believed to be reliable become issues, the judge may require the identity of the informer to be disclosed, but he may require the disclosure in camera.

Rule 5-13 forbids comment by the judge or counsel about claim of privilege and also forbids drawing inferences from the claim. Claims of privilege are allowed, as far as practical, outside the presence of the jury. Any party subject to a possible adverse inference is entitled to an instruction that no such inference from a claim of privilege is permissible. The instruction is given only after request of the party so entitled. The no comment provision accords with the weight of authority.[158]

F. *Witnesses*

Coming now to the subject of witnesses and beginning with competency, the proposed Rules do not require witnesses to have any particular mental or moral qualifications to testify. Indeed, the only grounds of disqualification proposed[159] are lack of personal know-

(b) EXCEPTIONS. There is no privilege under this rule (1) in proceedings in which one spouse is charged with a crime against the person or property of the other or of a child of either, or with a crime against the person or property of a third person committed in the course of committing a crime against the other, or (2) as to matters occurring prior to the marriage, or (3) in proceedings in which a spouse is charged with importing an alien for prostitution or other immoral purposes in violation of 8 U.S.C. § 1328, or with transporting a female in interstate commerce for immoral purposes or other offense in violation of 18 U.S.C. §§ 2421-2424.

158 Annot., 116 A.L.R. 1170 (1938).

159 PROPOSED FED. R. EVID. 6-01 provides:

GENERAL RULE OF COMPETENCY. Every person is competent to be a witness except as otherwise provided in these rules.

ledge of the matter about which the witness is attempting to testify, failure to swear or affirm to tell the truth, or status as a judge or juror in the trial at which he is called to testify.[160]

Besides being incompetent to testify at the trial, a petit juror may not testify concerning the effect of anything upon his or any other juror's mind or emotions in relation to the verdict. Nor may he testify concerning his mental processes in connection with the verdict.[161] Similiar restrictions apply to a grand juror with regard to his mental processes, as well as the effect of anything influencing him or his fellows to assent to or dissent from an indictment.[162] The authorities agree almost unanimously in excluding this evidence.[163] Substantial authority refuses to allow a juror to disclose any irregularities occurring in the jury room.[164] The proposal rejects the latter view. In an attack on a verdict or indictment it allows jurors to testify to matters other than their inner reactions and thus follows the modern trend.[165] Rule 6-06 allows jurors, the persons who know what actually occurred, to testify in proceedings to set aside a verdict and augments protection against improperly returned verdicts. At the same time, it does not place verdicts completely at the mercy of jurors, and it reduces the temptation for parties or lawyers to tamper with the jury.

The scarcity of incompetency grounds does not mean, of course, that there is no protection against the witness who is mentally incompetent, has a bad character, or is either a party to the case or interested in the outcome. If such a situation exists, the opponent can use these facts to impeach him. These matters, which at common law were disqualifying, today are relevant on the issue of credibility.[166] Although some jurisdictions currently purport to maintain mental qualifications, Professor Weihofen has said that few witnesses are disqualified on this ground. When the challenge of mental incapacity is interposed, the judge is apt to allow the jury to consider the testimony's weight and credibility.[167]

Under the proposed Rules there is no "Dead Man" provision pre-

160 *See* PROPOSED FED. R. EVID. 6-02 to -06.

161 PROPOSED FED. R. EVID. 6-06(b).

162 *Id.; cf.* FED. R. CRIM. P. 6(e). An affidavit or evidence of a statement by a petit or grand juror indicating an effect which would preclude his testimony under Rule 6-06(b) is made inadmissible by the second sentence of subsection (b).

163 8 J. WIGMORE, EVIDENCE § 2349 (McNaughton rev. ed. 1961).

164 *Id.*, § 2354. *But see* Mattox v. United States, 146 U.S. 140 (1892).

165 *E.g.*, Wright v. Illinois & Miss. Tel. Co., 20 Iowa 195 (1866); Perry v. Bailey, 12 Kan. 415 (1874); State v. Kociolek, 20 N.J. 92, 118 A.2d 812 (1955).

166 C. MCCORMICK, *supra* note 5, §§ 40-45, at 61 & 62.

167 Weihofen, *Testimonial Competence and Credibility*, 34 GEO. WASH. L. REV. 53 (1965).

venting the surviving party to a transaction from testifying against the representative of a deceased person. Such provisions more often prevent just than unjust claims against estates.[168] In spite of the Dead Man Statute, a dishonest claimant can suborn a qualified person to commit perjury, even though the claimant himself cannot testify on the subject.[169] More than thirty years ago, the American Bar Association recommended abolition of the "Dead Man" doctrine.[170] Seventeen jurisdictions, including California, Kansas and New Jersey,[171] have adopted "statutes consistent with the recommendation."[172] The Canal Zone and the Virgin Islands also have abrogated the doctrine.[173] Thus all jurisdictions which have systematically revised the law of evidence[174] allow the survivor to testify against a representative of the deceased, even where the survivor is interested in the outcome of the case.

On the subject of impeachment, proposed Rule 6-07 states: "The credibility of a witness may be attacked by any party, including the party calling him." A party should not be compelled to hold out his witnesses as worthy of belief, since he seldom has a free choice in selecting them. As a practical matter, he can call only persons who his lawyer believes observed the facts. The proposition that one may not impeach his own witness is restricted frequently by exceptions,[175] such as that permitting impeachment when the testimony surprises the party calling the witness.[176] These inroads upon the proposition

168 St. John v. Lofland, 5 N.D. 140, 64 N.W. 930 (1895).

169 C. MCCORMICK, *supra* note 5, at 143.

170 63 ABA REP. 570 (1938). The committee also recommended admission of declarations of the decedent, if they are found to be made in good faith and on personal knowledge.

171 CAL. EVID. CODE 700 (West 1966); KAN. STAT. ANN. §§ 60-407, -418, -419 (1964); N.J. STAT. ANN. § 2A:81-2 (1952). The California Law Revision Commission, quoted in CAL. EVID. CODE § 1261 (West 1966), commented: ". . . the dead man statute is not continued in the Evidence Code."

172 Vanderbilt includes eleven states and the District of Columbia. A. VANDERBILT, *supra* note 69, at 338-41. Three other states have since adopted comprehensive codes of evidence which abolish Dead Man Statutes without referring to them specifically. *See* note 171 *supra;* note 173 and accompanying text *infra.*

173 C.Z. CODE, tit. 5, §§ 2737, 2821, 2822, 2823 (1963); 5 V.I. CODE ANN. §§ 777, 831, 832, 833 (1957).

174 For amplification, see text accompanying notes 135 and 136 *supra.*

175 *See, e.g.,* Mitchell v. Swift & Co., 151 F.2d 770 (5th Cir. 1945); Martin v. Los Angeles R.R., 75 Cal. App. 744, 171 P.2d 511 (1946); Marsh v. South Carolina R.R., 56 Ga. 275, 277 (1876); Roe v. State, 152 Tex. Crim. 119, 210 S.W.2d 817 (1948).

176 *E.g.,* GA. CODE ANN. § 38-1801 (1955); *see* Young v. United States, 97 F.2d 200 (5th Cir. 1938); Anthony v. Hobbie, 85 Cal. App. 2d 798, 193 P.2d 748 (1948); Fjellman v. Weller, 213 Minn. 457, 7 N.W.2d 521 (1942).

indicate judicial and legislative doubts as to its soundness. In 1962, the Second Circuit completely rejected the prohibition against impeachment by the proponent of a witness.[177] California Evidence Code § 785 and Kansas Code of Civil Procedure § 60-420 reach the same result. The present proposal agrees with these authorities and with the views of most of the writers on the subject.[178]

As in other instances in which character evidence is relevant, a witness' opinion concerning the truthful character of other witnesses is admissible under Rule 6-08. However, opinions that a certain witness is truthful are admissible only after the introduction of opinion evidence of untruthfulness or other evidence impugning his truthful character.[179] Subdivision (b) proposes that evidence of the reputation of a witness for truthfulness or untruthfulness be inadmissible. Reputation in respect to truth and veracity ordinarily does not exist.[180] Witnesses who testify to this trait, in all probability, are giving opinions disguised as reputation, because reputation is what lawyers, feeling bound by tradition, require.

Proposed Rule 6-09 limits the use of impeachment by conviction evidence to convictions for crimes which by law are punishable by death or by imprisonment in excess of one year and crimes which involved dishonesty or false statement. Nevertheless, a conviction is inadmissible to impeach if more than ten years have passed since the expiration of the party's probation or sentence, or if there has been a pardon or equivalent procedure because of rehabilitation or innocence. Generally under Rule 6-09, evidence of juvenile adjudications are inadmissible to discredit a witness; however, the judge in certain circumstances may allow such evidence. The Rule contains no language differentiating the accused from other persons who become witnesses. The intention is to allow an accused who elects to be sworn as a witness to be impeached by conviction of crime, just as other witnesses. This is the traditional practice, although some states do not allow it.[181]

177 United States v. Freeman, 302 F.2d 347 (2d Cir. 1962).

178 *See* C. McCORMICK, *supra* note 5, at 70-71; J. MORGAN, *supra* note 138, at 63-65; 2 J. WIGMORE, *supra* note 1, §§ 896-904; Ladd, *Impeachment of One's Own Witness—New Developments*, 4 U. CHI. L. REV. 69 (1936).

179 PROPOSED FED. R. EVID. 6-08(a). In addition, evidence of convictions of the witness for certain crimes is acceptable, and cross-examination of the witness to be impeached as to specific instances of misconduct is allowed. *Id.* at (c). The opinion may cover only the character trait of truthfulness or untruthfulness, not general character. This is in accord with the weight of authority. *See* C. McCORMICK, *supra* note 5, § 44.

180 PROPOSED FED. R. EVID. 6-08, Advisory Comm.'s Note.

181 3 J. WIGMORE, *supra* note 1, §§ 889-891.

In federal courts conventional practice has limited cross-examination (1) to matters testified to on direct[182] and (2) to matters relating to the credibility of the witness.[183] Rule 6-11(b) adopts this practice, recognizing also the trial judge's discretion to allow questions as to additional matters at the time of cross-examination as if on direct examination. The Advisory Committee's Note offers as justification for a limited scope of cross-examination the fact that an orderly presentation of the case is thereby promoted. In other words, the Rule avoids interrupting the presentation of one party's case through cross-examination of the first party's witness.

Rule 6-12 allows an adverse party to require the production at trial of any writing used by a witness to refresh his memory. He may also inspect such writing, use it in cross-examination, and introduce portions in evidence. When a writing is used for this purpose *before* trial but not used by a witness on the stand, the great majority of cases, including Supreme Court decisions[184] have not granted this right.[185] Nevertheless, the Rule removes this dichotomy; it treats a writing used to refresh recollection before trial the same as one used for that purpose on the stand.

Prior law required that counsel seeking to impeach a witness by a previous inconsistent statement give him an opportunity to explain or deny. Rule 6-13(b) preserves the essence of this requirement. This Rule, however, does not require laying this foundation during cross-examination but permits such action anytime before introduction of extrinsic evidence of the inconsistent statement. Thus, several witnesses suspected of collusion could all be examined before disclosure of a joint previous contradictory statement. Further explaining the practice of laying the foundation, subdivision (a) of Rule 6-13 provides that in examining the witness to be impeached, the prior statement or its contents need not be shown or disclosed to him. However, on request the same must be shown or disclosed to opposing counsel. Disclosure to counsel is intended to protect against *false* insinuations that a statement has been made. *The Queen's Case,*[186] an 1820 English

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182 Gilmer v. Higley, 110 U.S. 47 (1884); Philadelphia & Trenton R.R. v. Stimpson, 39 U.S. (14 Pet.) 448, 461 (1840); Butler v. New York Cent. R.R., 253 F.2d 281 (7th Cir. 1958).

183 *E.g.*, Eschelback v. William S. Scull Co., 293 F.2d 599 (3d Cir. 1961); Young Ah Chor v. Dulles, 270 F.2d 338 (9th Cir. 1959); Majestic v. Louisville & N.R.R., 147 F.2d 621 (6th Cir. 1945).

184 Georgia v. Evans, 316 U.S. 159 (1942); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

185 *See generally* Annots., 125 A.L.R. 200 (1940); 82 A.L.R.2d 473, 562 (1962).

186 Brod. Rep. 976 (H.L. 1820).

decision concerning impeachment with a written inconsistent statement, required that a cross-examiner, before questioning a witness about his own prior statement in writing, first show it to the witness. This doctrine needlessly interferes with cross-examination. It has been abandoned in the country of its origin[187] and would be abolished by Rule 6-13(a).

Sequestration of witnesses is made a matter of right by Rule 6-15.

G. *Opinions and Expert Testimony*

According to Rules 7-01 and 7-02, the test for permitting testimony in the form of opinion is usefulness. Rule 7-01(b) is designed to promote effective communication by witnesses but to limit opinion testimony by requiring it to be helpful in deciding issues. Cases sometimes use the word "necessary" to describe the test, but there is a growing movement to substitute the expressions "helpful" or "useful."[188]

If facts or data upon which an expert bases a testimonial opinion or inference are of a type upon which experts may reasonably rely in forming opinions or inferences about a subject, they need not be admitted into evidence. Applied to propositions of generalized knowledge, such as scientific principles, this doctrine has caused little, if any, disagreement. Physicians, for example, use medical science in arriving at opinions, and much of a given doctor's medical knowledge is based on inadmissible hearsay. Rule 7-03 extends the general doctrine by allowing expert opinion evidence, even if it is based upon particular facts of the case which the court could not hear directly. The proposal, then, permits experts to do in court what they regularly do outside. For instance, a physician's diagnosis is often based on information furnished by relatives, nurses, and others. Normally some of this data would be admissible only after considerable cost in time, effort, and money. The practical solution, presented by the Committee's Rule, for such situations is recommended by McCormick and other thoughtful writers.[189] California Evidence Code § 801(b) is similar.

According to Rule 7-05, an expert witness may give his opinion

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187 Ladd, *Some Observations on Credibility: Impeachment of Witnesses*, 52 CORNELL L.Q. 239, 246 (1967).

188 CAL. EVID. CODE § 800 (West 1966); KAN. STAT. ANN. § 60-456(a) (1964); N.J. STAT. ANN. § 2A:84A, Rule 56(1) (Supp. 1969); C.Z. CODE tit. 5, § 2931(a) (1963); 5 V.I. CODE ANN. § 911(1) (1957); C. MCCORMICK, *supra* note 5, § 11; 7 J. WIGMORE, *supra* note 1, § 1919.

189 C. MCCORMICK, *supra* note 5, § 15; Rheingold, *The Basis of Medical Testimony*, 15 VAND. L. REV. 473, 489 (1962); *see* Schooler v. State, 175 S.W.2d 664 (Tex. Civ. App. 1943); Sundquist v. Madison Rys., 193 Wis. 83, 221 N.W. 392 (1928).

and his reasons therefor without prior disclosure of the underlying data, unless the judge requires otherwise. If the judge does not exercise his option, the proponent may choose (1) to use a hypothetical question or otherwise disclose the basis in advance, or (2) to let his opponent bring out such facts and data as he wishes on cross-examination of the expert. The Commissioners on Uniform State Laws included a similar provision in the Model Expert Testimony Act in 1937.[190] This idea has influenced statutes in several states.[191]

It has been said, especially in older cases, that expression by a witness of an opinion upon the ultimate issue is prohibited. Yet in many instances, such opinions were and are allowed.[192] For example, who would question the admissibility of a handwriting expert's opinion on the authenticity of a writing which furnishes the basis of a suit?[193] Rule 7-04 abolishes the ultimate issue doctrine. It follows the New Jersey Rules of Evidence, the Kansas Code of Civil Procedure, and the California Evidence Code.[194]

Pursuant to Rule 7-06, the presiding judge, exercising his discretion, may inform the jury that the court appointed the expert witness, if such is the fact. Surely this provision should not shock anyone. These Rules are proposed for the United States courts, where the judge has traditionally discussed the weight of evidence and commented on its probative value.[195]

H. *Hearsay*

Hearsay is the subject of Article VIII of the Proposed Rules. The cases have manifested marked conflict concerning admissibility of

190 Uniform Expert Testimony Act § 9, in NATIONAL CONF. OF COMM'RS ON UNIFORM STATE LAWS, HANDBOOK AND PROCEEDINGS OF THE FORTY-SEVENTH ANNUAL CONFERENCE 339, 345 (1937).

191 *See* CAL. EVID. CODE § 805 (West 1967); KAN. STAT. ANN. § 60-456(4) (1964); N.J. STAT. ANN. § 2A:84A, Rule 56(3) (Supp. 1968).

192 *E.g.*, Grismore v. Consolidated Prods. Co., 232 Iowa 328, 359, 5 N.W.2d 646, 662 (1942).

193 *See* Holmes v. Goldsmith, 147 U.S. 150, 163 (1893). In *Holmes*, an action on a promissory note, witnesses testified as to the genuineness of the maker's signature. No question was raised about the opinions bearing on an ultimate issue, although the defense seemed anxious to exclude the handwriting evidence and did make a different objection. *Cf.* Montana Ry. v. Warren, 137 U.S. 348 (1890) (In condemnation proceedings, opinions as to the value of the property were received in evidence.); Hardy v. Merrill, 56 N.H. 227, 22 Am. R. 441 (1875) (sanity).

194 CAL. EVID. CODE § 805 (West 1967); KAN. STAT. ANN. § 60-456(4) (1964); N.J. STAT. ANN. § 2A:84A, Rule 56(3) (Supp. 1968). Other jurisdictions also have abolished the ultimate issue doctrine. *See* C.Z. CODE tit. 5, § 2931(d) (1963); 5 V.I. CODE ANN. § 911(4) (1957).

195 Quercia v. United States, 289 U.S. 466, 469 (1933); Sleek v. J.C. Penney Co., 324 F.2d

evidence of nonverbal, nonassertive conduct, as distinguished from verbal statements or nonverbal conduct intended as an assertion.[196] Flight is an example of conduct in relation to which the actor's intent is significant. A person may leave the scene of a crime or a community in which a crime has been committed for various reasons. If he flees only to avoid arrest, he has no intention of communicating or expressing himself. Thus, the definitions in Rule 8-01 do not treat nonverbal nonassertive conduct as hearsay. The Advisory Committee evidently thinks that hearsay dangers are minimized by the absence of an intent to assert, which in turn reduces the significance of the actor's veracity or lack of it.[197]

Rule 8-01 is drafted to reject cases which treat nonassertive conduct as hearsay if it is offered to show the actor's belief evidencing the truth of the fact believed—a double inference. The courts deciding these cases consider the conduct as the equivalent of an assertion and sometimes describe it as an implied assertion.[198] The proposed Rule does not accept this analysis and is supported by the following considerations: "Because such conduct is evidently more dependable than an assertion, there is rational basis for the differentiation."[199] It is more dependable because: (1) There is no representation and therefore no danger of misrepresentation, and (2) the actor has relied on his own belief by acting on it. The provision also clarifies and simplifies the concept of hearsay. Furthermore the hearsay objection to conduct, where available, is probably frequently overlooked.[200] In addition, many court decisions, although not a majority, admit the evidence.[201]

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467 (3d Cir. 1963); United States v. New York Foreign Trade Zone Operators, Inc., 304 F.2d 792 (2d Cir. 1962).

196 C. McCORMICK, *supra* note 5, at 472-78.

197 PROPOSED FED. R. EVID. 8-01, Advisory Comm.'s Note, at 161-62.

198 People v. Mendez, 193 Cal. 39, 223 P. 65 (1924); Wright v. Tatham, 7 Eng. Rep. 559 (H.L. 1838).

199 Falknor, *The "Hear-Say" Rule as a "See-Do" Rule: Evidence of Conduct*, 33 ROCKY MT. L. REV. 133, 137 (1960). *Compare* 2 J. WIGMORE, *supra* note 1, § 267, *with* Morgan, *Admissions as an Exception to the Hearsay Rule*, 30 YALE L.J. 355, 361 (1921).

200 Falknor, *supra* note 199, at 135, 137.

201 *E.g.*, Billeci v. United States, 184 F.2d 394 (D.C. Cir. 1950); United States v. Sessin, 84 F.2d 667 (10th Cir. 1936); Steil v. Holland, 3 F.2d 776 (9th Cir. 1925); Baer Groc. Co. v. Barber Milling Co., 223 F. 969 (4th Cir. 1915); Louisville & N.R.R. v. Varner, 129 Ga. 844, 60 S.E. 162 (1908); Donovan v. Selinas, 85 Vt. 80, 81 A. 235 (1911). Sometimes even cases in the same jurisdiction are conflicting. *Compare* Louisville & N.R.R. v. Varner, *supra*, *with* Sherling v. Continental Trust Co., 175 Ga. 672, 165 S.E. 560 (1932). For other cases, see C. McCORMICK, *supra* note 5, at 475-77.

Finally, the provision of 8-01(a) accords with a recent trend in legislation.[202]

McCormick supports a provision of this sort on two grounds. Classifying as hearsay all conduct showing the actor's belief when offered to establish the fact believed, excludes too much valuable and significant evidence. Moreover, a modified definition of hearsay will be accepted more readily than a new exception to the hearsay rule.[203] Assertive conduct, such as identification by pointing out persons or objects and flight for the purpose of diverting attention from another, remain within the definition of hearsay.

Under Rule 8-01(c), a prior statement by a person who testifies at a trial or hearing and is subject to cross-examination concerning the statement is excluded from the definition of hearsay, if the statement is: (1) Inconsistent with his testimony, (2) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, (3) one of identification of a person made soon after perceiving him, or (4) a transcript of testimony given under oath at a trial or hearing or before a grand jury. The last-named is distinguished from the *exception* for former testimony taken at the instance of or against a party who had an opportunity to develop the testimony by direct, cross, or redirect examination and whose motives and interests were similar to those of the party against whom it is now offered.[204] Under exclusion (4) it does not matter what the interest of the person who had an earlier opportunity to examine or cross-examine was; significant is that the witness is again on the stand and can be cross-examined when the report of the testimony is introduced by the party against whom it is introduced. This evidence is distinct from out-of-court statements of a declarant who becomes a witness because the report is of a statement, made under oath and subject to the penalities of perjury, in the solemnity of court proceedings.

Traditionally prior inconsistent statements have been held admissible to impeach but not to evidence the truth of the facts stated. By means of exclusion (1), Rule 8-01 treats such statements as substantive evidence. Concerning a similar provision, the California Law Revision Commission has said:

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202 CAL. EVID. CODE §§ 225, 1200 (West 1966); KAN. STAT. ANN. § 60-459 (1964); C.Z. CODE tit. 5, § 2961(1) (1963); 5 V.I. CODE ANN. § 931 (1957). *See also* N.J. STAT. ANN. § 2A:84A, Rule 62(1) (Supp. 1968).

203 C. MCCORMICK, *supra* note 5, at 479.

204 *See* PROPOSED FED. R. EVID. 8-04.

> Section 1235 admits inconsistent statements of witnesses because the dangers against which the hearsay rule is designed to protect are largely nonexistent. The declarant is in court and may be examined and cross-examined in regard to his statements and their subject matter. In many cases, the inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy that gave rise to the litigation. The trier of fact has the declarant before it and can observe his demeanor and the nature of his testimony as he denies or tries to explain away the inconsistency. Hence, it is in as good a position to determine the truth or falsity of the prior statement as it is to determine the truth or falsity of the inconsistent testimony given in court. Moreover, Section 1235 will provide a party with desirable protection against the "turncoat" witness who changes his story on the stand and deprives the party calling him of evidence essential to his case.[205]

Some jurisdictions have gone much further, providing for the admissibility of previous statements made by a person who is present at the hearing and available for cross-examination on the statement.[206] The federal proposal is more conservative:

> The position taken by the Advisory Committee in formulating this part of the rule is founded upon an unwillingness to countenance the general use of prior prepared statements as substantive evidence, but with a recognition that particular circumstances call for a contrary result. The judgment is one more of experience than of logic. The rule requires in each instance, as a general safeguard, that the declarant actually testify as a witness, and it then enumerates four situations in which the statement is excepted from the category of hearsay. Compare Uniform Rule 63(1) which allows any out-of-court statement of a declarant who is present at the trial and available for cross-examination.[207]

Traditionally the purposes for which prior consistent statements are received have been limited to rebutting charges of recent fabrication, improper influence, or motive; that is, to supporting the cred-

205 CAL. EVID. CODE § 1235, Comment, at 255 (West 1966).

206 KAN. STAT. ANN. § 60-460(1) (1964); C.Z. CODE tit. 5, § 2962(1) (1963); 5 V.I. CODE ANN. § 932(1) (1957).

207 PROPOSED FED. R. EVID. 8-01, Advisory Comm.'s Note, at 164.

ibility of the witness. The proposed Rule prevents the hearsay rule[208] from limiting use of the consistent statement. If the evidence is offered to rebut one or more of the three specified charges, then, so far as the hearsay rule is concerned, it is admissible to establish the facts set forth in the statement. This result is sound, since the adversary, by making the charge, opened the door. The jury, having heard the evidence, is relieved of the difficult, if not impossible, task of using it to determine one relevant issue but not another. The Advisory Committee's stated position, quoted above,[209] is applicable here also.

The Supreme Court has recently made an observation pertinent to exclusion (3). The Court commented:

> There is a split among the States concerning the admissibility of prior extra-judicial identifications, as independent evidence of identity, both by the witness and third parties present at the prior identification. See 71 ALR 2d 449. It has been held that the prior identification is hearsay, and, when admitted through the testimony of the identifier, is merely a prior consistent statement. The recent trend, however, is to admit the prior identification under the exception that admits as substantive evidence a prior communication at the trial. See 5 ALR 2d Later Case Service 1225-1228. . . .[210]

Admissions of a party offered in evidence against him would be within the definition of hearsay in 8-01(c) were it not that the Rule provides they shall not be hearsay. There is general agreement concerning their admissibility but some disagreement as to the theoretical justification for the result.[211] Whether they are included as an exception to the hearsay rule or are put in a category of nonhearsay is of little importance. Clearly a party should not be allowed to prevent introduction of his own statement by claiming either that it is unreliable because it is not under oath or that he should have an opportunity to cross-examine himself. He can easily take the stand, if he wishes to deny or explain his earlier statement.[212] Furthermore, although the general admissibility of admissions seems universally

208 PROPOSED FED. R. EVID. 8-02.

209 See text accompanying note 207 *supra*.

210 Gilbert v. California, 388 U.S. 263, 272 n.3 (1967), quoted in PROPOSED FED. R. EVID. 8-01, Advisory Comm.'s Note, at 166.

211 4 J. WIGMORE, *supra* note 1, at 2-5; Morgan, *supra* note 199, at 361; Strahorn, *The Hearsay Rule and Admissions*, 85 U. PA. L. REV. 484, 564, 573, 576 (1937).

212 J. WIGMORE, *supra* note 1; Morgan, *supra* note 199.

accepted, it is difficult to fit this practice into the theory of the exceptions.[213] The most convenient approach, therefore, is to treat them, not as hearsay, but as circumstantial evidence.[214] This is the effect of proposed Rule 8-01(c). By the Rule's provisions, admissions include, under certain conditions, statements by others adopted by the party, statements by co-conspirators, and representative statements.

More than a decade ago, Professor Morgan pointed out that at one time all relevant hearsay was admissible. Moreover, Anglo-American courts never have rejected all hearsay.[215] We say that those hearsay items which are admissible comprise exceptions to the rule. Actually no theory now in use will explain all the exceptions or harmonize one with another.[216] Morgan has suggested that the test of admissibility should be (a) whether the hearsay is such that the trier can put a reasonably accurate value upon it as evidence of the matter it is offered to prove, and (b) whether direct testimony of the declarant is unavailable or, if available, is likely to be less reliable.[217]

To cover hearsay exceptions, the proposed Rules use a pattern which is consistent with the above suggestion. Instead of the number of exceptions currently in vogue, there are only two. These adopt the dichotomy presented by Morgan in clause (b) of his test. The first exception is set forth in Rule 8-03(a): "A statement is not excluded by the hearsay rule if its nature and the special circumstances under which it was made offer assurances of accuracy not likely to be enhanced by calling the declarant as a witness, even though he is available." Supporting this exception is the theory that, because of the dimming of a declarant-witness' recollection by the time of the trial and other factors, a hearsay statement under appropriate circumstances is at least as reliable as possible testimony given by the declarant if he were a witness at the trial. This theory, although not necessarily expressed, is recognized and accepted by the cases upholding numerous common law exceptions to the hearsay rule in which unavailability of the declarant is not required.[218]

213 McCormick believes the notion that an opponent cannot prevent the introduction of his own declarations by questioning their trustworthiness is an expression of feeling rather than logic. Nevertheless, it is so widespread "that it may stand for a reason." C. MCCORMICK, *supra* note 5, at 503.

214 Scloss v. Traunstine, 135 N.J.L. 11, 49 A.2d 677, 679, 680 (Sup. Ct. 1946); Strahorn, *supra* note 211.

215 2 E. MORGAN, *supra* note 103, at 221.

216 *Id.*

217 *Id.* at 221-22.

218 For examples, see Morgan, *supra* note 199.

Rule 8-04(a) describes the second exception by providing that: If the declarant is unavailable as a witness, a statement made under special circumstances which together with the nature of the statement offer strong assurances of accuracy is not excluded by the hearsay rule. The preceding Rule permits receipt of hearsay where its assurances of accuracy are considered to be as good as or better than those which would be furnished by the declarant's taking the stand and testifying. Rule 8-04 admits hearsay considered inferior to testimony from the stand but possessing strong assurances of accuracy. A Rule 8-04 statement, however, is received only if the declarant is unavailable. With regard to the admissibility of a statement qualifying under Rule 8-03, the availability or unavailability of the declarant is irrelevant: the (b) part of Professor Morgan's test is present.

Sometimes the probative value of particular evidence may require the trier's evaluation; this is suggested as part of the test by Morgan's clause (a). The Rules use traditional hearsay exceptions to illustrate applications of the two proposed exceptions.[219] These illustrations, in subdivision (b) of Rules 8-03 and 8-04, provide standards for gauging the probable accuracy with which the trier can place an evidentiary value upon a particular piece of hearsay evidence. Use of illustrations is intended to utilize the experience and wisdom of the past but not to fix inflexibly the scope of the two exceptions. Hearsay need not fit exactly within one of the illustrations to be admissible. The plan should furnish reasonable predictability of result for trial counsel and also provide for growth and development of evidence doctrine regarding exceptions to the hearsay rule.

The case of *Dallas County v. Commercial Union Assurance Co.*[220] shows how this growth can occur. In an action against an insurance company, plaintiff's claim that lightning caused the collapse of the insured structure was supported by evidence that charred timbers were found in the ruins. Defendant then offered a fifty-eight-year-old newspaper account of a fire in the building during construction. The court held the newspaper admissible. This decision was appealed. The circuit court's opinion did not classify the newspaper as an ancient document or as within any other readily identifiable exception. "It is

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219 In describing the common law and statutory exceptions in the Rules some modifications were inevitable. Where a split of authority existed, it was the job of the Advisory Committee to select the view which in its opinion was better or to combine the best features of more than one view. These choices are reflected in the draft.

220 286 F.2d 388 (5th Cir. 1961).

admissible because it is necessary and trustworthy, relevant and material, and its admission is within the trial judge's discretion in holding the hearing within reasonable bounds."[221] Assuming adoption of proposed Rules and subsequent determination of the newspaper account's admissibility, the outcome should prove identical. The nature of the article, dealing as it did with a subject of local interest and a public matter generally known in the community when the story was published, and the circumstances under which the statement was made as a newspaper report would seem to offer sufficient assurances of accuracy even under Rule 8-03. Judge Wisdom, writing for the court of appeals in *Dallas County*, said that the newspaper article published on the day of the fire provided more reliable, trustworthy and competent evidence than the testimony of a witness called to the stand fifty-eight years later.[222] Another example of judicial use of general principles and analogy to develop the law of hearsay is found in the cases admitting dying declarations in civil suits.[223]

Articles IX (Authentication & Identification), X (Contents of Writings, Recordings, & Photographs), and XI (Miscellaneous Rules) of the proposed Rules will not be discussed. To this author the problems covered therein and their solutions do not seem as noteworthy as those found in the others.

IV. Conclusion

Treatment of state law in the Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates is consistent with Supreme Court decisions involving the *Erie* doctrine and with a proper concept of federalism. The content of the Rules is not radical. There is respectable authority for each provision. Sometimes, however, choices had to be made between conflicting precedents.

While the law must be clarified and must grow, improvement is a slow process. The Federal Rules of Procedure, especially the Civil and Criminal Rules, with their amendment over the years, prove this. Just as changes are needed today in evidence rules, other changes will be necessary in the future. Rome was not built in a day and the evidentiary millenium will not be reached in a decade—or in many decades. The proposal being made at this time is a start—hopefully in the right di-

221 *Id.* at 397-98.

222 *Id.* at 397.

223 *E.g.*, United States Auto. Ass'n v. Wharton, 237 F. Supp. 255 (W.D.N.C. 1965); Thurston v. Fritz, 91 Kan. 468, 138 P. 625 (1914).

rection. The purpose of the entire endeavor, a job done by lawyers and judges for lawyers and judges (and the litigating portion of the public), is to produce modern, reasonably uniform, and functional rules of evidence "to the end that the truth may be ascertained and proceedings justly determined."[224]

224 PROPOSED FED. R. EVID. 1-02.