INTRODUCTION[1]

This pamphlet consists of the Federal Rules of Evidence and materials designed to aid in understanding, construing, and applying them.

Chief Justice Warren in 1965 appointed an advisory committee to draft rules of evidence for the federal courts. The Committee's preliminary draft was published and circulated for comment in 1969. 46 F.R.D. 161. A revised draft was circulated in 1971. 51 F.R.D. 315. In 1972, the Supreme Court prescribed Federal Rules of Evidence, to be effective July 1, 1973. 56 F.R.D. 183. Justice Douglas dissented. Pursuant to the various enabling acts, Chief Justice Burger transmitted the rules to the Congress, which suspended the rules pending further study by Congress. Pub. L. No. 93-12. After extensive study, the Congress enacted the rules into law with various amendments, to become effective July 1, 1975. Pub. L. No. 93-595, 88 Stat. 1926 (Jan. 2, 1975). The occasional amendments and additions that have since been made are reflected in the rules as here presented.

Thus the Federal Rules of Evidence are the product of both the rulemaking process established by the Supreme Court and the legislative process of Congress. Of at least equal importance is the vast collection of common law precedents, with occasional statutes, that constituted the background against which the rules evolved. It can be seen that each of these sources must be taken into consideration in reaching understanding of the rules.

The rules are in the final analysis legislative in nature, and problems of their effect are problems of statutory interpretation. Questions whether interpretive inquiry should be directed to ascertaining the intent of the legislature or the meaning to its audience tend to be minimal, since the rules are directed to a skilled professional audience in the main, in contrast to, say, a criminal statute directed to the public generally. With the rules, intent and meaning tend to come together, with the same interpretive materials relevant to both. The basic relevant interpretive materials are the common law background and the legislative history, with the most significant aspects of the latter consisting of the Advisory Committee's Notes and various congressional reports and debates, briefly described below. To help a reader working sequentially through the legislative

---

[1] This introductory material was prepared by the late Professor Edward W. Cleary, Reporter to the Advisory Committee for the Federal Rules of Evidence. For a more detailed discussion, see Cleary, *Preliminary Notes on Reading the Rules of Evidence*, 57 NEB. L. REV. 908 (1978).

background of any given rule, if a rule was commented upon by reference to subdivisions within that rule, the Advisory Committee notes and reports of House/Senate Committees have been segmented and arranged to display those comments in descending order, by subdivision.

. . .

Rules Prescribed by the Supreme Court. These rules were transmitted by the Court to the Congress, carried the prestige of the Court, and were the Court's exercise of the rulemaking powers granted by the various enabling acts. They constitute the framework and to a large extent also the particulars of the rules enacted by the Congress. Whether and how a Court's rule was amended by the Congress is described in the *Note be Federal Judicial Center* following each rule in the pamphlet.

Advisory Committee's Notes. The notes supported and explained the rules, were circulated with them, and were transmitted to the Congress with the rules. The involved congressional committees and subcommittees were thoroughly familiar with the notes, and except where changes were made in the rules the notes should be taken as the equivalent of a congressional committee report as representing the thinking of the Congress. The pertinent note, or portion thereof, is set forth in the Pamphlet for each rule. Where the Congress returned to an earlier version of the rule, the note is the one that corresponds to that version. Portions no longer relevant because of congressional changes in the rule are omitted.

Congressional Materials. The House took the lead in congressional consideration of the rules. Accordingly, in the Pamphlet any pertinent portion of the *Report of the House Committee on the Judiciary* is the first of the congressional materials under each rule. Senate consideration of the rules chronologically followed that of the House, and as a result any pertinent portion of the *Report of the Senate Committee on the Judiciary* is located under each rule in the Pamphlet after that of the House committee. Where House and Senate passed differing versions of a rule, the difference was resolved by conference, and the *Conference Report* generally concludes the congressional materials. In some instances other congressional materials which are authoritative and helpful are, however, also included.

Some General Observations

Questions as to what a rule really means present probably the most basic problem of interpretation. The language of the rule

itself should be taken as the prime source of meaning, read in the light of such context as may be relevant. The most relevant context will often be legislative history, which on occasion may even override an apparently plain and unmistakable meaning of the words of the rule.[2] The result may be startling, as when the Court of Appeals for the District of Columbia Circuit concluded that a conviction for attempted burglary used for impeachment under Rule 609(a) did not involve dishonesty as the language was used in the rule.[3] Yet the opposite conclusion would have been most difficult to reach in view of the legislative history of the rule.[4]

No common law of evidence in principle remains under the rules. "All relevant evidence is admissible except as otherwise provided . . . ."[5] In reality, of course, the common law remains as a source of guidance in identifying problems and suggesting solutions, within the confines of the rules.

A recurring question is that of the extent to which the application of the rules may be extended beyond their express provisions. Some explicit authorizations to courts to invent and create are found, as for example the provision of Rule 501 that privileges "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience," and the provisions of Rules 803(24) and 804(b)(5) [now Rule 807] for the restricted admission of hearsay statements not falling within an enumerated exception. A somewhat tighter rein is kept on the judiciary by the rules that obviously contemplate a measure of invention but only within the confines of a stated principle, as in Rule 404(b) where illustrations are given of purposes for which evidence of other crimes may be admitted.

With regard to the more particularized rules, how should parallel situations be treated? Should the rule be regarded as occupying the field exclusively, or should it be extended by

---

[2] The manner of exercise of its legislative powers by the Congress as spelled out in the Constitution is the passing of bills and obtaining the President's approval or overriding his veto. U.S. CONST. art. I, § 7. While this may suggest the irrelevance of legislative history, in the British tradition, the American commitment is contrary, and it can scarcely be denied that the reasoning of those involved is a helpful source of illumination, without having the authority of law.

[3] United States v. Smith, 551 F.2d 348 (D.C. Cir. 1976).

[4] *Id.* at 362.

[5] FED. R. EVID. 402.

analogy to related situations? The answer lies in the purpose of the rule: if the additional situation presents the same problem as that with which the rule was designed to deal, application of the rule is appropriate. For example, under Rule 801(d)(1)(C) an out-of-court identification statement made after viewing a photograph has been held to be governed by the nonhearsay rule specifically applicable to statements made after viewing the accused in person.[6] Or again, the prohibition against testimony by the judge in the trial over which he is presiding, in Rule 605, was extended to preclude testimony by his clerk.[7]

Not to be confused with the foregoing is the judicial engrafting onto a rule of a requirement not set forth in the rule and not supported by legislative history or other relevant context. An example is the engrafting of a requirement that other crimes as proof of intent under Rule 404(b) be proved by clear and convincing evidence, although no such provision is found in the rule.[8]

Rule 102 provides:

> These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

Entitled "Purpose and Construction," the rule sets a high standard for approaching problems of application and meaning but furnishes small guidance to solving particular questions. The most important aspect of the rule may well be its implicit recognition that rules do not, and cannot, resolve in specific terms a very large proportion of evidentiary uncertainties that may arise, and that solutions must be reached through application of accepted principles of statutory construction.

---

[6] United States v. Lewis, 565 F.2d 1248 (2d Cir. 1977), *cert. denied*, 435 U.S. 973 (1978).

[7] Kennedy v. Great Atl. & Pac. Tea Co., 551 F.2d 593 (5th Cir. 1977), *reh'g denied*, 554 F.2d 475 (1977).

[8] United States v. Beechum, 555 F.2d 487 (5th Cir. 1977), *rev'd*, 582 F.2d 898 (5th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 920 (1979).

TABLE OF CONTENTS

Introduction i

FEDERAL RULES OF EVIDENCE FOR UNITED STATES COURTS

ARTICLE I. GENERAL PROVISIONS

101	Scope; Definitions	1
102	Purpose	5
103	Rulings on Evidence	5
104	Preliminary Questions	11
105	Limiting Evidence That Is Not Admissible Against Other Parties or for Other Purposes	17
106	Remainder of or Related Writings or Recorded Statements	18

ARTICLE II. JUDICIAL NOTICE

201	Judicial Notice of Adjudicative Facts	19

ARTICLE III. PRESUMPTIONS IN CIVIL CASES

301	Presumptions in Civil Cases Generally	29
302	Applicability of State Law to Presumptions in Civil Cases	35

ARTICLE IV. RELEVANCE AND ITS LIMITS

401	Test for Relevant Evidence	37
402	General Admissibility of Relevant Evidence	39
403	Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons	41
404	Character Evidence; Crimes or Other Acts	43
405	Methods of Proving Character	51
406	Habit; Routine Practice	53
407	Subsequent Remedial Measures	56
408	Compromise Offers and Negotiations	59

409	Offers to Pay Medical and Similar Expenses	67
410	Pleas, Plea Discussions, and Related Statements	68
411	Liability Insurance	78
412	Sex-Offense Cases: The Victim's Sexual Behavior or Predisposition	80
413	Similar Crimes in Sexual-Assault Cases	92
414	Similar Crimes in Child-Molestations Cases	93
415	Similar Acts in Civil Cases Involving Sexual Assault or Child Molestation	94

ARTICLE V. PRIVILEGES

501	Privilege in General	97
502	Attorney–Client Privilege and Work Product; Limitations on Waiver	102

ARTICLE VI. WITNESSES

601	Competency to Testify in General	113
602	Need for Personal Knowledge	115
603	Oath or Affirmation to Testify Truthfully	116
604	Interpreter	117
605	Judge's Competency as a Witness	117
606	Juror's Competency as a Witness	118
607	Who May Impeach a Witness	125
608	A Witness's Character for Truthfulness or Untruthfulness	126
609	Impeachment by Evidence of a Criminal Conviction	131
610	Religious Beliefs or Opinions	146
611	Mode and Order of Examining Witnesses and Presenting Evidence	147
612	Writing Used to Refresh a Witness's Memory	153
613	Witness's Prior Statement	156
614	Court's Calling or Examining a Witness	158
615	Excluding Witnesses	159

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

701	Opinion Testimony by Lay Witnesses	163
702	Testimony by Expert Witnesses	166
703	Bases for an Expert's Opinion Testimony	175

704	Opinion on an Ultimate Issues	179
705	Disclosing the Facts or Data Underlying an Expert's Opinion	182
706	Court-Appointed Expert Witnesses	184

ARTICLE VIII. HEARSAY

801	Definitions That Apply to This Article; Exclusions from Hearsay	194
802	The Rule Against Hearsay	210
803	Exceptions to the Rule Against Hearsay—Regardless of Whether the Declarant Is Available as a Witness	211
804	Exceptions to the Rule Against Hearsay—When the Declarant Is Unavailable as a Witness	263
805	Hearsay Within Hearsay	282
806	Attacking and Supporting the Declarant's Credibility	283
807	Residual Exception	287

ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

901	Authenticating or Identifying Evidence	289
902	Evidence That Is Self-Authenticating	295
903	Subscribing Witness's Testimony	302

ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

1001	Definitions That Apply to This Article	303
1002	Requirement of the Original	305
1003	Admissibility of Duplicates	307
1004	Admissibility of Other Evidence of Content	308
1005	Copies of Public Records to Prove Content	310
1006	Summaries to Prove Content	311
1007	Testimony or Statement of a Party to Prove Content	311
1008	Functions of the Court and Jury	312

ARTICLE XI. MISCELLANEOUS RULES

1101	Applicability of the Rules	315
1102	Amendments	320
1103	Title	321

DELETED AND SUPERSEDED MATERIALS

105	Summing Up and Comment by Judge [Not enacted.]	323
301	Presumptions in General [As prescribed by Supreme Court]	324
301	Presumptions in General [As passed by House of Representatives]	324
303	Presumptions in Criminal Cases [Not enacted.]	329
406	Habit; Routine Practice [Subdivision (b) not enacted.]	333
501	Privileges Recognized Only as Provided [Not enacted.]	334
502	Required Reports Privileged by Statute [Not enacted.]	339
503	Lawyer-Client Privilege [Not enacted.]	340
504	Psychotherapist-Patient Privilege [Not enacted.]	346
505	Husband-Wife Privilege [Not enacted.]	351
506	Communications to Clergymen [Not enacted.]	354
507	Political Vote [Not enacted.]	357
508	Trade Secrets [Not enacted.]	358
509	Secrets of State and Other Official Information [Not enacted.]	359
510	Identity of Informer [Not enacted.]	364
511	Waiver of Privilege by Voluntary Disclosure [Not enacted.]	368
512	Privileged Matter Disclosed Under Compulsion or Without Opportunity to Claim Privilege [Not enacted.]	369
513	Comment Upon or Inference From Claim of Privilege; Instruction [Not enacted.]	370
804	Hearsay Exceptions; Declarant Unavailable [Subdivision (b)(2) not enacted.]	372

EVIDENCE RULES RESTYLING PROJECT 375

Unrestyled and Restyled Federal Rules of Evidence 380

Case Supplement 499

Warger v. Shauers: Case Note 499

Peña-Rodriguez v. Colorado: Case Note 504

Tanner, Warger, & Peña-Rodriguez: Afterthoughts 510

Miranda and Silence (addressing *Salinas v. Texas*) 512

Ohio v. Clark: Case Note 523

ARTICLE I. GENERAL PROVISIONS

Rule 101. SCOPE; DEFINITIONS

(a) Scope. These rules apply to proceedings in United States courts. The specific courts and proceedings to which the rules apply, along with exceptions, are set out in Rule 1101.

(b) Definitions. In these rules:

(1) "civil case" means a civil action or proceeding;

(2) "criminal case" includes a criminal proceeding;

(3) "public office" includes a public agency;

(4) "record" includes a memorandum, report, or data compilation;

(5) a "rule prescribed by the Supreme Court" means a rule adopted by the Supreme Court under statutory authority; and

(6) a reference to any kind of written material or any other medium includes electronically stored information.

(Enacted Jan. 2, 1975; as amended Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 25, 1988, eff. Nov. 1, 1988; Apr. 22, 1993, eff. Dec. 1, 1993; as restyled Apr. 26, 2011, eff. Dec. 1, 2011.)

NOTE BY FEDERAL JUDICIAL CENTER

The rule enacted by the Congress is the rule prescribed by the Supreme Court without change.

ADVISORY COMMITTEE'S NOTE

Rule 1101 specifies in detail the courts, proceedings, questions, and stages of proceedings to which the rules apply in whole or in part.

ADVISORY COMMITTEE'S NOTE TO 1993 AMENDMENT TO RULE 101

This revision is made to conform the rule to changes made by the Judicial Improvements Act of 1990.

ADVISORY COMMITTEE NOTE'S TO 2011 RESTYLING OF RULE 101

The language of Rule 101 has been amended, and definitions have been added, as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.[1]

The reference to electronically stored information is intended to track the language of Fed. R. Civ. P. 34.

The Style Project

The Evidence Rules are the fourth set of national procedural rules to be restyled. The restyled Rules of Appellate Procedure took effect in 1998. The restyled Rules of Criminal Procedure took effect in 2002. The restyled Rules of Civil Procedure took effect in 2007. The restyled Rules of Evidence apply the same general drafting guidelines and principles used in restyling the Appellate, Criminal, and Civil Rules.

1. General Guidelines.

Guidance in drafting, usage, and style was provided by BRYAN GARNER, GUIDELINES FOR DRAFTING AND EDITING COURT RULES (Admin. Office of the U.S. Courts 1996) and BRYAN GARNER, DICTIONARY OF MODERN LEGAL USAGE (2d ed. 1995). *See also* Joseph Kimble, *Guiding Principles for Restyling the Civil Rules, in* PRELIMINARY DRAFT OF PROPOSED STYLE REVISION OF THE FEDERAL RULES OF CIVIL PROCEDURE, at x (Feb. 2005) (available at

http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Prelim_draft_proposed_pt1.pdf);

[1] [A similar paragraph appears in the Advisory Committee's Note to each of the restyled rules. To avoid repetition, I have omitted this paragraph throughout the volume. Still, the Committee's injunction that it intended no substantive change in restyling the rules applies throughout. I have retained the balance of the Advisory Committee's notes, which address issues peculiar to one or a few of the restyled rules.—GF]

Joseph Kimble, *Lessons in Drafting from the New Federal Rules of Civil Procedure*, 12 SCRIBES J. LEGAL WRITING 25 (2008–2009). For specific commentary on the Evidence restyling project, see Joseph Kimble, *Drafting Examples from the Proposed New Federal Rules of Evidence*, 88 MICH. B.J. 52 (Aug. 2009); 88 MICH. B.J. 46 (Sept. 2009); 88 MICH. B.J. 54 (Oct. 2009); 88 MICH. B.J. 50 (Nov. 2009).

2. Formatting Changes.

Many of the changes in the restyled Evidence Rules result from using format to achieve clearer presentations. The rules are broken down into constituent parts, using progressively indented subparagraphs with headings and substituting vertical for horizontal lists. "Hanging indents" are used throughout. These formatting changes make the structure of the rules graphic and make the restyled rules easier to read and understand even when the words are not changed. Rules 103, 404(b), 606(b), and 612 illustrate the benefits of formatting changes.

3. Changes to Reduce Inconsistent, Ambiguous, Redundant, Repetitive, or Archaic Words.

The restyled rules reduce the use of inconsistent terms that say the same thing in different ways. Because different words are presumed to have different meanings, such inconsistencies can result in confusion. The restyled rules reduce inconsistencies by using the same words to express the same meaning. For example, consistent expression is achieved by not switching between "accused" and "defendant" or between "party opponent" and "opposing party" or between the various formulations of civil and criminal action/case/proceeding.

The restyled rules minimize the use of inherently ambiguous words. For example, the word "shall" can mean "must," "may," or something else, depending on context. The potential for confusion is exacerbated by the fact the word "shall" is no longer generally used in spoken or clearly written English. The restyled rules replace "shall" with "must," "may," or "should," depending on which one the context and established interpretation make correct in each rule.

The restyled rules minimize the use of redundant "intensifiers." These are expressions that attempt to add emphasis, but instead state the obvious and create negative implications for other rules. The absence of intensifiers in the restyled rules does not change their substantive meaning. *See, e.g.*, Rule 104(c) (omitting "in all cases"); Rule 602 (omitting "but need not"); Rule 611(b) (omitting "in the exercise of discretion").

The restyled rules also remove words and concepts that are outdated or redundant.

4. Rule Numbers.

The restyled rules keep the same numbers to minimize the effect on research. Subdivisions have been rearranged within some rules to achieve greater clarity and simplicity.

5. No Substantive Change.

The Committee made special efforts to reject any purported style improvement that might result in a substantive change in the application of a rule. The Committee considered a change to be "substantive" if any of the following conditions were met:

a. Under the existing practice in any circuit, the change could lead to a different result on a question of admissibility (e.g., a change that requires a court to provide either a less or more stringent standard in evaluating the admissibility of particular evidence);

b. Under the existing practice in any circuit, it could lead to a change in the procedure by which an admissibility decision is made (e.g., a change in the time in which an objection must be made, or a change in whether a court must hold a hearing on an admissibility question);

c. The change would restructure a rule in a way that would alter the approach that courts and litigants have used to think about, and argue about, questions of admissibility (e.g., merging Rules 104(a) and 104(b) into a single subdivision); or

d. The amendment would change a "sacred phrase"—one that has become so familiar in practice that to alter it would be unduly disruptive to practice and expectations. Examples in the Evidence Rules include "unfair prejudice" and "truth of the matter asserted."

Rule 102. PURPOSE

These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.

(Enacted Jan. 2, 1975; as restyled Apr. 26, 2011, eff. Dec. 1, 2011.)

NOTE BY FEDERAL JUDICIAL CENTER

The rule enacted by the Congress is the rule prescribed by the Supreme Court without change.

ADVISORY COMMITTEE'S NOTE

For similar provisions see Rule 2 of the Federal Rules of Criminal Procedure, Rule 1 of the Federal Rules of Civil Procedure, California Evidence Code § 2, and New Jersey Evidence Rule 5 (repealed and replaced by New Jersey Rule of Evidence 102 (1993)).

Rule 103. RULINGS ON EVIDENCE

(a) Preserving a Claim of Error. A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:

(1) if the ruling admits evidence, a party, on the record:

(A) timely objects or moves to strike; and

(B) states the specific ground, unless it was apparent from the context; or

(2) if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.

(b) Not Needing to Renew an Objection or Offer of Proof. Once the court rules definitively on the record—either