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ARTICLES

THE FEDERAL RULES OF EVIDENCE AND THE QUALITY OF PRACTICE IN FEDERAL COURTS*

STEPHEN A. SALTBURG**

I. THE NORTHERN DISTRICT OF OHIO SEMINAR

THIS IS A GREAT DAY FOR LAWYERS IN CLEVELAND; in fact, it is a great day for lawyers practicing in the entire Northern District of Ohio. Today marks the beginning of a landmark conference in which the active judges comprising a federal district bench lend their support, their encouragement and their enthusiasm to a program that is designed to educate lawyers about federal practice and to improve trial techniques in federal courts by suggesting better ways for competent lawyers to manage federal litigation. For those who participate, benefits should accrue to their clients and their own personal practices generally. And, as a result of their participation, the overall efficiency of the federal courts in the District should improve. The message of this program, at least the message that I glean from it, is that the judges from the Northern District of Ohio care enough about the quality of practice in their courts to want it to be the very best. They want to see lawyers using their talents optimally, and they are willing to descend from the bench, to remove their robes, to roll up their sleeves and to get down to the business of working with distinguished judges from elsewhere, with a couple of professors and, most importantly, with their own bar to improve the level of performance in the Northern District of Ohio.*

It is somewhat unfortunate that this seminar is not the natural outgrowth of a continuous practice over many years of lawyers constantly trying to improve themselves and of judges supporting that practice. Candor requires all of us to note at the outset of this Seminar that in recent years attacks, many by federal judges, have been made on the competency of trial lawyers. In fact,

*© Professor Stephen A. Saltzburg, 1978. This article represents edited excerpts from a one-day lecture on the Federal Rules of Evidence delivered at the Cleveland-Marshall College of Law on October 25, 1978, as part of the experimental “Lawyers' Seminar in Federal District Court Practice.”

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1 I recognize that at least one judge in the Northern District of Ohio has doubts about the utility of a program such as the "Lawyers' Seminar" as a mechanism for assuring adequate lawyering in federal district courts. But, like his Brethren, he appears willing to participate in the Seminar in order to see whether the experiment will produce the kind of results that his Brethren expect. It should not be forgotten that the question whether the Seminar works will remain an open one until participants have a chance to try out the new skills they may have developed. Even then, I suspect that the extent to which the Seminar has been successful will be subject to fair debate. Because this Seminar is an experiment, it probably is a more uncertain enterprise than other efforts to improve lawyer skills, and I doubt that any participant in the program is likely to forget that. Yet, no matter how the Seminar fares in its effort to improve lawyering in federal courts in the Northern District of Ohio, the symbolism of the effort being made by the federal judges here is likely to have lasting value. It is a real demonstration of their commitment to excellence in the practice of law.
the Chief Justice of the United States has taken the lead in criticizing the
caliber of lawyer performance in federal courts. His comments have been
echoed by distinguished jurists sitting on influential courts. Other federal
judges, including those here in the Northern District of Ohio, and the lawyers
who practice before them could not help but focus on the question whether
lawyers are practicing effectively before federal district courts. Elsewhere I
have voiced my doubts about the legitimacy of some of the attacks that have
been made on the competency of lawyers' performance; nevertheless,
whether or not serious problems of lawyer incompetency exist, there is little
doubt that lawyer performance in all courts could be improved.

That you agree with this last point, it seems to me, is one of the significant
messages of your experimental Seminar. It is not viewed as a remedy for
incompetency, nor is it simply designed to provide minimum skills necessary
to survive in federal courtrooms. Indeed, it is somewhat doubtful that an
advertisement offering to train incompetent lawyers in federal practice would
produce a very large audience. Arguably, those who are least competent are
least likely to know of their own inadequacies. Certainly, they are not likely to
admit their weaknesses. The genius of your program from my perspective is
that it is directed simultaneously at two very different groups: lawyers who are
not presently admitted to the federal courts (or who, although admitted,
rarely practice before the federal courts) and are thus not very familiar with
the intricacies of practice in the Northern District of Ohio, and seasoned
practitioners who are interested in learning how old techniques have been
improved or how new techniques can be utilized to improve the practice of
law in federal courts.

In other words, your program does not assume that the principal problem
to be addressed is lawyer incompetency. Rather, it assumes that the goal of all
judges and lawyers is to provide clients and the general public the best in the
way of legal services and dispute resolution systems for federal problems.
Some doubters will question whether those uninitiated in federal practice
have anything in common with those whose daily bread depends upon their
success in federal litigation. I think that this Seminar will demonstrate,
however, that thus far many techniques, many skills, many procedural
devices and many forms of practice are not being handled by even the most
experienced lawyers in the ways they could be. Moreover, the sage veteran
may be surprised at the innovations that the novice, who is not in any rut at all,
may suggest. And those new to federal practice should benefit from seeing the

2 E.g., Burger, The Special Skills of Advocacy: Are Specialized Training and Certification of
Advocates Essential to Our System of Justice?, 42 Fordham L. Rev. 227 (1973); Burger, A Sick

3 See, e.g., Remarks of Chief Judge Irving R. Kaufman to the Second Circuit Judicial

4 See Saltzburg, The Unnecessarily Expanding Role of the American Trial Judge, 64 Va. L.
Rev. 1, 6-7 n.19 (1978).

5 It is not clear that we could develop adequate criteria by which to measure the quality of
Soc'y Rev. 257 (1976) with Carlson, Measuring the Quality of Legal Services: An Idea Whose
Time Has Not Come, 11 Law & Soc'y Rev. 287 (1976). Some people have more confidence than
others that methods can be devised to measure minimal competence. See, e.g., Devitt, Improving
Federal Trial Advocacy — II, 78 F.R.D. 251 (1978); Report and Tentative Recommendations of
the Committee to Consider Standards for Admission to Practice in the Federal Courts, 79 F.R.D.
experienced lawyer's bag of tricks and from having the opportunity to question whether the bag is as complete as it might be. The experienced and the inexperienced alike will learn, I think, that there is much that they can do with procedural and evidence rules that they heretofore have not thought about doing.

The discussion of the Federal Rules of Evidence might be the one part of the program in which the most experienced lawyers hardly can claim a very significant edge over those who have never appeared in a federal court. After all, the evidence rules have been in effect for only three and one-half years. The truth of the matter is that district judges in many courts have indicated in several different forums that many lawyers seem to be barely aware that a new set of rules took effect in 1975. Even those lawyers who have built reputations for care and skill in advocacy often still depend upon their pre-Rules knowledge rather than on post-Rules study. Much that could be done with the Federal Rules of Evidence is missed, and much of what the Rules tell us should not happen happens anyway, because lawyers are not sufficiently familiar with all of the provisions of the sixty-four rules of evidence. 8

II. THE BACKGROUND OF CODIFICATION GENERALLY

One point that I shall endeavor to make today is that the Federal Rules of Evidence offer an opportunity for dramatic improvement in federal trial court practice. In the hands of the most experienced practitioner or the novice litigator just weaned from law school, the evidence rules offer a promise of even-handed justice that has heretofore been unavailable. Used properly, the Federal Rules of Evidence hold out a promise that trials might be less costly to litigants in terms of out-of-pocket expenditures, that the societal costs associated with erroneous decisions by trial judges might be reduced, and that federal litigants' satisfaction with the results of litigation might be increased. Before explaining the way in which the evidence rules can produce these benefits, if used properly of course, I shall turn to the background of the Federal Evidence Code so that you understand what we had before the Federal Rules of Evidence.

When one traces the law of evidence in federal courts from the First Judiciary Act of 17897 up until 1975, one does not find a uniform approach to evidence questions. As one commentary has noted, "the story of the development of federal evidence law is a tangle of Congressional enactments, state law, and appellate decisions." 21 For some time it was unclear whether federal courts would follow state evidence law under the Rules of Decision Act,9 whether they were to create their own rules under the Mode of Proof

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8 When the rules took effect there were 63 rules, but Congress recently enacted a new Rule 412 to cover the use of character evidence of a rape victim in a prosecution for rape tried in a federal court. Privacy Protection for Rape Victims Act of 1978, Pub. L. No. 95-540, 92 Stat. 2046.

The fact that lawyers may have been slow to learn and to cite the Federal Rules of Evidence does not necessarily mean that they were incompetent. Busy lawyers, and busy judges as well, naturally would find it hard to find the time to study a new set of rules. But by this time, the Rules should be familiar. One goal of this Seminar is to assure that they are, or will be when the Seminar ends.

7 First Judiciary Act, ch. 20, §§ 1-35, 1 Stat. 73 (1789).


9 The Rules of Decision Act is part of the First Judiciary Act, ch. 20, § 34, 1 Stat. 92 (1789).
Act, or whether the Conformity Acts governed evidence questions. Even after the Supreme Court decided that the Rules of Decision Act governed, uniformity was not forthcoming, since the Act covered only common law actions, and federal courts often found ways of not following the Act. Discerning the law to be applied in equity cases, in criminal cases, in admiralty and in bankruptcy cases was not easy.

Even after the Federal Rules of Civil Procedure were adopted, Rule 43 provided little help for federal judges in deciding points of evidence law.

Rule 43, as it read prior to the adoption of the Federal Rules of Evidence, is set forth below. Additions to the Rule attributable to enactment of the evidence rules are in italics; deletions are in brackets.

**Rule 43. [Evidence] Taking of Testimony.**

(a) **FORM [AND ADMISSIBILITY].** In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an Act of Congress or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court. 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.

(b) **SCOPE OF EXAMINATION AND CROSS-EXAMINATION.** A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adversary party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also, and may be cross-examined by the adverse party only upon the subject matter of his examination in chief.

(c) **RECORD OF EXCLUDED EVIDENCE.** In an action tried by a jury, if an objection to a question propounded to a witness is sustained by the court, the examining attorney may make a specific offer of what he expects to prove by the answer of the witness. The court may require the offer to be made out of the hearing of the jury. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. In actions tried without a jury the same procedure may be followed, except that the court upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged.
Although Rule 26\(^{16}\) of the Federal Rules of Criminal Procedure was more straightforward than its civil counterpart, it failed to provide much guidance as to where federal trial courts were to find law on points that were not clearly established in decisions of the Supreme Court or circuit courts.\(^{17}\) That courts constantly in search of evidence law should yearn for a code or readily accessible set of rules is not surprising. That none existed for most of our history is.

Although there were attempts to codify rules of evidence in the nineteenth century — most notably the adoption of the Field Code of Evidence in Oregon and California — codification apparently was not pushed in most jurisdictions prior to the first third of the twentieth century. Indeed, New York rejected the portion of the Field Code of Civil Procedure containing rules of evidence. Even in jurisdictions that adopted the Code, it proved "ineffec-
tual."\(^{18}\) In the second decade of the twentieth century, the Commonwealth Fund turned its attention to the law of evidence. For its final report, published in 1927,\(^{19}\) the Fund's evidence committee polled portions of the bar in a nonscientific sampling in an effort to develop certain recommendations for the improvement of trial procedures. While the Report was not a serious effort to codify evidence rules\(^{20}\) it did have an influence on the American Bar

(d) AFFIRMATION IN LIEU OF OATH. Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.

(e) EVIDENCE ON MOTIONS. When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.

(f) INTERPRETERS. The court may appoint an interpreter of its own selection and may fix his reasonable compensation. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court.

One commentary suggests that "the three bodies of law referred to in Rule 43(a) proved upon close inspection to be elusive, to some extent even illusory." 21 C. WRIGHT & K. GRAHAM, supra note 8, § 5002, at 43 (footnote omitted). Another referred to the pre-Rules situation as a "hodgepodge that had demanded attention for years." 10 MOORE'S FEDERAL PRACTICE § 1, at 7 (1976) (footnote omitted). See also Preliminary Study, supra note 13, at 94-98.

\(^{16}\) Rule 26 is set forth below. Additions to the Rule attributable to enactment of the evidence rules are in italics; deletions are in brackets.

Rule 26: EVIDENCE

In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court. [The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.]

\(^{17}\) As the Supreme Court itself noted, "It is obvious that a court which can make only infrequent sallies into the field cannot recast the body of case law on this subject in many, many years, even if it were clear what the rules should be." Michelson v. United States, 335 U.S. 469, 486 (1948).

\(^{18}\) See generally 21 C. WRIGHT & K. GRAHAM, supra note 8, § 5005, at 69.

\(^{19}\) See MORGAN et al., THE LAW OF EVIDENCE: SOME PROPOSALS FOR ITS REFORM. Elsewhere I have criticized portions of the Report. See Saltzbug, supra note 4 at 28-33.

\(^{20}\) Five reforms were suggested: one dealing with restoring the power of the judge to comment on evidence, the second dealing with judicial power to admit evidence on undisputed issues (summary judgment would work better today), a third dealing with the abolition of the Dead Man's Statute and the final two expanding the class of admissible hearsay evidence.
Association Committee on Improvements in the Law of Evidence, which was chaired by Dean Wigmore. In 1938 that committee issued its own Report, which set forth a set of proposals drafted by Wigmore himself with an indication as to how members of the five-member committee and the sixty-six member advisory committee voted on each proposal. Although the Report generally endorsed the proposals of the Commonwealth Fund Committee and urged broader reforms, it is interesting to note that the votes were against giving the trial judge more discretion in rulings on admissibility of evidence and immunizing the trial judge from risks of reversal on appeal.

It was also in 1938 that work began on the American Law Institute's Model Code of Evidence, a project finished four years later. With the respected Edmund M. Morgan of Harvard as Reporter, Dean Wigmore as Chief Consultant, and a group of Advisors composed inter alia of outstanding federal judges, this very important project rode out a storm of controversy and resulted in the first modern codification of evidence law. Despite the extensive work done by the members of the group drafting the Model Code, no jurisdiction ever adopted it. When the Nebraska Supreme Court attempted to include provisions of the Code as a part of its civil procedure rules, the legislative backlash was striking; the state legislature not only disapproved all of the proposed rules, it repealed the statute authorizing the court to promulgate rules of procedure. In short, "[t]hose state bar associations or law revision groups that did not wholly ignore the Model Code rejected it in language ranging in tone from vehement rejection of the basic concept to approval of the concept but rejection of the specific code proposed." The California Committee to the Governors of the State Bar charged as follows:

[T]he Code seeks to destroy the foundation upon which our structure for the administration of justice is founded and substitute an entirely new theory. . . . The Code proceeds upon the theory that all the wisdom and learning of the past is to be discarded; that the rights of parties are no longer to depend upon settled rules of law or evidence but upon the view of each individual judge. . . .

The drafters of the Model Code did not hide the fact that they were giving great discretion to the trial judge. In his Foreword to the Model Code, Professor Morgan wrote that

[t]he proposed Code leaves no room for doubt as to the power of the trial judge. His historic role as master of the trial is restored. He has complete control of the conduct of the trial. . . . [H]e is to see

21 The report is reprinted in A. VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 558-90 (1949). It makes only a few recommendations and most are general in nature.

22 Wigmore favored a more detailed code with more specific provisions. Morgan favored some specificity with much less detail than Wigmore. During the 1940 meeting of the American Law Institute, the Institute debated the approach to take to the Model Code and favored Morgan's position. 17 ALL PROCEEDINGS 66-80 (1940).


to it that the evidence is presented honestly, expeditiously and in such form as to be readily understood: to this end he regulates in his discretion such matters as the order in which evidence is to be offered and witnesses are to be called, the number of witnesses to be called for a single term, the conduct of counsel in examining witnesses, the manner and scope of examination and cross-examination, the use of leading questions, of memoranda to refresh recollection, and of maps, models, diagrams, summaries and other devices for making testimony readily understandable, and the production of available documents on demand. And he may of his own motion exclude evidence which would be inadmissible if a proper objection were made or a proper claim of privilege were interposed. . . .\textsuperscript{26}

Rule 105 of the Model Code listed 13 powers of the trial judge. According to the popular literature, this explicit allocation of power to the judge accounted in large measure for much of the resistance to the Model Code. It is somewhat ironic that the federal trial judge operating today under the Federal Rules of Evidence possesses many of the same powers. This does not mean, however, that resistance to the Model Code was insincere or unreasonable. Certain portions of the Model Code provided less guidance to trial judges as to the usual rules to be followed than do the Federal Rules.\textsuperscript{27} Moreover, not only did Rule 503 of the Model Code provide that hearsay evidence would be admissible if a declarant were unavailable as a witness, but Rule 303 also provided that the trial judge had discretion to exclude evidence on the ground that it was more prejudicial than probative. A very broad hearsay exception combined with a broad power to exclude might have frightened many who reasonably may have feared that one side’s untested evidence would be admitted at the same time an opponent’s better evidence would be excluded. Once again, the Federal Rules provide more explicit guidance to the trial judge on hearsay exceptions, although there is leeway that remains for special cases.\textsuperscript{28}

It was the absence of detail that caused Wigmore to complain that “[t]he Draft Code has thrown overboard scores of these detailed rules of guidance, substituting some broad abstractions, potent only to reduce to guesswork the practitioner’s preparation for trial and to breed argument and dispute in the conduct of the case.”\textsuperscript{29}

Although some states tried to redraft the Model Code in an effort to render it more acceptable to the bar, none was successful.\textsuperscript{30} The Model Code nevertheless did have some influence. In 1943 the American Bar Association took action, when its House of Delegates directed a study of uniform evidence rules, and specifically provided that the Model Code should serve as the basis of the study. Meanwhile, the Advisory Committee on Civil Rules

\textsuperscript{26} Morgan, Foreword to \textit{Model Code of Evidence}, at 13-14 (1942).

\textsuperscript{27} \textit{Compare}, \textit{e.g.}, \textit{Fed. R. Evid.} 611 \textit{with Model Code of Evidence Rule 105} (1942).

\textsuperscript{28} \textit{Compare} \textit{Fed. R. Evid.} 803 (24) and 804(b)(5) \textit{with Model Code of Evidence Rule 503(a)} (1942).


\textsuperscript{30} See generally R. Lempert & S. Saltzburg, \textit{supra} note 24, at 1194.
reconsidered whether it should undertake to compile rules of evidence but found that it was not feasible at the time to do so.\textsuperscript{31} The American Bar Association then enlisted the support of the National Conference of Commissioners on Uniform State Laws in an effort to develop a more acceptable set of evidence rules that would be adopted by the states. In 1950, drafting began on the Uniform Rules of Evidence, and they were completed in 1953.

In many respects the Uniform Rules were based upon the Model Code, but changes were made in an effort to make the controversial provisions of the Code more acceptable. The goal was to achieve "sensible change without shock."\textsuperscript{32} Several days after the rules were approved by the Uniform Commissioners, they were endorsed by the American Bar Association.\textsuperscript{33} Unlike the drafters of the Model Code, the drafters of the Uniform Rules attempted "to express the rules in simple language and in convenient usable form."\textsuperscript{34} They also prized brevity.\textsuperscript{35} Where possible, the Uniform Rules omitted references to the extensive powers of the trial judge that were included in the Model Code. For example, provisions in the Model Code allowing the judge to comment on the evidence and broadly control trial procedures were avoided.\textsuperscript{36}

Despite these efforts by the Uniform Commissioners to develop a more acceptable set of evidence rules, the Uniform Rules, although more successful than the Model Code, hardly could be termed a substantial success. Those jurisdictions that adopted the Code tended to modify it greatly,\textsuperscript{37} and few adopted it at all.\textsuperscript{38}

An observer noted that the Uniform Rules, like the Model Code, "strikes down certain landmarks of evidence as to which we have made a fetish during our entire legal careers."\textsuperscript{39} Perhaps he exaggerated the point, but he was a prescient onlooker who suggested that the states would be more receptive to evidence reform if it were attempted first in the federal courts. He proved to be correct.

\section*{III. The Movement Toward Federal Rules of Evidence}

In 1958 the House of Delegates of the American Bar Association urged the Judicial Conference of the United States to appoint a special committee to adopt the Uniform Rules for use in federal courts. In March, 1961, in special session, the Judicial Conference approved a proposal of the Standing Committee on Rules of Practice and Procedure and called for a project devoted to Federal Rules of Evidence. A special committee under the

\begin{footnotesize}
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\item \textsuperscript{31} See Preliminary Study, supra note 13, at 91.
\item \textsuperscript{32} Gard, The Uniform Rules of Evidence, 31 Tul. L. Rev. 19, 23 (1956).
\item \textsuperscript{33} See McCormick, Some Highlights of the Uniform Rules, 33 Tex. L. Rev. 559, 560 (1955).
\item \textsuperscript{34} Gard, Kansas Law and the New Uniform Rules of Evidence, 2 U. Kan. L. Rev. 333, 338 (1954).
\item \textsuperscript{35} See generally id.
\item \textsuperscript{36} See Model Code of Evidence rules 8, 105 (1942).
\item \textsuperscript{37} See generally R. Lempert & S. Saltzburg, supra note 24, at 1195-96.
\item \textsuperscript{39} Nordbye, Proposed Rules to Cover the Field of Evidence, in Civil and Criminal Procedures Reviewd, 26 Hennepin Lawyer 131, 135 (1958).
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chairmanship of Yale Law Professor James William Moore was appointed. In December, 1961, a Preliminary Report on the Advisability and Feasibility of Developing Uniform Rules of Evidence for the United States District Courts was completed.\textsuperscript{40} The Preliminary Study was not the most thorough project ever undertaken by federal judges. In fact, it was a foregone conclusion that the committee would report back that it was both feasible and advisable to have uniform rules of evidence in federal courts. The Preliminary Study concluded that the Supreme Court had been given the power to formulate rules of evidence and that the \textit{Erie} doctrine\textsuperscript{41} was not a major obstacle to development of uniform rules. The study also concluded that the Uniform Rules of Evidence would be a suitable place to begin the reform of evidence rules appropriate to the various sorts of cases litigated in federal courts. Among the benefits associated with a uniform set of rules were the following: lawyers would have an easier time in dealing with a set of rules rather than attempting to order all existing common law authorities; with a uniform set of federal rules as a starting point, the states might begin to improve the condition of their laws of evidence; and lawyers and judges who tried federal cases in more than one state would not have to be familiar with the multifarious evidence rules found in the several states. When the Preliminary Study by the special committee was circulated in 1962, it appears that most of the comments were favorable. A final report, submitted to the Standing Committee on Rules of Practice and Procedure in early 1963, concluded that it was both feasible and desirable to formulate uniform rules of evidence for federal courts. Two years later, Chief Justice Warren appointed an Advisory Committee to draft rules of evidence.

The following excerpt, which is as concise as any, I hope, illustrates the way in which the Rules worked their way through the Supreme Court and ultimately through the Congress of the United States.

The Advisory Committee transmitted to the Standing Committee a "Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates" on January 30, 1969. On March 31, 1969, the Standing Committee circulated the preliminary draft to the bar and Bench for consideration. It was not until October, 1970, that the Standing Committee presented to the Judicial Conference its revised draft of evidentiary rules which substantially modified the preliminary draft. The revised draft was approved by the Judicial Conference and referred to the Supreme Court. The Supreme Court concluded that the revised draft should be submitted for comments to lawyers and Judges in the same manner as the preliminary draft. This was done in March, 1971.

Many comments and criticisms were made with respect to both drafts, and revisions were made in the revised draft, just as they had been made in the previous draft. After the Advisory Committee had reworked its product, it submitted it to the Standing Committee, which made some revisions before approving the draft and submitting it to the Judicial Conference. The Judicial Conference

\textsuperscript{40} 30 F.R.D. 73 (1962).

\textsuperscript{41} See Erie R.R. Co. v. Thompkins, 304 U.S. 64 (1938).
also approved the draft and then forwarded it to the Supreme Court in October, 1971. Although the Court did not promulgate this revision of the revised draft, it did receive further comments and suggestions, including some from the Department of Justice. Upon receipt of these comments, the Court requested the Advisory Committee and the Standing Committee to evaluate them. Early in 1972 the Advisory Committee and the Standing Committee met again and made further modifications. This procedure, which did not allow for public comment on the final draft, has been severely criticized. In any event, on November 20, 1972, the Supreme Court approved a final draft.

Had the same procedure that was used in adopting the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure been used with respect to the new evidentiary Rules (a procedure that would also have applied absent any contrary congressional action), the Supreme Court draft would have become effective automatically after the passage of 90 days. It would have taken objections by both Houses of Congress to stop the Rules. Because Congress recognized the importance of the evidentiary Rules and because the label "substantive" was persistently applied to several of the Rules, Congress enacted in early 1973, Public Law 93-12, which provided that the Rules should not be effective until expressly approved by the Congress.

Two days after receiving the proposed Rules from Chief Justice Burger on February 5, 1973, the Subcommittee on Criminal Justice of the Committee on the Judiciary of the House of Representatives (formerly designated as Special Subcommittee on Reform of Federal Criminal Laws) opened hearings on the desirability of the uniform code of evidence and the merits of the Rules approved by the Supreme Court. After six days of hearings, and receipt of numerous written communications, the Subcommittee circulated a draft on June 28, 1973. Following extensive comments from the public, the Subcommittee revised its draft and on October 10, 1973, reported its revised draft to the full Judiciary Committee. On October 16 and 18, and on November 6, 1973, the full Committee debated the bill and amended it in several respects before reporting it to the full House. Several additional amendments were made by the full House before the Rules were passed on February 6, 1974. A Senate version of the Rules was passed on November 22, 1974, following hearings on July 4th and 5th, 1974, before the full Senate Committee on the Judiciary. As a result of compromises by House and Senate conferees, the final bill was approved by the House on December 16, and the Senate on December 18. It was sent to


Justice Douglas dissented.

S. SALTZBURG & K. REDDEN, supra note 38, at 4-5.
President Ford who approved it on January 2, 1975, whereupon it became Public Law 93-595, 88 Stat. 1926 et seq.\textsuperscript{44}

The general background of codification set forth earlier indicates that the Federal Rules of Evidence did not come easy. Before a set of rules was finally accepted for use in the federal courts, and ultimately for adoption in many states, the greatest evidence scholars of our time clashed with each other, and with members of the bar and the judiciary,\textsuperscript{45} over the manner in which evidence reform was to be accomplished. Wigmore never saw his detailed Code adopted. Morgan never saw the changes in the law that he hoped for come about. Neither had a chance to be a part of the final product that we now call the Federal Rules of Evidence, although the work of both was influential. In fact, but for their efforts at codification and the lessons learned as a result, one would doubt whether the Federal Rules possibly could have engendered the enthusiastic reception that they actually have received. In light of the resistance of the bar to earlier codification attempts, it is remarkable to note that almost one-third of the states already have adopted codes of evidence based on the proposed or final version of the Federal Rules.\textsuperscript{46} In another year, it would not be surprising if half the states or more had chosen versions of the Federal Rules of Evidence to govern their judicial proceedings.

\textbf{IV. The Significance of the Rules}

What accounts for this remarkable success of the Federal Rules? How can it be that this code succeeded where its predecessors so dismally failed? Is the answer simply that the opponents of codification were worn down, too tired to fight the new code? Or is there something more fundamental about the Federal Rules of Evidence that helps to explain the welcome that they have received. Several theories could be offered: \textit{e.g.}, the Federal Rules corrected the defects in the Model Code and Uniform Rules; the bar recognized the hyperbole that distorted the debate on earlier codification attempts; or the attitudes of the bar simply changed. None of these theories is very persuasive, however. The Federal Rules are built upon the foundation of the earlier codes, the organized bar to this day seems to believe that the rejection of the Model Code and the Uniform Rules was wise, and there is little data to support the hypothesis that basic ideas about evidence are much different today from what they were twenty-five years ago. No, these theories do not suffice. But there is another that standing alone, or in connection with the others, does. When the Chief Justice of the United States, his successor, the Supreme Court itself, the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, a special study committee appointed by the Chief Justice and, presumably, most federal judges support a set of rules to govern federal practice, the task of selling the rules is greatly simplified, especially when the Supreme Court has rulemaking power.

The federal judges — not all of them, but most, and most key figures in the judiciary — asked for rules. Thus, the Federal Rules of Evidence were

\textsuperscript{45} \textit{See generally} Introduction to \textit{Model Code of Evidence}, at xv-xvi (1942).

welcomed by most of those manning the “trial pits.” In short, they were received by judges with open arms, not with a “show me why” attitude. And if the influential judges thought the Rules were needed, the bar was not very likely to disagree.

But this cannot be the whole answer as to why the Rules were so welcome. After all, some judges did oppose their adoption, and the Congress took a careful look before going along with the Rules. Certainly, the states that jumped on the Federal Rules bandwagon would not have blindly accepted a codification that they previously had opposed. Some advantages of having Rules must have been perceived by the supporters. Yet, they rarely, if ever, have been well articulated. Maybe different supporters saw different advantages and could agree only on a bottom line — i.e., to adopt the Rules — but not on a rationale. As I indicated earlier, I believe that the case for Federal Rules of Evidence is quite strong. My reasoning is different from that of several others. There are several points that need to be made and I shall consider them in ascending order of importance. It is these points that account for the favorable reception of the Federal Rules of Evidence.

First, it is very important to note that, whereas most of the Rules of Civil Procedure and the Rules of Criminal Procedure involve pre-trial and post-trial matters, the Federal Rules of Evidence most often will be utilized in the courtroom or in the middle of a hearing or deposition when there is scant time for reflection and research. This is not to suggest that careful lawyers will not make motions seeking evidence rulings in advance of trial. Indeed, the motion in limine is a very useful device to educate a lawyer as to what is likely to happen at trial so that the lawyer may properly advise a client with respect to a fair settlement in light of the real chance of prevailing in litigation.47

Nor do I suggest that pre-trial preparation is not important, for the prepared lawyer is always better off during litigation. But I do say that no matter how well a lawyer prepares, in many situations points of evidence law will arise during trial and will not have been anticipated. When that happens, the lawyer needs to be able to research the point quickly, or at least to fall back on a body of law that is readily accessible. The Federal Rules of Evidence is such a body of law. The fact that a lawyer can have the Rules present in the courtroom means that often he or she need not rely on ten or more volumes of the Wigmore treatise as authority for an evidence point. Easy access to “the law” is an enormous advantage of the Rules. Judges obviously are similarly advantaged.48 Some have referred to this benefit as “the pocket bible

47 The motion in limine is so important that it should not be arbitrarily restricted by individual judges. Compare S. SALTZBURG & K. REDDEN, supra note 38, at 116-17 (1978 Supp.) with Frankel, The Adversary Judge, 54 Tex. L. Rev. 465, 474 n.25 (1976).

48 Even when the parties carefully prepare their case prior to trial, they often will not alert the judge to all of the evidence issues prior to trial. Perhaps they should. Perhaps this would improve the quality of rulings. But, unless the judge has managed to force the issues out in the open during pre-trial, which may be more likely in a civil than a criminal case, the trial judge may have to rule quickly if the trial is not to become a nightmare of delays. Reference to the Federal Rules is likely to produce better and quicker rulings than would have been produced by reference to any single common law authority.

Even when a trial must be adjourned because the judges and the lawyers cannot find a ready reference in the Federal Rules on a particular point, at least they will know that the Rules themselves do not provide the answer and will know that they will have to look elsewhere. This clue may aid research, and speed up the litigation process even where some delay is inevitable.
argument," and although attitudes toward the argument are not always made clear, some apparently would give it little weight. But, in my experience, the argument has merit. Of course, lawyers and judges will not find easy answers to every question that might arise in the language of the specific Rules. But in many instances the language will provide a good clue as to the immediate objection or response to an objection that should be made in order to preserve precious litigation rights. Moreover, having the language right there, together with some of the authorities interpreting the language, puts the lawyer in much better shape than he or she previously was in.

Nothing in this argument suggests that the Federal Rules of Evidence make the common law irrelevant. As with all subjects, the more one knows about evidence and about where the codified rules came from, the better one is able to argue a point. It is not necessary, however, to establish that the Federal Rules remove any necessity for knowledge of the common law or that they answer every question that might arise to establish that the Federal Rules are likely to improve trial practice. The important thing is that in many instances the Federal Rules provide answers to questions about what rules of evidence govern particular issues. The fact that they do not provide all the answers means that they are not a perfect guide to solving evidence problems. But, the fact remains that the rules can be most useful.

Related to the idea that lawyers and judges now have a better reference for quick decisions than they ever had before is the fact that law schools are using the Federal Rules of Evidence more and more in training young lawyers. Many come out of law school with full knowledge of the Federal Evidence Rules and are able to put their knowledge to work immediately in federal courts throughout the United States. Prior to the adoption of these rules, it was a rare jurisdiction indeed in which a lawyer could feel comfortable citing the evidence rules that he learned in a law school course. The fact that new lawyers who pour out of law schools in ever increasing numbers, know the

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49 See 21 C. WRIGHT & K. GRAHAM, supra note 8, § 5006, at 96.
50 See, e.g., id.
51 Elsewhere I have noted that "Congress clearly did not intend to make the new Federal Rules completely self-sufficient." S. SALTZBURG & K. REDDEN, supra note 38, at 735. This reference attempts to set forth guidelines for filling out the interstices of the Federal Rules. The analysis suggested requires that different sections of the Rules be treated differently, and several guidelines for interpretation are suggested. Id. at 735-44.

The point has been made in some commentaries, see, e.g., 21 C. WRIGHT & K. GRAHAM, supra note 8, § 5001 at 1-2, that the Federal Rules principally build upon earlier codification attempts and not upon previous statutes or decisions. This seems to me to be an overstatement of the case. Earlier codification attempts themselves built upon common law decisions, as Professor Morgan was careful to point out in his commentary to the Model Code. In addition, the Advisory Committee's Notes accompanying its draft of the Federal Rules cited federal statutes and decisions from time to time when relevant. Moreover, the Notes cited the work of Wigmore and McCormick and others. Many statutes and decisions are discussed therein. To say that these were not carefully considered is to suggest that the secondary sources were read but not the original material referred to, a proposition which seems doubtful to me. It is true that prior codification attempts received attention, but it is equally true that this attention was not exclusive. Finally, Congress asked for analysis of certain common law authorities, especially with respect to privileges, in considering the rules. See, e.g., S. SALTZBURG & K. REDDEN, supra note 38, at 202-17. Thus, there was attention given to common law authorities.

52 I never would suggest that the Rules are perfect. I have not hesitated to criticize the drafting of many and to recommend either amendment or a judicial construction designed to avoid problems. See, e.g., S. SALTZBURG & K. REDDEN, supra note 38, at 287, 388-90, 531.
Federal Rules better each year, as the Rules are cemented into the law school curriculum, means that their ability to make quick and accurate decisions in the courtroom is likely to be greater and greater as time goes on. The existence of the Federal Rules and their use in their training of young lawyers may very well make young lawyers even better able to use the Rules than some attorneys who have been out practicing for a considerable period of time.

A second important point is that the Rules are likely to have lasting significance for federal courts because their very existence has forced federal judges to talk to each other more than they have in recent years, perhaps more than they ever have, about rules of evidence and how they should be applied. Although the Model Code was controversial and was debated in some quarters, the fact is that it was attacked from its inception and never had many adherents among the regular bar. Although the Uniform Rules did fare a little better, they too never received widespread adoption. These earlier codification attempts were debated, but the debate appears to have been of a different sort than the discussion of this set of Federal Rules, supported from the beginning of the drafting by the Supreme Court.53

During 1975 and 1976, I had the privilege and pleasure of participating in a series of workshops held in every federal circuit of the United States, but one, for the district judges sitting in the respective circuits. Virtually all of the judges attended what turned out to be a clinical session on the Federal Rules. One criminal and one civil problem, both raising a host of evidence questions, were used in an effort to get the judges to see how the Rules fit together and how they might apply somewhat differently in civil and criminal cases. Even in the one circuit where the program was not held, the judges had their own program on evidence rules. Federal judges discussed what the new Rules meant, how they should best be used and interpreted, and the problems that were likely to arise. To this day, I believe that because the judges were so active in thinking about evidence problems, certain errors that had crept into their past performances were eliminated. In large part, this came as a result of conferences with their colleagues. Similar programs on evidence still are regular fare in many districts. As a result of discussion and thought about the Federal Rules, judicial rulings on evidence are likely to be better and more informed than in pre-Rules days.

Just as the judges are now more familiar with the Rules, lawyers too are gradually becoming more familiar with them. Today's seminar highlights this point. As a result of continuing legal education courses held throughout the country and sponsored by different groups, lawyers are beginning to realize that the Federal Rules are going to be more and more important to them as they continue to practice law. As noted above, there is a possibility that lawyers who have been out of law school for some years and who, therefore,

53 The same advantage accrues to states that codify evidence rules, something that I learned first-hand when I served as the Reporter to the Supreme Court of Alaska on Alaska Rules of Evidence. Two justices on the court indicated that they believed that the Model Code and the Uniform Rules had triggered significant debate. But, in speaking to Alaska trial judges and practicing lawyers, and in working with a special advisory committee appointed by the Alaska Supreme Court, it became clear that once the idea of really having a set of Rules set in, lawyers and judges began to think about evidence issues in a more determined and concerned way than they previously had.

Prior to the adoption of a code, it has to be more difficult to foster seminars for, and to promote debate among, judges and lawyers since they often cannot agree on where to begin to talk about
never studied the Federal Rules in law school, may find that the Rules require more of an adjustment than younger lawyers who learned their evidence in large measure by studying either a draft version or the actual Federal Rules. New discussions of evidence law have been generated by the adoption of the Federal Rules, and new suggestions for revisions of evidence law have been made. In the several states that have adopted evidence codes based on the federal model, one finds at crucial places departures from the approach of the Federal Rules. This indicates that the states are thinking through their own problems and sometimes resolving them in ways that are much different from the resolution of the Federal Rules. Whether the state rules or the Federal Rules are better is not the important thing; what is important is that people are rethinking old evidence concepts and are trying to bring them into line with 20th century concepts.

A third advantage to adoption of the Federal Rules is that the Federal Rules have provided judges and lawyers with answers to questions that heretofore have been up in the air. There is an argument that having answers to some questions, especially evidence questions, is more important than having the correct answers. For 200 years we have struggled to define the evidence rules that we think should be used in the various courtrooms of the United States. We have had the benefit of the best thinking of Wigmore and his multi-volume treatise, and of many other evidence scholars — lawyers, judges and professors. The Federal Rules of Evidence make certain decisions, albeit controversial ones, that signify it is better in some instances to have an imperfect rule that can be clearly stated and used now, than to wait for a perfect rule to be developed. Having a certain answer avoids continual litigation on repetitive points and indicates to lawyers more clearly what rules govern the litigation game than did the common law system; lawyers are better able to predict their clients' chances of prevailing in the contest and to advise clients accordingly.

Senior Judge Henry J. Friendly, (then Chief Judge), testified before the Congress in opposition to the Federal Rules. He warned that adoption of the Rules would produce more appeals and more reversals. From conversations with appellate judges in the federal system and in some state systems that have adopted versions of the Federal Rules, I have learned that many doubt the validity of Judge Friendly's prophesy. But I am prepared to accept it as true, at least in the short run. Undoubtedly, it will take some time, as it would with any code or set of rules, to shake down the defects, to explain some of the new language, to fill in the gaps, and to clarify the meaning of some of the vague terms used. But, one would expect, as years go by, that things will become clearer. If the appellate courts do not perform well the task of clarification, one can expect that the Rules will be amended to promote clarity. In the long run, lawyers, litigants and judges should be able to know the rules of the game better than they did prior to the Rules' taking effect. This evidence law, and they disagree so much on what their law is that it is not easy to move to a discussion of how to improve it.


should promote planning for litigation, increase chances of obtaining fair settlements, and avoid the need for appellate review on many points of evidence law. To the extent that appellate courts are called upon to decide evidence questions, they should be deciding only the most important questions. No longer will appellate judges be saying the same things they have said for 200 years about basic evidence doctrines. These are taken care of by the Rules. Now appellate tribunals are free to devote their attention to truly important questions. As a result, some appellate courts are beginning to rethink traditional and important evidence doctrines.\textsuperscript{56}

These arguments help to make a case that the Federal Rules of Evidence are a significant development in modern lawyering. But the most powerful argument remains to be made. It is ironic that this argument should be made at a time when many lawyers and judges believe that, for better or worse, the Burger Court is cutting back on or limiting some of the major Warren Court decisions.

The decisions of the Warren Court probably stood in the popular mind for one principle above all others: \textit{i.e.}, equality of citizens’ rights is fundamental. Whether it be the school desegregation cases,\textsuperscript{57} the one-person one-vote cases,\textsuperscript{58} cases recognizing the right of criminal defendants to know and exercise their constitutional rights,\textsuperscript{59} or cases providing “average” citizens access to fellow citizens for purposes of speech,\textsuperscript{60} one message that resounded loud and clear was that citizens have a right to a certain amount of equal treatment. Today, some people see the Burger Court as retreating in the area of school desegregation,\textsuperscript{61} as less sensitive than the Warren Court to voting rights claims,\textsuperscript{62} as not very concerned that criminal defendants have a full opportunity to know and to exercise their constitutional rights,\textsuperscript{63} and as uninterested in protecting the ability of the average citizen to effectively speak to fellow citizens.\textsuperscript{64}

My purpose here is neither to support nor to attack either the Warren Court or the Burger Court. It is not necessary for me to argue that the older decisions were better and more enlightened, or that the more recent decisions chart a more judicious and responsible course. Nor is it necessary for me to debate the extent to which recent decisions actually make inroads into precedents. It is sufficient for my purposes to note there is little doubt that the

\textsuperscript{56} See, e.g., Diversified Indus. Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1978); United States v. Beechum, 555 F.2d 487, \textit{rehearing granted}, 563 F.2d 782 (5th Cir. 1977).
\textsuperscript{60} See, e.g., Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968).
\textsuperscript{64} See, e.g., Hudgens v. N.L.R.B., 424 U.S. 507 (1976); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).
Burger Court has limited some of the “equality” decisions of the Warren Court. But I would emphasize that the Burger Court has fully supported the earlier efforts of the Warren Court to generate Federal Rules of Evidence. One legacy of equality that I believe Chief Justice Warren will leave to the United States, no matter what happens to the substantive constitutional decisions of his Court, is the Federal Rules of Evidence. As noted earlier, although the Rules were not enacted until Chief Justice Burger took office, the preliminary study, the appointment of the drafting committee and the actual drafting all took place during the years of Chief Justice Warren. These Rules will be a lasting tribute to a fundamental kind of equality in United States courts that no Supreme Court seems likely to disturb.

Prior to the adoption of the Federal Rules of Evidence, every practicing lawyer knew that when he or she walked into a courtroom, having by lot drawn one particular judge, that judge’s own set of evidence rules was likely to be employed. The same lawyer knew that when chance assigned another judge to a case, a different set of evidence rules well might be employed. Lawyers learned to play whatever game each trial judge established. Trial judges often established rules of thumb for their courts because they had no other rules to guide them. When it came to evidence rulings, appellate courts did little to minimize the impact of the idiosyncracies of a trial judge. In some jurisdictions there were probably almost as many sets of evidence rules as trial judges.

Some time ago Justice Robert Jackson commented that “[t]he rights of clients, like the liberties of our people are only those which some lawyer can make good in a courtroom.” What was wrong with evidence law prior to the Federal Rules was that no lawyer could be sure what set of rules would be employed in a courtroom and whether he could vindicate his client’s rights or his client’s liberties before a particular judge. Admittedly, this argument easily can be overstated; in some jurisdictions judges may have ruled more uniformly than in others. Virtually every lawyer to whom I have spoken, however, is able to point in his or her jurisdiction to peculiar doctrines and sui generis rules of thumb that were developed by individual judges, and that were different from those of their colleagues on the bench.

There is something terribly wrong with a single system that allows cases to be tried differently in different courtrooms, so that different rules govern the way in which the evidence that is necessary to resolve the case will be presented. If the Congress ever were to pass a statute that said in courtroom “A” a litigant would get the benefit of one rule, but that in courtroom “B” across the hall the same litigant dealing with the same case would have to use a different rule, I doubt that courts would allow that legislation to stand for a moment. Yet, that was precisely the situation in courtroom after courtroom prior to the adoption of the Federal Rules. Different sets of evidence rules were employed, and different sets of evidence rules can produce different outcomes. Although it is probably true that no one ever will be able to demonstrate the extent to which the different rules actually did produce disparate results, it also is true that no one ever will be able to deny the real possibility that the percentage was more than de minimus.

What the Federal Rules of Evidence establish is that the words "Equal Justice Under Law," chiseled in stone on the front of the Supreme Court Building, are now to be chiseled into everyday reality in every federal trial court in the nation. No longer will there be two, three or ten sets of evidence rules depending on the number of judges that happen to sit on a given bench. To the extent that we can do it and make it work, there will be one set of evidence rules that will be applied uniformly throughout the United States. I have already pointed out the practical benefits of such a rule. The symbolic benefits are equally important. Litigants, rich or poor, wise or unwise, represented by retained counsel or by appointed lawyers, all will know that the same evidence rules apply to each of them. This is no small step in the march toward equal justice.

Now it is true that rules do not do justice; men and women do justice. But the thrust of American law this century is to recognize that men and women do justice largely by rules, and the Federal Rules of Evidence are a landmark step toward further recognition of that fact. What is most encouraging is that the federal bench, which may at this point be as fine a bench as we have ever had, despite the political nature of judicial appointments, has for the most part welcomed the Rules. Their symbolic quality has not been lost on most federal judges. The notion of equal treatment is a powerful one, and one which they seem pleased to share.

The question may arise whether even a modicum of equal justice will be forthcoming as a result of the adoption of a set of rules that gives enormous discretionary power to trial judges. Consider, for example, that under Rule 102, the trial judge is given instructions as to how to construe the Rules in order to promote the ascertainment of the truth and the just determination of proceedings; under Rule 403, the judge is allowed to balance the probative value of evidence against certain evils; under Rule 412, the new rape shield law, the trial judge is called upon to balance probative value against prejudicial effect in a very specific context; under Rules 609(a) and (b), the trial judge once again is called upon to perform a very specific kind of balancing of probative value against prejudicial effect; under subdivision (d) of Rule 609, the judge is asked to determine when an exception should be created from a general presumption against admissibility in order to serve the interests of justice; under Rule 611, the judge is given enormous control over the way in which a trial is conducted and the manner in which witnesses are to be protected against harassment; under Rules 702, 703 and 705, the judge is given great control over the use of expert witnesses and the form which their testimony will take; under Rule 701, the judge has discretion to exclude opinion evidence as not being helpful or to admit it as it may assist the trier of fact; under Rule 706, the trial judge has the authority to appoint an independent expert; under Rule 614, the judge can call and question witnesses; under Rules 803(6) and (8), the judge can determine that the way in which evidence was gathered was sufficiently untrustworthy to warrant its exclusion; under the residual hearsay exceptions, Rules 803(24) and 804(b) (5), the judge is given authority to create special exceptions, albeit narrow ones, from the general ban on hearsay evidence to meet the needs of particular cases; and under Rule 1003, the judge has the authority to either require or not require an accounting for the absence of an original document.
This is hardly an exclusive list of the powers given to the trial judge under the Federal Rules of Evidence. Lest the list frighten anyone, I should note immediately that appellate courts have held that with these explicit powers go responsibilities. Under Rules 403 and 609 especially, where the balancing that the trial judge is to do is never exact, more and more appellate courts are asking trial judges to state reasons for their rulings. As the United States Court of Appeals for the Second Circuit stated, "[a]lthough Rule 403 has placed great discretion in the Trial Judge, discretion does not mean immunity from accountability." 66 The Third Circuit made it clear that the balancing that is to be done "is not a pro forma one. A sensitive analysis of the need for the evidence as proof on a contested factual issue, of the prejudice which may eventuate from admission, and of the public policies involved is in order before passing on such an object [under Rule 403]." 67 The court went on to say that "[t]he substantiality of the consideration given to competing interests can be best guaranteed by an explicit articulation of the trial court's reasoning." 68

The long and the short of it is that trial judges have been told that they are going to be held accountable by appellate courts for their discretionary rulings. 69 Now that trial judges understand this, many are becoming accustomed to making a careful record, setting forth the reasons why evidence is either admitted or rejected. The more careful the trial judge is at trial, the easier the task the appellate court has. More importantly, the more careful the trial judge is in making a record, the less incentive a party has to take an appeal, because when the trial judge states reasons for the record, the trial judge rarely will be reversed. It will take something like an abuse of discretion or a clear-cut error in order to warrant a reversal. 70

Trial judges have some power under Rules like 103(b) to create a good record. But to do it right, they need the help of the lawyers. So it is more and more common to see the trial judge ask the lawyer who makes a Rule 403 objection or a Rule 609 attempt at impeachment to state exact reasons why evidence is objectionable or why it should be admitted. When the trial judge puts the burden on the lawyers, the task of the trial judge in stating reasons is greatly simplified. It is the lawyer's responsibility to make the arguments, and it is the judge's responsibility to rule. The judges who are most likely to find appellate decisions requiring a statement of reasons to be onerous are those judges who for too long have disregarded the role of counsel in their courts in making objections and specifying grounds therefor. Such judges must begin to change their ways. And lawyers can insist that judges do, by asking for a specification of the grounds for a ruling. 71 When judges are called upon to account for their actions, they increasingly call upon lawyers to account for theirs. Accountability becomes the name of the game. Given a system in
which the lawyers are accountable and the trial judges are accountable, the system is likely to function as Chief Justice Warren probably envisoned that it would — i.e., as equitably as a system can that is administered by fallible men and women.

From time to time a decision is handed down that runs smack in the face of a Rule. One that comes to mind is a recent decision of the United States Court of Appeals for the Ninth Circuit in United States v. Batt. 72 Despite an explicit provision in Rule 608(b) that impeachment by prior bad acts is limited to questions put to the witness on the stand and that extrinsic evidence is not to be admitted, the Court of Appeals attempted to use Rule 102 as a way around the more explicit language in Rule 608. The opinion was a bad one, because, if allowed to stand, it would have cast doubt on the legitimacy of the whole system of codified evidence rules. More significant than the initial opinion itself was that there was a dissent which pointed out the problem and ultimately led the panel to withdraw its opinion. 73 Perhaps this signifies a recognition on the part of the panel that it was out of step with the philosophy of a federal evidence code.

As federal trial judges face new demands and endeavor to meet the goals of those who for such a long time have supported codification, and as lawyers strive to meet the new demands placed upon them by trial judges, we may begin to see a new system of litigation, a system where high quality litigation is commonplace, rather than rare, a system in which the Chief Justice of the United States is concerned not with removing incompetent lawyers from practice, but is only concerned with assuring that the level of performance is always on the rise.

Prior to the adoption of the Federal Rules, the argument was made that federal uniformity was not necessary and that it would be preferable to require federal courts to follow state evidence law. 74 The theory was that it would be preferable for lawyers, who generally practice in only one state, to know that the same evidence law applies in both state and federal courts. While this argument had some force, it was probably much overstated. Today it could be dismissed with the notation that we have Federal Rules and it is too late in the day to lament the fact that they are part of our federal law. But such a response, although it might save time, hardly would inspire the kind of confidence in the utility of the Federal Rules that I have advocated. Hence, I would like to address my remarks to the concept of intrastate uniformity, as opposed to system-wide uniformity in the federal courts throughout the United States.

The fatal flaw in the argument for intrastate uniformity is that it assumes that federal judges and lawyers who look to state law could find it. At an

72 558 F.2d 513 (9th Cir.), vacated, 573 F.2d 599 (1977), appeal pending.
73 See United States v. Batt, 573 F.2d 599 (9th Cir. 1977). This time the Ninth Circuit approved the admission of the disputed evidence on the sole basis of Rule 404(b). Judge Kennedy again dissented, arguing that Rule 404(b) should not permit a jury's consideration of extrinsic, and in this case, illegally-seized evidence. For a case applying pre-Rules law and citing Rule 608 as persuasive authority for the point that a "no extrinsic rule" means what it says, see United States v. Ling, 581 F.2d 1118 (4th Cir. 1978). For a post-Rules case rejecting the Batt approach, see United States v. Herman, 589 F.2d 1191 (3d Cir. 1978).
earlier point, I emphasized that one of the gravest pre-Rules problems was the existence of multifarious evidence rules that seemed to pop up in individual courtrooms in every state in the union. To say that federal judges and lawyers should use state law would be to decide that that state of affairs is tolerable. Also, it would signify that the thousands of cases found in the Wigmore treatise are the law that federal courts should follow. For the pragmatic reasons stated earlier, such an approach is unworkable and unacceptable. Also, to bind federal judges to follow the evidence law of the states in which they sit would be to bind them to read the reported decisions of every level of the state system as well as the reported decisions of federal tribunals. Lawyers would share this burden too. Although it might be thought that lawyers bear the burden now, at least if they practice in both federal and state courts, some lawyers have a practice that is predominantly federal. Keeping up with the securities and antitrust cases or the criminal decisions of federal courts is a sufficient workload for any lawyer.

Among the other problems that federal judges would face if they had followed state law is that they would have no opportunity for input as to what the state law should be. Certainly, this would lead to enormous frustration on the part of the federal bench. Amendments to evidence rules might not be made by the states even if every federal judge in the country agreed that amendments were necessary.

Imagine the increased burden placed on appellate judges who would have to determine state evidence law in a number of jurisdictions. It is true that sometimes they are called upon to determine state law even now, but this is often viewed as a cost, not a benefit, of certain forms of federal litigation.

Government lawyers who litigate important kinds of cases in different jurisdictions would have to be familiar with fifty sets of evidence rules. And even if local counsel were retained to assist the regular government lawyer, the local counsel might have little idea how to integrate the state evidence rules into the government's theory of a case. Decisions on where to file suits against large corporations on major federal questions would be made on evidence law grounds, rather on grounds of convenience in carrying forward litigation. Federal questions would be decided with no uniform rules to help guarantee uniform outcomes. Sometimes, Congress may opt for such a system, but it does so infrequently, and federal courts have stood ready to protect federal policy from state encroachments.

The fact is, I think, that those who feared federal uniformity viewed the sixty-three evidence rules that were adopted (sixty-four now with the addition of Rule 412) as being more complicated than they really turned out to be.

75 Id. at 604-05. There is a stronger case for following state privilege law, which probably has as much impact on out-of-court conduct as on in-court conduct. Even here, however, the fact that state law often is unclear means that out-of-court conduct is conducted at the peril of the actor. Had the rules on privileges approved by the Supreme Court gone into effect, the specific rules of federal privilege now would be clear. Unfortunately, Congress enacted a general rule on privileges that provides no more guidance in particular instances than does the common law of most states. Despite the fact that the Supreme Court's privilege rules were not adopted for the federal courts, they have had a great impact on some states that have codified rules. In the long run, they may still be deemed to be a great service to the clients, patients, and spouses of the world who rely on evidentiary privileges.

be.77 Without doubt, some effort is required of judges and lawyers who desire to master the rules. But it is also plain that a fair amount of effort produces an ability to handle the rules with ease, or at least with relative ease when one thinks about memorizing (and perhaps carrying into court) the entire Wigmore treatise on evidence. For some reason that is difficult to fathom, those who feared the federal rules also believed that they restricted the discretion of the trial judge.78 Hopefully, I have demonstrated in my previous comments that this is untrue. Enormous discretion remains, but that discretion is controlled and is subject to some accountability.

Had there been state codes as good as the Federal Rules in effect prior to the Federal Rules project, the argument for following state law would have been stronger. Had the Model Code or the Uniform Rules caught on in a majority of jurisdictions, there might have been no need for federal rules. But there were few state codes and the codification effort was unsuccessful before the adoption of the Federal Rules. Thus, the need for uniform rules is real and their adoption was a plus for federal trial and appellate practice.79

V. CONCLUSION

Thus, it is my conclusion that the Federal Rules of Evidence are significant for practical and philosophical reasons. At this point, I hope that I have persuaded you that the Federal Rules of Evidence do hold out the promise of more efficient trial and appellate courts, of better lawyering, and of more equal justice for all. The evidence rules signify the continuing belief that every case tried in a federal court is a “federal case” in the best sense of the term and that it ought to be taken seriously and that all litigants ought to be handled as if their cases really mattered. That is the challenge of the Federal Rules of Evidence. This program is a step toward meeting that challenge. For that reason, I thank you for having me participate.

77 One commentary criticizes the Preliminary Study, supra note 13, for not taking into account certain costs, e.g., what it would cost lawyers to outfit their libraries with multi-volume treatises on the Rules. See 21 C. WRIGHT & K. GRAHAM, supra note 8, § 5006, at 96. It is interesting that it is the authors of a multi-volume treatise who raise this point. My own belief is that most lawyers can practice very well in federal court using the Federal Rules of Evidence with a one-volume work. Obviously, I am not unbiased, however, since I have coauthored such a book and have endeavored to make it a practical resource for the average trial lawyer and judge. The book is the FEDERAL RULES OF EVIDENCE MANUAL (2d ed. 1977), together with the 1978 Supplement.

78 See, e.g., Weinberg, supra note 74, at 609-12.

79 One more comment is in order on the subject of the costs and benefits of a uniform system of evidence rules for federal courts: If the opponents of such rules had been correct in forecasting that states would be reluctant to follow the federal lead, then the burden placed on lawyers of having to deal with two sets of evidence rules in the same jurisdiction might have been more troublesome than it turns out to be. With hindsight we know that the same states that found the Model Code and the Uniform Rules to be unacceptable have applauded the Federal Rules. The Preliminary Study was correct; the adoption of Federal Rules has generated state reform of evidence law, so that soon lawyers in most states will have, if not identical rules applicable in state and federal courts, laws that are much alike. Thus, we now know that the burden on the bar is not a very significant concern. Somewhat surprisingly, this is the case even in jurisdictions that have not adopted the Federal Rules. To a surprising extent, state courts have adopted portions of the Rules as part of state law by judicial decision. See, e.g., State v. Morgan, 541 S.W. 2d 385 (Tenn. 1976). In a number of Continuing Legal Education sessions sponsored by the American Law Institute and the American Bar Association's Committee on Continuing Legal Education, lawyers have reported that state trial judges will accept references to the Federal Rules as persuasive authority when state law is unclear.