

FEDERAL RULES OF EVIDENCE

2009–2010 Edition

also including
CALIFORNIA EVIDENCE CODE
(with selected comments)
UNIFORM RULES OF EVIDENCE
WESTLAW ELECTRONIC RESEARCH GUIDE
REPORT ON CASELAW DIVERGENCE FROM FRE

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FEDERAL RULES OF EVIDENCE 2009–2010 Edition

Including
Notes by the Federal Judicial Center
Pertinent Advisory Committee Notes
Relevant Legislative History
References to McCormick on Evidence, 6th
Deleted and Superseded Materials
also

CALIFORNIA EVIDENCE CODE
(With Selected Comments)

UNIFORM RULES OF EVIDENCE

ELECTRONIC RESEARCH IN EVIDENCE

**NOTES ON CASE LAW DIVERGENCE FROM THE
FEDERAL RULES OF EVIDENCE**

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INTRODUCTION¹

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 the Congress. P.L. 93-12. After extensive study, the Congress enacted the rules into law with various amendments, to become effective July 1, 1975. P.L. 93-595, approved January 2, 1975, 88 Stat. 1926. 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 the 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 were 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 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 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.

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).

References to McCormick Text. The first item after each federal rule in the Pamphlet is a heading "Section References, McCormick 6th ed." [It should be noted that these references will differ somewhat from those of McCormick 1st Edition utilized in the Advisory Committee Notes following each rule.] Under it are the numbers of the text sections where the rule is mentioned or discussed, with the discussions more in depth shown in italics. Judicial decisions and other authorities construing the rule will be found in the listed sections. Any differences between the federal rule and the revised Uniform rule are pointed out in the text. Sections where the background and current posture of the common law are set forth and evaluated will be found near, usually preceding, sections discussing the rule.

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 by 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 the light of reason and experience," and the provisions of Rules 803(24) and 804(b)(5) 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 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

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. 1 § 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.

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

7. *Kennedy v. Great Atlantic & Pacific Tea Co.*, 551 F.2d 593 (5th Cir.1977), rehearing denied 554 F.2d 475.

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 the 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.

8. *United States v. Beechum*, 555 F.2d 487 (5th Cir.1977). The panel decision was overturned in banc. 582 F.2d 898, cert. denied 440 U.S. 920.

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FEDERAL RULES OF EVIDENCE FOR UNITED STATES COURTS *

PUBLIC LAW 93-595; 88 STAT. 1926

Approved Jan. 2, 1975

[H.R. 5463]

An Act to establish rules of evidence for
certain courts and proceedings.

*Be it enacted by the Senate and House of Representatives of the United
States of America in Congress assembled, That:*

The following rules shall take effect on the one hundred and
eightieth day beginning after the date of the enactment of this Act.
These rules apply to actions, cases, and proceedings brought after the
rules take effect. These rules also apply to further procedure in actions,
cases, and proceedings then pending, except to the extent that applica-
tion of the rules would not be feasible, or would work injustice, in which
event former evidentiary principles apply.

ORDER OF APRIL 30, 1979

1. That Rule 410 of the Federal Rules of Evidence be, and it hereby
is, amended to read as follows:

[See amendment made thereby following Rule 410, post.]

2. That the foregoing amendment to the Federal Rules of Evidence
shall take effect on November 1, 1979, and shall be applicable to all
proceedings then pending except to the extent that in the opinion of the
court the application of the amended rule in a particular proceeding
would not be feasible or would work injustice.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to
transmit to the Congress the foregoing amendment to the Federal Rules
of Evidence in accordance with the provisions of 28 U.S.C. § 2076.

CONGRESSIONAL ACTION ON AMENDMENT PROPOSED APRIL 30, 1979

Pub.L. 96-42, July 31, 1979, 93 Stat. 326, provided that the amend-
ment proposed and transmitted to the Federal Rules of Evidence affect-
ing rule 410, shall not take effect until Dec. 1, 1980, or until and then
only to the extent approved by Act of Congress, whichever is earlier.

* References to sections of *McCormick on Evidence*, 6th ed. follow the text of each Rule.
The more important section references are printed in italic.

FEDERAL RULES OF EVIDENCE

ORDER OF MARCH 2, 1987

1. That the Federal Rules of Evidence be, and they hereby are, amended by including therein amendments to Rules 101, 104, 106, 404, 405, 411, 602, 603, 604, 606, 607, 608, 609, 610, 611, 612, 613, 615, 701, 703, 705, 706, 801, 803, 804, 806, 902, 1004, 1007 and 1101, as hereinafter set forth:

[See amendments made thereby under respective rules, post.]

2. That the foregoing changes in the Federal Rules of Evidence shall take effect on October 1, 1987.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing changes in the rules of evidence in accordance with the provisions of Section 2076 of Title 28, United States Code.

ORDER OF APRIL 25, 1988

1. That the Federal Rules of Evidence be, and they hereby are, amended by including therein amendments to Rules 101, 602, 608, 613, 615, 902, and 1101, as hereinafter set forth:

[See amendments made thereby under respective rules, post.]

2. That the foregoing changes in the Federal Rules of Evidence shall take effect on November 1, 1988.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing changes in the rules of evidence in accordance with the provisions of Section 2076 of Title 28, United States Code.

ORDER OF JANUARY 26, 1990

1. That the Federal Rules of Evidence be, and they hereby are, amended by including therein amendments to Rule 609(a)(1) and (2), as hereinafter set forth:

[See amendment made thereby, post].

2. That the foregoing changes in the Federal Rules of Evidence shall take effect on December 1, 1990.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing changes in the rules of evidence in accordance with the provisions of Section 2074 of Title 28, United States Code.

ORDER OF APRIL 30, 1991

1. That the Federal Rules of Evidence for the United States District Courts be, and they hereby are, amended by including therein amendments to Evidence Rules 404(b) and 1102.

[See amendments made thereby under respective rules, post.]

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2. That the foregoing amendments to the Federal Rules of Evidence shall take effect on December 1, 1991, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Evidence in accordance with the provisions of Section 2072 of Title 28, United States Code.

ORDER OF APRIL 22, 1993

1. That the Federal Rules of Evidence for the United States District Courts be, and they hereby are, amended by including therein amendments to Evidence Rules 101, 705, and 1101.

[See amendments made thereby under respective rules, post.]

2. That the foregoing amendments to the Federal Rules of Evidence shall take effect on December 1, 1993, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Evidence in accordance with the provisions of Section 2072 of Title 28, United States Code.

ORDER OF APRIL 29, 1994

1. That the Federal Rules of Evidence for the United States District Courts be, and they hereby are, amended by including therein amendments to Evidence Rule 412.

[See amendments made thereby under respective rules, post.]

2. That the foregoing amendments to the Federal Rules of Evidence shall take effect on December 1, 1994, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Evidence in accordance with the provisions of Section 2072 of Title 28, United States Code.

ORDER OF APRIL 11, 1997

ORDERED:

1. That the Federal Rules of Evidence be, and they hereby are, amended by including therein amendments to Evidence Rules 407, 801, 803(24), 804(b)(5), and 806, and new Rules 804(b)(6) and 807.

FEDERAL RULES OF EVIDENCE

2. That the foregoing amendments to the Federal Rules of Evidence shall take effect on December 1, 1997, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Evidence in accordance with the provisions of Section 2072 of Title 28, United States Code.

ORDER OF APRIL 24, 1998

ORDERED:

1. That the Federal Rules of Evidence be, and they hereby are, amended by including therein amendments to Evidence Rules 615.

2. That the foregoing amendments to the Federal Rules of Evidence shall take effect on December 1, 1998, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Evidence in accordance with the provisions of Section 2072 of Title 28, United States Code.

ORDER OF APRIL 17, 2000

ORDERED:

1. That the Federal Rules of Evidence for the United States District Courts be, and they hereby are, amended by including therein amendments to Evidence Rules 103, 404, 702, 703, 803(b) and 902.

2. That the foregoing amendments to the Federal Rules of Evidence shall take effect on December 1, 2000, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Evidence in accordance with the provisions of Section 2072 of Title 28, United States Code.

ORDER OF MARCH 27, 2003

ORDERED:

1. That the Federal Rules of Evidence for the United States District Courts be, and they hereby are, amended by including therein amendments to Evidence Rule 608(b).

2. That the foregoing amendments to the Federal Rules of Evidence shall take effect on December 1, 2003, and shall govern in all

FEDERAL RULES OF EVIDENCE

proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Evidence in accordance with the provisions of Section 2072 of Title 28, United States Code.

ORDER OF APRIL 12, 2006

ORDERED:

1. That the Federal Rules of Evidence be, and they hereby are, amended by including therein the amendments to Evidence Rules 404, 408, 606 and 609.

2. That the foregoing amendments to the Federal Rules of Evidence shall take effect on December 1, 2006, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That the CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Evidence in accordance with the provisions of Section 2072 of Title 28, United States Code.

CONGRESSIONAL ACTION ON PROPOSED RULE 502

Pub.L. 110-322, September 19, 2008, 122 Stat. 3537, added Rule 502 to the Federal Rules of Evidence and inserted it in the Table of Contents. The amendments apply in all proceedings commenced after September 19, 2008, and, insofar as is just and practicable, in all proceedings pending on that date.

FEDERAL RULES OF EVIDENCE

ARTICLE I. GENERAL PROVISIONS

Rule

- 101. Scope.
 - 102. Purpose and Construction.
 - 103. Rulings on Evidence.
 - (a) Effect of Erroneous Ruling.
 - (b) Record of Offer and Ruling.
 - (c) Hearing of Jury.
 - (d) Plain Error.
 - 104. Preliminary Questions.
 - (a) Questions of Admissibility Generally.
 - (b) Relevancy Conditioned on Fact.
 - (c) Hearing of Jury.
 - (d) Testimony by Accused.
 - (e) Weight and Credibility.
 - 105. Limited Admissibility.
 - 106. Remainder of or Related Writings or Recorded Statements.
-

Rule 101. Scope

These rules govern proceedings in the courts of the United States and before the United States bankruptcy judges and United States magistrate judges, to the extent and with the exceptions stated in rule 1101.

(As amended Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 25, 1988, eff. Nov. 1, 1988; Apr. 22, 1993, eff. Dec. 1, 1993.)

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

56 F.R.D. 183, 194

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

1987 Amendment

United States bankruptcy judges are added to conform this rule with Rule 1101(b) and Bankruptcy Rule 9017.

1988 Amendment

The amendment is technical. No substantive change is intended.

1993 Amendment

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