

Federal Rules *of* Evidence

*With Selected
Legislative History,
California Evidence Code,
and Case Supplement*

2003 Edition

Eric D. Green
Charles R. Nesson
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ASPEN
PUBLISHERS

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**With Selected Legislative History,
California Evidence Code, and
Case Supplement
2003 EDITION**

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PREFACE

This volume can be used with Green, Nesson, and Murray, *Problems, Cases, and Materials on Evidence, Third Edition* (Aspen Law and Business 2001) or any other set of evidence teaching materials.

The supplement contains the Federal Rules of Evidence as originally enacted by Congress and as subsequently amended. It includes, after each rule, the Advisory Committee's Notes and the relevant legislative history, such as the reports of the House and Senate Committees on the Judiciary, and, where appropriate, floor debate. Changes through December 31, 2002 have been included, as well as some proposed changes pending as this volume goes to press.

Also included in this volume is the California Evidence Code, which is valuable as a point of comparison to the federal rules. The California Evidence Code is updated to December 31, 2002 as well.

This supplement contains certain significant court decisions published since the last edition. It also contains, for the first time, materials on the ethical implications of presentation of evidence in court. These materials include excerpts from one of the authors' trial advocacy texts on this subject and an additional problem illustrating some of the ethical issues that arise in an evidentiary context. The authors welcome comment from colleagues and other users of this text on the inclusion of material of this character.

Finally, this supplement also includes an article urging the repeal or modification of many of the rules of evidence for nonjury civil trials. The purpose of this addition is to encourage debate and discussion about the base assumptions underlying the evidence law regime and about how this regime affects access to the courts by different groups of litigants.

The authors of this supplement wish to call their colleagues' attention to their Evidence Web Site at www.law.harvard.edu/publications/evidencecii/. This web site contains the contents of this supplement and the entire contents of the Third Edition of the casebook, along with a quantity of other cases and materials useful for scholars, teachers, students, and practitioners of the law of evidence. Use of the web site is free and open to the public. The authors welcome colleagues' or students' contributions of cases and other materials to be posted on the site, as well as comments and feedback on its usefulness as a resource for teaching or research.

The history of the codification process that resulted in the Federal Rules of Evidence began in 1942 when the American Law Institute adopted the Model Code of Evidence. The Model Code drafting and advisory committees included the great figures in the field of evidence—Edmund M. Morgan, John H. Wigmore, John M. Maguire, Mason Ladd, Charles T. McCormick, and others. Reformist and controversial, the Model Code stimulated debate and progress but was not adopted in any jurisdiction.

In 1948, the Commissioners on Uniform State Laws authorized a codification modeled on the structure of the Model Code. The 1954 Uniform Rules of Evidence that resulted were less radical than the Model Code and shorter in length. Yet the Uniform Rules were adopted only by Kansas (and partially by New Jersey), although they were widely cited by courts in interpreting the common law.

In 1961, Chief Justice Earl Warren appointed a special Judiciary Conference Committee to determine whether a federal evidence code was feasible and desirable. The committee responded affirmatively, and in 1965 the Chief Justice appointed an Advisory Committee on Rules of Evidence to draft proposed rules. A Preliminary Draft was published and circulated by the committee in 1969. 46 F.R.D. 161. In 1971, the Advisory Committee published a Revised Draft, 51 F.R.D. 315, which on November 20, 1972, was promulgated by the Supreme Court as the Federal Rules of Evidence, to be effective July 1, 1973. 56 F.R.D. 183.

The rules promulgated by the Supreme Court were transmitted to Congress pursuant to the Rules Enabling Act. Congress promptly enacted Pub. L. No. 93-12, 87 Stat. 9 (March 30, 1973), deferring the effective date of the rules until such time as they were enacted into law, and thereby allowing Congress time to consider issues raised by the rules.

The rules were referred to the House Committee on the Judiciary, which held extensive hearings on the rules and proposed several amendments including the deletion of all of the rules of privilege. A bill to establish federal rules of evidence, as amended by the House, was passed in February 1974. H.R. 5463, 93d Cong., 2d Sess. A similar process in the Senate, S. Rep. No. 1277, 93d Cong., 2d Sess., necessitated a conference. Agreement by the two chambers was reached in December 1974, Conf. Rep. No. 1597, 93d Cong., 2d Sess., and the rules were enacted into law January 2, 1975, to be effective July 1, 1975 except for Rule 410, which was to be effective August 1, 1975. Pub. L. No. 93-595, 88 Stat. 1926. A complete set of the original legislative documents is reproduced in Bailey & Trelles, *The Federal Rules of Evidence, Legislative Histories and Related Documents* (William S. Hein & Co., 4 vols., 1980).

The rules have subsequently been modified by Congress and the Supreme Court in a few instances, most recently by a series of Amendments which took effect December 1, 2002. Also, the Federal Judicial Center has drafted a set of historical notes that explain the development of the rules through

Preface

the legislative process. Where helpful, these notes have been included in this compilation.

More than thirty-five states, as well as the U.S. military and Puerto Rico, have enacted evidence codes substantially based on the federal rules, with many states in the process of drafting proposed codes based on the federal rules. California, with its own Evidence Code, is a major exception. Thus, although not without its critics, it is clear that the federal codification has become the most significant single source of evidence law in America.

The authors wish to acknowledge, with thanks, the helpful assistance of Gregory J. Comeau, HLS '05, in the preparation of this supplement.

Eric D. Green
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June 2003

SUMMARY OF RULE-MAKING AND AMENDMENT PROCESS

[The following is an excerpt from a pamphlet published by the Administrative Office of the U.S. Courts, entitled *The Federal Rules of Practice and Procedure—A Summary for Bench and Bar* (1993), outlining the process by which the Federal Rules are enacted and amended.]

AUTHORITY

The Congress has authorized the federal judiciary to prescribe the rules of practice, procedure, and evidence for the federal courts, subject to the ultimate legislative right of the Congress to reject, modify, or defer any of the rules. The authority and procedures for promulgating rules are set forth in the Rules Enabling Act. 28 U.S.C. §§2071-2077.

The Judicial Conference of the United States is also required by statute to “carry on a continuous study of the operation and effect of the general rules of practice and procedure.” 28 U.S.C. §331. As part of this continuing obligation, the Conference is authorized to recommend amendments and additions to the rules to promote;

- simplicity in procedure,
- fairness in administration,
- the just determination of litigation, and
- the elimination of unjustifiable expense and delay.

THE RULES COMMITTEES

The Judicial Conference’s responsibilities as to rules are coordinated by its Committee on Rules of Practice and Procedure, commonly referred to as the “Standing Committee.” 28 U.S.C. §2073(b). The Standing Committee has five advisory committees, dealing respectively with the appellate, bankruptcy, civil, criminal, and evidence rules. 28 U.S.C. §2073(a)(2). The Standing Committee reviews and coordinates the recommendations of the five

advisory committees, and it recommends to the Judicial Conference proposed rules changes “as may be necessary to maintain consistency and otherwise promote the interests of justice.” 28 U.S.C. §2073(b).

The Standing Committee and the advisory committees are composed of federal judges, practicing lawyers, law professors, state chief justices, and representatives of the Department of Justice. Each committee has a reporter, a prominent law professor, who is responsible for coordinating the committee’s agenda and drafting appropriate amendments to the rules and explanatory committee notes.

The Assistant Director for Judges Programs of the Administrative Office of the United States Courts currently serves as secretary to the Standing Committee, coordinates the operational aspects of the rules process, and maintains the records of the committees. The Rules Committee Support Office of the Administrative Office provides the day to day administrative and legal support for the secretary and the committees.

OPEN MEETINGS AND RECORDS

Meetings of the rules committees are open to the public and are widely announced. All records of the committees, including minutes of committee meetings, suggestions and comments submitted by the public, statements of witnesses, transcripts of public hearings, and memoranda prepared by the reporters, are public and are maintained by the secretary. Copies of the rules and proposed amendments are available from the Rules Committee Support Office.

HOW THE RULES ARE AMENDED

The pervasive and substantial impact of the rules on the practice of law in the federal courts demands exacting and meticulous care in drafting rule changes. The rulemaking process is time-consuming and involves a minimum of seven stages of formal comment and review. From beginning to end, it usually takes two to three years for a suggestion to be enacted as a rule.

The process, however, may be expedited when there is an urgent need to enact an amendment to the rules.

All interested individuals and organizations are provided an opportunity to comment on proposed rules amendments and to recommend alternative proposals. The comments received from this extensive and thorough public examination are studied very carefully by the committees and generally improve the amendments. The committees actively encourage the submission

Summary of Rule-Making and Amendment Process

of comments, both positive and negative, to ensure that proposed amendments have been considered by a broad segment of the bench and bar.

STEP 1. INITIAL CONSIDERATION BY THE ADVISORY COMMITTEE

MAKING SUGGESTIONS FOR CHANGES

Proposed changes in the rules are suggested by judges, clerks of court, lawyers, professors, government agencies, or other individuals and organizations. They are considered in the first instance by the appropriate advisory committees (appellate, bankruptcy, civil, criminal, or evidence). Suggestions for changes, additions, or deletions must be submitted in writing to the secretary, who acknowledges each letter and distributes it to the chair of the Standing Committee and the chair and reporter of the advisory committee.

The reporter normally analyzes the suggestions and makes appropriate recommendations to the advisory committee. The suggestions from the public and the recommendations of the reporter are placed on the advisory committee's agenda and are normally discussed at its next meeting. The advisory committees usually meet twice a year, and they also conduct business by telephone and correspondence.

CONSIDERATION OF SUGGESTIONS

In considering a suggestion for a change in the rules, the advisory committee may take several courses of action, including:

1. Accepting the suggestion, either completely or with modifications or limitations;
2. Deferring action on the suggestion or seeking additional information regarding its operation and impact;
3. Rejecting a suggestion because it does not have merit or would be inconsistent with other rules or a statute; or
4. Rejecting a suggestion because, while it may be meritorious, it simply is not necessary or important enough to warrant the significant step of an amendment to the federal rules.

The secretary is required, to the extent feasible, to advise the person making a suggestion of the action taken on it by the advisory committee.

DRAFTING RULES CHANGES

When an advisory committee decides initially that a particular change in the rules would be appropriate it normally asks its reporter to prepare a

Summary of Rule-Making and Amendment Process

draft amendment to the rules and an explanatory committee note. The draft amendment and committee note are discussed and voted upon at a committee meeting.

The Standing Committee has a style subcommittee that works with the respective advisory committees in reviewing proposed amendments to ensure that the rules are written in clear and consistent language. In addition, the reporter of the Standing Committee and the reporters of the five advisory committees are encouraged to work together to promote clarity and consistency among the various set of federal rules.

STEP 2. PUBLICATION AND PUBLIC COMMENT

Once an advisory committee votes initially to recommend an amendment to the rules, it must obtain the approval of the Standing Committee, or its chair, to publish the proposed amendment for public comment. In seeking publication, the advisory committee must explain to the Standing Committee the reasons for its proposal, including any minority or separate views.

After publication is approved, the secretary arranges for printing and distribution of the proposed amendment to the bench and bar, to publishers, and to the general public. More than 10,000 persons and organizations are on the mailing list, including

- federal judges and other federal court officers
- United States attorneys,
- other federal government agencies and officials,
- state chief justices,
- state attorneys general,
- legal publications,
- law schools
- bar associations, and

interested lawyers, individuals, and organizations requesting distribution.

The public is normally given 6 months to comment in writing to the secretary regarding the proposed amendment.

In an emergency, a shorter time period may be authorized by the Standing Committee.

During the 6-month comment period, and advisory committee schedules one or more public hearings on the proposed amendments. Persons who wish to appear and testify at the hearings are required to contact the secretary at least 30 days before the hearings.

STEP 3. CONSIDERATION OF THE PUBLIC COMMENTS AND FINAL APPROVAL BY THE ADVISORY COMMITTEE

At the conclusion of the public comment period, the reporter is required to prepare a summary of the written comments received from the public

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and the testimony presented at the hearings. The advisory committee then takes a fresh look at the proposed rule changes in light of the written comments and testimony.

If the advisory committee decides to make a substantial change in its proposal, it will provide a period for additional public notice and comment.

Once the advisory committee decides to proceed in final form, it submits the proposed amendment to the Standing Committee for approval. Each proposed amendment must be accompanied by a separate report summarizing the comments received from the public and explaining any changes made by the advisory committee following the original publication. The advisory committee's report must also include minority views of any members who wish to have their separate views recorded.

STEP 4. APPROVAL BY THE STANDING COMMITTEE

The Standing Committee considers the final recommendations of the advisory committee and may accept, reject, or modify them. If the Standing Committee approves a proposed rule change, it will transmit it to the Judicial Conference with a recommendation for approval, accompanied by the advisory committee's reports and the Standing Committee's own report explaining any modifications it made. If the Standing Committee makes a modification that constitutes a substantial change from the recommendation of the advisory committee, the proposal will normally be returned to the advisory committee with appropriate instruction.

STEP 5. JUDICIAL CONFERENCE APPROVAL

The Judicial Conference normally considers proposed amendments to the rules at its September sessions each year. If approved by the Conference, the amendments are transmitted promptly to the Supreme Court.

STEP 6. SUPREME COURT APPROVAL

The Supreme Court has the authority to prescribe the federal rules, subject to a statutory waiting period. 28 U.S.C. §§2072, 2075. The Court normally transmits proposed rules amendments to the Congress by May 1 of each year. 28 U.S.C. §2074.

STEP 7. CONGRESSIONAL REVIEW

The Congress has a statutory period of at least 7 months to act on any rules prescribed by the Supreme Court. If the Congress does not enact legislation to reject, modify, or defer the rules, they take effect as a matter of law on December 1. 28 U.S.C. §2074.

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In the case of the Federal Rules of Bankruptcy Procedure the statutory waiting period is 3 months. Accordingly, absent Congressional action proposed rules changes take effect on August 1. 28 U.S.C. §2075. . . .

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