

BACK TO THE FUTURE WITH PRIVILEGES

ABANDON CODIFICATION, NOT THE COMMON LAW

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I. INTRODUCTION AND OVERVIEW

A subcommittee of the Federal Rules of Evidence Advisory Committee is working on the codification of privilege rules that were so controversial when the evidence code was originally proposed, that Article V, containing all relationship privilege proposals, was eliminated from the proposed code to ensure its adoption.¹ I oppose this effort by the Advisory Committee, not because of the inherent absence of value in codification,² but because the process that has

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1. In contrast, situational or topical privileges, like subsequent remedial measures, Rule 407, and offers of compromise, Rules 408 and 410, were codified. Consequently, they are not the subject of this proposed codification in Article V. They are addressed in this article only to the extent they contain issues that have been unaddressed by the Federal Rules of Evidence Advisory Committee.

2. Indeed, the codification of rules has reduced inconsistencies within the federal courts and between federal and state courts where the federal rules have

been established for maintaining all codified procedural rules has proven to be less effective in accommodating the evolution of evidence rules than the common law alternative it replaced.

My doubts about the value in codifying privilege rules are based upon a comparison of advances within the Federal Rules of Evidence (looking at existing problems and enacted solutions), compared with common law developments in the jurisprudence of the most frequently litigated privilege, the attorney-client privilege. This privilege is deceptively complicated in its many applications, has continuously evolved over many centuries, and is still changing with technological advances, litigation needs and judicial attitudes about its underlying principles. My own treatise on the privilege and the procedures that control its assertion and resolution comprises more than 2000 pages.³ At best, codification would only memorialize the privilege's skeletal outlines at a particular point in evolution, and codified generalizations would accomplish far too little to justify the probable stifling effect they would have on this long, continuing, robust evolution. While my argument can be criticized for being premised on experiences with only one of the many privileges being considered for codification, the history of the United States Judicial Conference's willingness or ability to fulfill its stewardship responsibility to the entire evidence code suggests that the evolution of all evidentiary doctrine has been, and will continue to be, retarded by codification.

Our experiment with codified evidence rules for the past thirty years, and the Judicial Conference's demonstrated unwillingness to address a range of problems either ignored or created in that codification, when compared to the dynamic change witnessed in our privilege jurisprudence under common law principles over the same time-frame, strongly suggests that case-by-case, judicially interpreted common law is a vastly superior means through which to create or revise evidence rules. In fact, the exercise of judicial rule-making power under the common law has been the principal driving force

been adopted. That benefit, however, is not eliminated if the Federal Rules of Evidence were not a binding code, but a compilation of established practices and preferred approaches recommended by the Advisory Committee and approved by the U.S. Judicial Conference.

3. PAUL R. RICE, *ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES* (West Group 2d ed. 1999) [hereinafter RICE, *ATTORNEY-CLIENT PRIVILEGE*].

even behind the Evidence Advisory Committee's actions—providing the basis for both actions and solutions by the Committee. Any effort by the Judicial Conference through its Advisory Committee to pile additional management responsibilities on its platter through codification of privilege rules should be resisted as long as the Judicial Conference refuses to adequately attend to the large number of problems within the existing evidence code which, in many instances, have existed for over thirty years!

Quite the contrary of what the Advisory Committee is attempting to do, I believe that the comparative evolution of privilege rules through case-by-case decisions and the evidence code through the quasi-legislative Advisory Committee process suggests two things. First, that privileges should be left untouched. Second, that all evidence rules might be far better served if the Federal Rules of Evidence were not binding, but rather suggested practices based on the Advisory Committee's survey of judicial decisions, academic literature, and ongoing public debates. This way, the Judicial Conference's unwillingness or inability to respond to developing evidentiary needs would have a far less negative impact on the development and evolution of our evidence jurisprudence.

The rule-making process and its ability to maintain the existing evidence rules has proven to be a poor substitute for the common law power of judges to mold the rules on a case-by-case basis as needs arise. Our rules have evolved over centuries and they continue to evolve as judges, pursuing just adjudications, are required to "interpret" them to meet changing problems of novel factual situations. The difference under our codified system is that the evolution of our rules is slowed by the injection of a quasi-legislative process that waits to see what sitting judges are experiencing, how they are lining up behind competing theories, whether a problem is important enough for the Committee's attention, and what special interests have to say, before even initiating the codification process. In the interim, of course, trial judges are required to address the problems the Advisory Committee turns its back on, because they have no choice. And this must be accomplished through the exercise of their inherent judicial power that supposedly was superseded and restricted by the codification of the rules they are applying (or occasionally ignoring). Once the Judicial Conference has acted, codification gives rise to distracting, and perhaps, unproductive

debates in the trial and appellate courts about the specific language of the codified rule, rather than the principles and policies that each recognized rule was designed to further: debates of form over substance.

If experience with the attorney-client privilege is indicative of developments in other areas of privilege, the most compelling reason to oppose the codification of privilege rules is the vitality of the evolution of privilege jurisprudence under the common law principles that judges have applied under Article V of the Evidence Code. In contrast to experiences with virtually all of the codified evidence rules under the Advisory Committee's jurisdiction, there have been significant changes in the attorney-client privilege since the promulgation of the Evidence Rules in early 1973 and the relegation of privilege jurisprudence in Rule 501 to "principles of the common law as they may be interpreted . . . in the light of reason and experience."⁴

Because of the intransigence of the Federal Judicial Conference in addressing issues in other articles of the Evidence Code,⁵ and from the experiences in state systems where privileges have been codified and, as a consequence, stymied in their evolution,⁶ the probabilities are quite high that few of the positive developments currently experienced in the federal system would have materialized had Article V been codified as originally proposed.

Initially, I will survey the nature of the Advisory Committee process and examine what it has accomplished, what it has not accomplished, and reasons it has given for its inaction. Thereafter, I will examine the apparent principles followed by the Committee in fulfilling its stewardship responsibilities. Next, I will explore the dynamic evolution of the attorney-client privilege under the common law principles that have governed them since the adoption of the Evidence Rules and contrast developments with the Committee's

4. FED. R. EVID. 501.

5. For an examination of these failures, see The Evidence Project, *Proposed Revisions to the Federal Rules of Evidence*, 171 F.R.D. 330 (1997) [hereinafter The Evidence Project]; Paul R. Rice, *Advisory Committee on the Federal Rules of Evidence: Tending to the Past and Pretending for the Future?*, 53 HASTINGS L.J. 817 (2002) [hereinafter Rice, *Tending to the Past*]; Paul R. Rice & W. Delker, *Federal Rules of Evidence Advisory Committee: A Short History of Too Little Consequence*, 191 F.R.D. 678 (2000).

6. See *infra* text accompanying note 198.

demonstrated management principles. Following this contrast, I will conclude that the proposed expansion in the responsibilities of the Advisory Committee should be rejected until the flaws in that process have been resolved and it has addressed all of the issues over which the Judicial Conference has had jurisdiction for over thirty years.

II. THE QUASI-LEGISLATIVE PROCESS UNDER THE RULES ENABLING ACT

A. *A Brief History*

In 1933, Congress enacted the Rules Enabling Act and charged the Federal Judicial Conference (made up of Article III judges) with the responsibility of maintaining the procedural codes employed in federal courts.⁷ Initially, this included supervision of the Federal Rules of Civil Procedure. Later the Federal Rules of Criminal Procedure were added. Over time, this responsibility grew to include Appellate Rules and Bankruptcy Rules. While the original Congressional charge to the Judicial Conference probably included the Federal Rules of Evidence that were enacted in 1973, the Rules Enabling Act was amended in 1988 specifically to include evidentiary rules within the ambit of the Judicial Conference's rule-making powers.⁸ The Chief Justice of the Supreme Court, who controls the creation of Advisory Committees and the appointment of all their members, refused to assemble an Advisory Committee on the Federal Rules of Evidence (hereafter Committee) until 1993. In the interim, the maintenance of the evidence rules was relegated to the Federal Rules of Civil Procedures Advisory Committee where the evidence code and its problems were ignored like the poor stepsister, Cinderella.

7. 28 U.S.C. §§ 2072–2074 (1998). Within this Act, Congress “delegated almost all rulemaking authority to the judiciary, reserving to itself the post facto right to reject, enact, amend, or defer any of the rules.” Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U. L. REV. 1655, 1658 (1995). Originally delegated to the Supreme Court, the power to prescribe rules was transferred by Congress to the Judicial Conference of the United States in 1958. Act of July 11, 1958, Pub. L. No. 85-513, 72 Stat. 356 (codified as amended at 28 U.S.C. § 331 (2000)).

8. 28 U.S.C. § 2074(b) (1988).

*B. Judicial Conference's Management of Currently
Codified Rules*

In previous books, reports, and articles, I have been critical of the Judicial Conference's Advisory Committee on the Federal Rules of Evidence.⁹ It is not that the Committee has accomplished nothing in its short tenure. To be sure, a number of significant changes have been made. The problem lies with what the Committee has not done (and under its current structure and management philosophy, probably will not do), compared to the number, range and size of the problems that have existed for decades. When contrasted with the vitality of the evolution of attorney-client privilege jurisprudence, the record of the Committee has been strikingly inadequate.

The record of the Advisory Committee on the Federal Rules of Evidence begins in 1993.¹⁰ Each year, the Committee's work is summarized in minutes and published on its Website.¹¹ Those minutes are summarized below. Special focus is placed on the topics that were broached by the Advisory Committee, but upon which no action was taken, along with the reasons given. With an appreciation that the Committee has acknowledged the broad range of problem areas over the past thirty years and an understanding of what it has not addressed and why, one can begin to see why codification of privilege rules might be opposed by those concerned about the continued evolution of evidence rules in general, and the privilege rules in particular. When seen in contrast to the successful development of the attorney-client privilege over the same time-

9. See, e.g., PAUL R. RICE, BEST KEPT SECRETS OF EVIDENCE LAW: 101 PRINCIPLES, PRACTICES & PITFALLS (Anderson 2001); The Evidence Project, *supra* note 5; Rice, *Tending to the Past*, *supra* note 5; Paul R. Rice & W. Delker, *Federal Rules of Evidence Advisory Committee: A Short History of Too Little Consequence*, 191 F.R.D. 678 (2000); Paul R. Rice, *Bring On The Reformers: Evidence Code Cries Out for More Than Cautious Tinkering*, LEGAL TIMES, Oct. 19, 1998.

10. See Federal Rulemaking: Dockets, Minutes, and Reports: Minutes of Committee Meetings, available at <http://www.uscourts.gov/rules/minutes.htm>.

11. These summaries have been condensed from the minutes of the Advisory Committee published on the Advisory Committee's Webpage at <http://www.uscourts.gov/rules>.

frame, the conclusion is inescapable; the codification would likely be far more detrimental, than beneficial, to the continued evolution of that privilege.

1. What the Minutes Reveal About Management Style

In 1993-1994, the first year of their existence, many issues with many rules were discussed, but amendments were approved and sent to the Standing Committee only on Rule 407 (product liability actions and subsequent remedial measures) and Rule 103 (contemporaneous objections after motions *in limine*).¹² The Committee members first considered overruling *Huddleston v. United States*¹³ (in which the clear and convincing evidence requirement that prevailed under the common law was found not to have been incorporated into Rule 404(b) when prior bad acts are being offered), but did not because it would have been “political suicide,” there was nothing to fix, and it was “a problematic area that could not be improved.”¹⁴ The Committee also considered resolving the conflict in Rule 201 regarding notice and the taking of judicial notice on appeal, but ignored the conflict because “the rule was not used sufficiently.”¹⁵ The Committee further discussed clarifying Rule 612 by stating that when materials are used to refresh recollection, an opponent can offer those materials into the record only for impeachment purposes, but delayed action because such a change may be nothing more than an “academic exercise.”¹⁶ The Committee also talked about the poor drafting in Rule 608, but left it alone because the bad language had “acquired a recognized meaning.”¹⁷ Although the Committee noted that there was much controversy about prior criminal offenses admitted under Rule 609 and how much information can be brought out about them, the

12. Advisory Committee on the Federal Rules of Evidence, Minutes of the Meeting of Oct. 17–18, 1994, <http://www.uscourts.gov/rules/Minutes/ev10-17.htm> [hereinafter Minutes of Oct. 17–18, 1994].

13. 485 U.S. 681 (1989).

14. Advisory Committee on the Federal Rules of Evidence, Minutes of the Meeting of May 9–10, 1994, <http://www.uscourts.gov/rules/Minutes/ev5-9.htm>.

15. Advisory Committee on Evidence Rules, Minutes of the Meeting of Sept. 30 – Oct. 2, 1993, <http://www.uscourts.gov/rules/Minutes/ev9-30.htm> [hereinafter Minutes of Sept. 30 – Oct. 2, 1993].

16. *Id.*

17. *Id.*

Committee elected to do nothing because it did not want to “open a Pandora’s box.”¹⁸

In 1995, its second year of existence, the Committee approved amendments to Rule 804(b)(3) by making the corroboration requirement for declarations against interests applicable to both the government and defendants, and it attempted to clarify new evidence rules (Rules 413–415, requiring the introduction of evidence of similar crimes and acts when offered against individuals charged with sexual assault of adults and child molestation) being proposed to Congress outside the Rules Enabling Act Process.¹⁹ The Committee also discussed Congress’ proposals to amend Rule 702 by creating a new test for expertise based on “scientific knowledge,”²⁰ but chose to wait until the Supreme Court’s *Daubert v. Merrell Dow Pharmaceuticals, Inc.*²¹ decision.²² The Committee noted that problems existed in the definition of hearsay in Rule 801, but agreed that there would be no “wholesale overhaul of the hearsay rule as any such action would require a massive reeducation of the Bar.”²³ The Committee also voiced concerns about Rule 803(3) regarding the state of mind of a declarant being offered to prove the conduct of a third party, but took no action and gave no reason for failing to do so.²⁴ It further acknowledged the inconsistency between all other hearsay exceptions and the limitation on past recollection recorded, Rule 803(5), and learned treatises, Rule 803(18), which makes evidence admitted under those exceptions inadmissible as an exhibit, and therefore, unavailable to the jury during deliberations.²⁵ The Committee also discussed the practice of using Rule 803(6) (the business records exception) when reports are excluded under Rule

18. *Id.*

19. This effort was to no avail. Congress enacted the provisions despite the Committee’s concerns. Advisory Committee on Evidence Rules, Minutes of the Meeting of Jan. 9–10, 1995, <http://www.uscourts.gov/rules/Minutes/EV0195.pdf> [hereinafter Minutes of Jan. 9–10, 1995].

20. *Id.* at 2.

21. 590 U.S. 579 (1993).

22. Minutes of Jan. 9–10, 1995, *supra* note 19, at 4.

23. *Id.*

24. *Id.*

25. *Id.*

803(8) (the public records exception).²⁶ Since the reported cases, however, did not reflect that too great a problem was materializing, the Committee determined “there was no need to amend the rule.”²⁷

Additionally, the Committee recognized that Rule 803(8)(B), which precludes a criminal defendant from using governmental reports based on personal knowledge of government agents against the government, was inconsistent with the broader provisions in Rule 803(8)(C). The Committee speculated that the wording of the provision was probably a “drafting error,”²⁸ but since the courts that have considered the issue have ignored the limitation, the Committee saw “no need to amend the provision.”²⁹

The Committee also pondered the ambiguity in the term “predecessor in interest” in Rule 804(b)(1), but took no action because (1) prior testimony could not be used against a defendant in a criminal case, (2) does not appear (from reported decisions) to have been a problem when used against the government in a criminal case, and (3) would likely be admissible anyway under the residual exception in civil cases.³⁰ Additionally, the Committee discussed moving the residual exception in Rules 803(24) and 804(b)(5) to a new Rule 807 to make room for more numbers in each rule.³¹

Finally, the Committee rejected without explanation the proposal to amend Rule 1006 so as to clarify the evidentiary status of summaries.³² Other questions and issues were raised and the Reporter was asked to study them, determine what courts were doing, and report back.³³

In 1996, the Committee appeared to address significantly fewer issues. In its third year of existence, the Committee approved changes to Rule 407, extending it to product liability cases (originally sent to the Standing Committee in 1993) and sent it to the

26. Advisory Committee on Evidence Rules, Minutes of the Meeting of May 4–5, 1995, <http://www.uscourts.gov/rules/Minutes/min-ev5.htm> [hereinafter Minutes of May 4–5, 1995].

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

Standing Committee.³⁴ The Committee, however, rejected efforts to restyle the rule because there was a “freeze on a comprehensive restylization of the rules of evidence.”³⁵ It changed the amendment to Rule 801(d)(2)(E) from “may” to “shall” relative to the court considering the content of the statement in question in determining its admissibility.

The Committee also approved Rule 804(b)(6), an exception to the hearsay rule.³⁶ The approved exception requires a party forfeit the right to object to the admissibility of a statement made by a witness whose unavailability was caused, in part, by the wrongdoing of the party.³⁷ In addition, the Committee concluded that changes to Rule 201, judicial notice in criminal cases, were not warranted because “the Rule was not presenting a problem for courts or counsel.”³⁸ The Committee also broached the subject of presumptions.³⁹ However, the Committee was of the opinion that the proposal “would be a massive project with uncertain results” and therefore tabled it.⁴⁰ Many issues relating to a number of rules were raised and discussed, but no action was taken.

In 1997, the Committee approved and reported to the Standing Committee a rule on *in limine* practice under Rule 103, dispensing with the requirement of a contemporaneous objection at trial when definitive rulings were made pretrial.⁴¹ The Committee approved an amendment to Rule 404 that permitted the prosecution to put on negative defendant character evidence after the defendant has challenged the character of the victim, because of the provisions in the Omnibus Crime Bill. The Committee agreed that Rule 701, lay opinions, needed to be revised to avoid expert witnesses being called

34. Advisory Committee on Evidence Rules, Minutes of the Meeting of Apr. 22, 1996, <http://www.uscourts.gov/rules/Minutes/ev4-2296.htm> [hereinafter Minutes of Apr. 22, 1996].

35. *Id.*

36. *Id.*

37. Minutes of Apr. 22, 1996, *supra* note 34.

38. Advisory Committee on Evidence Rules, Minutes of the Meeting of Nov. 12, 1996, <http://www.uscourts.gov/rules/Minutes/min-ev11-1296.htm> [hereinafter Minutes of Nov. 12, 1996].

39. *Id.*

40. *Id.*

41. Advisory Committee on Evidence Rules, Minutes of the Meeting of Apr. 14–15, 1997, <http://www.uscourts.gov/rules/Minutes/ev4-97.htm> [hereinafter Minutes of Apr. 14–15, 1997].

as lay witness, and that Rule 702 needed to be revised to give “general standards that would guide a trial court in determining whether expert testimony is sufficiently reliable.”⁴² Action, however, was deferred.

The Committee took no action on the problem of Rule 703 being used as a backdoor means of introducing hearsay evidence. The Committee, however, approved amendments to Rule 803(6), business records, and adopted new rules for authenticating business records by certification in Rules 901(11) and 902(12).⁴³ The Committee also discussed amendments to Rule 706 with the appointment of experts by the court, but such appointments were not so prevalent that amendments were thought to be required. In addition, the Committee rejected proposals to codify procedural requirement under Rules 404(b) (prior bad acts) and Rule 609 (prior convictions), since the Rules were perceived as “working well under an extensively developed case law” and mandated procedures might lead to unnecessary reversals based solely on procedural irregularities.⁴⁴

Opinion rules dominated the Committee’s work in 1998. The Committee amended Rule 702 because there were disagreements over the meaning of *Daubert* and Congressional attempts involved “problematic language.”⁴⁵ The Committee’s guidance to judges consisted of three requirements: (1) that there be “sufficient and reliable information,” (2) that the “expert must employ reliable principles and methodology,” and (3) that the principles and methodology be applied “reliably.”⁴⁶ Rule 701 was amended to preclude expert witnesses from being called as lay witnesses and giving expert testimony without having complied with the expert witness disclosures requirements under Rule 26 of the Federal Rules of Civil Procedure.⁴⁷ The amendment tracked the language of Rule

42. Advisory Committee on Evidence Rules, Minutes of the Meeting of Oct. 20–21, 1997, <http://www.uscourts.gov/rules/Minutes/ev10-97.htm> [hereinafter Minutes of Oct. 20–21, 1997].

43. *Id.*

44. Minutes of Apr. 14–15, 1997, *supra* note 41.

45. Advisory Committee on Evidence Rules, Minutes of the Meeting of Apr. 6–7, 1998, <http://www.uscourts.gov/rules/Minutes/0498evidenceminutes.htm> [hereinafter Minutes of Apr. 6–7, 1998].

46. *Id.*

47. *Id.*

702 and precluded lay witness from giving testimony based on “scientific, technical or other specialized knowledge.”⁴⁸

The Committee also amended Rule 703 to permit the proponent of an expert witness who has relied on inadmissible evidence to delineate that evidence only if the probative value of the inadmissible evidence “substantially outweighed its prejudicial effect.”⁴⁹ Additionally, the Committee proposed a hearsay exception for prior consistent statements that are admissible under Rule 801(d)(1)(B) for rehabilitative purpose.⁵⁰ This proposed exception, however, was rejected because no problems of a “substantial” nature had been created.⁵¹ The Committee rejected a suggestion that the rules needed to be updated to accommodate the new technology of computerized evidence since the courts were “handling computerized evidence quite well under the broad and flexible Evidence Rules.”⁵² Consequently, the Committee expressed the view that “tinkering with language may create rather than solve problems.”⁵³

In 1999, after considering public comments on proposed changes to Rules 103, 404(a), 701, 702 and 703, 803(6), and 902(11) and (12), the Committee approved minor additional changes and sent the Rules to the Judicial Conference.⁵⁴ The Committee discussed a number of rules and concluded that further study was warranted.⁵⁵ The Committee took no further action on the subject of technological advances and the presentation of evidence, since it concluded that changes would be “costly and potentially confusing, and unwarranted given the fact that courts and litigants have had no problem in handling technological advances under the current Evidence Rules.”⁵⁶

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. Advisory Committee on Evidence Rules, Minutes of the Meeting of Apr. 12–13, 1999, at 2, <http://www.uscourts.gov/rules/Minutes/499minEV.pdf>.

55. Advisory Committee on Evidence Rules, Minutes of the Meeting of Oct. 25, 1999, at 5–7, <http://www.uscourts.gov/rules/Minutes/1099mnEV.pdf> [hereinafter Minutes of Oct. 25, 1999].

56. *Id.* at 6.

Despite acknowledging that some confusion existed about prior consistent statements offered under Rule 801(d)(1) (B) and whether they were admissible for truth after being offered “to support [a] witness’ credibility,” the Committee concluded that the problem was “not so serious as to require proposing an amendment at this time.”⁵⁷ The Committee also noted confusion about whether the extrinsic evidence rule in 608(b) was also applicable to extrinsic evidence of bias and simple contradiction, and it instructed the Reporter to prepare a report on the size of this problem.⁵⁸ Initial reactions to revisions, however, were unfavorable because “any amendment would require more than a simple substitution of one word for another.”⁵⁹ The Committee asked the Reporter to prepare a background report on the corroboration requirement in Rule 804(b)(3) in terms of corroboration only being required when the criminal defendant offer declarations against an interest to exonerate himself, because courts appeared to be in disarray.⁶⁰

In 2000, the Committee discussed the authentication of online materials, but thought the problems were manageable under existing authentication provisions in Rule 901.⁶¹ Self-authentication was thought to be out of the question because forgery was so easy on the Internet. The Committee approved an amendment that substituted “character for truthfulness” for the word “credibility” in Rule 608(b).⁶² The revisions were thought to be necessary because Rule 608(b) literally precludes extrinsic evidence when used to impeach a witness’s “credibility.”⁶³ Consequently, Rule 608(b) excluded evidence of bias, prior inconsistent statements, contradiction, or lack of capacity.⁶⁴ The Rule is intended to preclude extrinsic evidence only when the evidence is offered on the character trait of truthfulness relative to prior acts asked about on cross-examination.⁶⁵ The Committee rejected a proposal to allow learned treatises to be

57. *Id.*

58. *Id.* at 7.

59. *Id.*

60. *Id.*

61. Advisory Committee on Evidence Rules, Minutes of the Meeting of Apr. 17, 2000, at 4–6, <http://www.uscourts.gov/rules/Minutes/400EVMin.pdf>.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

admitted into evidence without a statement of reason.⁶⁶ Finally, the Committee approved an amendment to Rule 804(b)(3) (declarations against interests) that extended the corroboration requirement from defendants who sought to exculpate themselves, to all declarations against penal interests.⁶⁷

In 2001, the Committee approved amendments previously proposed for Rules 608(b) and 804(b)(3) and released them for public comment.⁶⁸ The Committee also discussed the proposals being drafted by the subcommittee on privileges and approved certain approaches.⁶⁹ In addition, the Committee ordered a report from the Reporter regarding whether Rule 803(4) should be amended to preclude statements by patients who have gone to a doctor solely for the purpose of preparing for litigation in light of the recent amendment to Rule 703.⁷⁰

In 2002, the Committee rejected several proposed amendments to the proposed revisions to Rule 608(b) and approved the revisions for submission to the Judicial Conference.⁷¹ The Committee also discussed a list of additional rules containing problems classified as “long-term projects.”⁷² No actions were taken, however, other than

66. *Id.*

67. *Id.* at 9.

68. Advisory Committee on Evidence Rules, Minutes of the Meeting of Apr. 19, 2001, at 4–6, <http://www.uscourts.gov/rules/Minutes/401EVMIn.pdf> [hereinafter Minutes of Apr. 19, 2001].

69. *Id.* at 8.

70. *Id.* at 14.

71. *Id.* at 14–20.

72. These rules and issues included: (a) the rule of completeness in Rule 106 and its application of oral statements (subsequently rejected); (b) the admission of character propensity evidence under Rule 404(a) in civil cases that feel criminal in nature (this was tentatively agreed to and proposals were sought from the Reporter); (c) the admission of offers of compromise under Rule 408 in subsequent criminal cases (subsequently tentatively approved subject to written proposals); (d) inconsistencies in the rape shield law of Rule 412 (subsequently rejected); (e) calling witnesses solely for the purpose of impeaching them under the authority of Rule 607; (f) whether crimes of dishonesty or false statement under Rule 609(a)(2) should be decided on the basis of the deceitful means by which the crime was committed or the elements of the crime; (g) whether a foundation is still required under Rule 613(b) before evidence of prior inconsistent statements are admissible; (h) whether Rule 704(b) applies only to expert witnesses or all witnesses; (i) whether statements reflecting one person’s state of mind under Rule 803(3) can be used to prove another persons conduct; (j) whether there is a conflict between the

instructing the Reporter to prepare a full report.⁷³ The Committee did not pursue bigger issues that went to the underlying rationale of a rule because changing the rules would (1) “upset settled expectations” from a Supreme Court decision,⁷⁴ (2) “upset substantial, ingrained expectations and could result in the inadvertent overruling of a large number of opinions,”⁷⁵ (3) “substantially change the case law,”⁷⁶ (4) “would meet substantial opposition from the Justice Department,”⁷⁷ and (5) “upsetting settled practices and expectations.”⁷⁸ The Committee rejected a proposal to explicitly modify Rules 413–415 by Rule 403 because “there is no need to amend the Rules in light of judicial unanimity” in applying Rule 403 to those rules.⁷⁹ The Committee also rejected the suggestion to change Rule 803(4) to exclude statements made to doctors solely for the purpose of developing testimony for trial.⁸⁰

The Committee also ordered further study of Rule 806 (impeaching declarants with prior bad acts under Rule 608(b)) and Rule 901 (authenticating digital evidence).⁸¹ Ultimately, the Committee decided not to take further action on a number of other rules because the rules “presented [] policy question[s] that most

theory underlying permitting doctors to testify to a patient’s statements who consulted them solely for the purpose of preparing testimony for trial and the new revisions to Rule 703; (k) whether past recollection recorded can be authenticated by a tandem of witnesses rather than one witness who adopted it; (l) whether the business records exception in Rule 803(6) should be clarified to make clear that the person with a duty to a business must also have personal knowledge; and (m) whether electronic evidence can qualify as a learned treatise under Rule 803(18).

73. Minutes of Apr. 19, 2002, *supra* note 68, at 14.

74. *Id.* at 15.

75. *Id.* at 16.

76. *Id.*

77. *Id.*

78. *Id.* at 20. These included (a) the distinction between relevance and condition relevance in Rule 104(b); (b) any changes to Rules 401–403 relative to determining relevance and balancing interests of prejudice to exclude it; (c) clarifying the assertive/nonassertive distinction in Rule 801(a); and (d) the confusing category of statements that are hearsay, but classified as non-hearsay under Rules 801(d).

79. *Id.*

80. *Id.* at 21.

81. Advisory Committee on Evidence Rules, Minutes of the Meeting of Oct. 18, 2002, at 11, <http://www.uscourts.gov/rules/Minutes/1002EVMin.pdf> [hereinafter Minutes of Oct. 18, 2002].

courts had already worked through” or they presented problems that had “been handled adequately by the courts, and has not created a problem that has affected the results in the cases.”⁸²

In 2003, the Committee approved revision to Rule 804(b)(3), deleting proposed extension to civil cases.⁸³ The Committee also terminated consideration of the revisions to (1) Rule 106 that would extend the rule of completeness to oral statements,⁸⁴ (2) Rule 404(a)(1) because clarification was unnecessary,⁸⁵ and (3) Rule 803(6) clarifying that business records had to be made by someone with personal knowledge and a business duty to the business keeping the records, because courts have approached the problem with “flexibility” and were not getting it wrong.⁸⁶ Finally, the Committee approved a tentative amendment to Rule 410 that would give protection to statements made by the prosecutor in plea discussions.⁸⁷

From the preceding summary of the Committee work over the past ten years, and discussions that this writer has had with past committee members over the same period,⁸⁸ several management philosophies are revealed. The first is the principle that “if it ain’t broke, don’t fix it.” The second is that certain rules are off-limits. The third is that less is better than more.

82. *Id.* at 14. These rules included Rule 804(a)(5) (deposition preference for hearsay exceptions premised on unavailability), Rule 804(b)(1) (different interpretations of “predecessor in interest”), Rule 807 (using the residual exception in “near miss” situations involving other rules), Rules 902(1), (2) and (6) (question of self-authentication with seals and of internet materials), and Rule 1006 (the inconsistent ways in which judges are permitting summaries to be used).

83. Advisory Committee on Evidence Rules, Minutes of the Meeting of Apr. 25, 2003, at 4, <http://www.uscourts.gov/rules/Minutes/403EVMin.pdf> [hereinafter Minutes of Apr. 25, 2003].

84. *Id.* at 9.

85. *Id.* at 10.

86. *Id.* at 18.

87. *Id.* at 16.

88. These discussions occurred as The Evidence Project was completing its evaluation of the Evidence Code and I, as its Director, was attempting to ascertain how the Project could work with the Advisory Committee in presenting the issues that the Project had identified, along with proposed revisions to address them.

a. *“If it ain’t broke, don’t fix it”*

From the time the Evidence Advisory Committee was initially established, Chief Justice Rehnquist has given clear instructions to all chairpersons appointed by him that he wants minimal revisions to the Rules—only those necessary to correct pressing problems.⁸⁹ As a consequence, members have lived by the professed motto, “If it ain’t broke, don’t fix it.”⁹⁰ To many of those deferential members, that principle has been translated to mean “it ain’t broke if it ain’t stopping traffic.” This is illustrated in the Commission’s refusal to address the issues in rules such as 803(3), declarant’s state mind statements being used to prove the conduct of a third-party (“I am going out with Frank tonight” offered to prove that Frank was with the declarant); 804(b)(1), the ambiguity in the term “predecessor in interest” which limits the admissibility of prior testimony of third parties (whether this testimony is admissible from a party with only a common factual interest, or whether the testimony must have been given by a party through whose title was derived); 801 (d)(1)(B), purposes for which consistent statements could be offered into evidence (whether all such statements are admissible for truth and for impeachment purposes); Rule 607, the practice of calling witnesses solely for the purpose of impeaching them under the Rule (whether the surprise and damage requirements are carried over from the common law); and Rule 613(b), the foundation dispute (whether it is still required prior to offering evidence of inconsistent statements). In each of these instances, because the courts were successfully handling problems in the flawed rules, action was not taken.

As a consequence, many ambiguities, inconsistencies, omissions, and ill-conceived ideas codified in the original code have never been addressed.⁹¹ Many problems have not been perceived as “problems” because trial judges, in interpreting and applying these problem rules, have exercised their inherent power to interpret and

89. This was acknowledged by three past chairpersons of the Committee who were personally interviewed by this author.

90. In discussions with both past and current members of the Advisory Committee, this admonition was quoted to me, without prompting, during virtually every conversation.

91. These problems were catalogued in a report by The Evidence Project of the American University Washington College of Law entitled, *The Evidence Project, Proposed Revisions to the Federal Rules of Evidence*, 171 F.R.D. 330 (1997).

apply the rules on an ad hoc basis to avoid unfairness. As a consequence, those problems have been swept under the rug by the Advisory Committee and correspondingly ignored. Through judicial activism the Evidence Code has often been successful because the judges on the front lines, on a case-by-case basis, have done the work of the Federal Judicial Conference—a service that in the past was called common law rule making. This has resulted in few efforts to make the Rules of Evidence better, only functional, and the Conference's responsibility is to do both.

Rules 413–415 are the most recent examples of issues being ignored because they are being dealt with in practice. The rules direct that prior sexual misconduct “is admissible” in certain types of cases.⁹² While the rules incorporate no explicit exceptions to admissibility, courts have unanimously concluded that they are modified by Rule 403 which excludes otherwise admissible evidence when the probative value of the evidence is substantially outweighed by the danger of unfair prejudice.⁹³ When this issue was brought to the attention of the Advisory Committee, the Committee decided not to proceed with amendments to the rules, noting “that every case construing these Rules has held that Rule 403 is applicable, so there is no need to amend the Rules in light of this judicial unanimity.”⁹⁴ Rather than modifying Rules 413–415 to address this specific issue, it would have been helpful if Rule 403 had been clarified as modifying all other rules unless superceded or excluded by specific language in each.

If the purpose of codification is to give structure and guidance, all “revisions” to the rule, regardless of whether they are created legislatively or judicially, should be reflected in the language of the rule. This is particularly true where the rule's language appears to be inconsistent with a judicially accepted practice. Perhaps the real reason action was not taken on these rules was the fact that they were enacted outside the Rules Enabling Act process (despite previous resistance by the Advisory Committee), and the Committee did not want to offend Congress—the second discernable management principle discussed below.⁹⁵

92. FED. R. EVID. 413–415.

93. FED. R. EVID. 403.

94. Minutes of Apr. 19, 2002, *supra* note 74.

95. *See infra* p. 102.

Members of the Committee have explained their reticence in taking a proactive role in the maintenance of the Evidence Code with their fear that changes will create more problems than they solve because each change, regardless of how good and appropriate, gives rise to additional litigation.⁹⁶ While increased litigation about the rules undoubtedly is an irritation for judges who don't want to be bothered with learning new rules and dealing with the adversarial squabbling that inevitably results among lawyers over their interpretation and application, this is inevitable in any system that is not stagnant. The disputes must be accepted as a cost of evolution and progress. Such adversarial squabbles reflect the vitality of the common law process and of our profession. It is an asset, not a liability.⁹⁷

Some judges perceive rule changes as giving rise to more squabbling than what occurred under the common law. This is probably more a perception than reality because the common law squabbling usually took place over a much longer time period. The theoretical advantage of codification is that whatever good comes from change can come more quickly. However, that good will usually come with the immediate cost of condensed periods of irritation while the scope and limits of each rule are explored. If the Judicial Conference, through its Evidence Advisory Committee, is not willing to accept and embrace these disputes, then it should not have the responsibility for maintaining the Evidence Code.

Despite the Committee's insistence that it does not act unless a demonstrated problem needs to be solved, it has made revisions in response to special interests of either its members or groups that have lobbied it. One example was the revision of the co-conspirator admission rule following the Supreme Court's decision in *Bourjaily v. United States*.⁹⁸ There was wide dissatisfaction with this decision because it construed Rule 801(d)(2)(E) as rejecting centuries of case law requiring that the existence of the conspiracy and the defendant's participation in the conspiracy be established with evidence independent of the content of the statement in question. While resolving

96. Minutes of Apr. 19, 2001, *supra* note 68, at 2, 14.

97. At some point, of course, the level of squabbling may indicate that the Advisory Committee's revisions may have been ill-advised or inadequate. Surely feared incompetence cannot be an acceptable excuse for inaction.

98. 483 U.S. 171 (1987).

(1) not to codify *Bourjaily*, (2) not to reject the Court's interpretation of Rule 801(d)(2)(E), and (3) not to impose a corroboration requirement, the Committee voted to change the co-conspirator admissions rule to add an additional clause acknowledging that the content of the statement in question could be considered, but specifying that the content of that statement, standing alone, could not satisfy the standards for admitting such statements under the rule.⁹⁹ While this was certainly a reasonable amendment to the rule, there was not a single reported decision or unreported instance in which a judge had even threatened to do this. Acting in conflict with its own informal management guidelines or practices is hypocrisy. This, of course, only breeds resentment and cynicism among those whose proposals for change have been rejected by the Committee because they did not correct an existing problem of a sufficiently pressing nature.

While triage is essential when resources are scarce and the need for action is immediate, a time must come when the rest of the injured and ill are treated. Over time it is unacceptable to say we need not attend to the others because their injuries are minor and will heal on their own. The unattended problems need to be addressed, if for no other reason than to accommodate the new lawyers and judges who are not familiar with the old practice and don't have time, during the rush of courtroom evidentiary hearings, to do any more than consult the language of the evidence rules. Under the Rules Enabling Act and the Advisory Committee structure that has been put in place, there is never a designated time when all problems will be addressed and old assumptions will be questioned.

The issues unattended to in the Evidence Code are enormous. This is reflected in the number of issues raised before the Committee but never acted upon. The following is a cross-section of rules and issues that have been left behind and should be attended to by the Committee before it is given additional responsibilities that may also be ignored.

99. Minutes of May 4–5, 1995, *supra* note 26.

i. Article III, presumptions

Amending the presumption rules has become far more important as we have moved into the world of electronic commerce.¹⁰⁰ Authentication of e-mail messages, for example, is a significant problem faced by litigants. The Committee tabled discussions of presumptions noting that it would “be a massive project with uncertain results.”¹⁰¹ The estimation of the massive nature of the project is probably correct because the codified provisions fail to recognize a single presumption—only enacting rules that restricted the effect of presumptions to shifting the burden of going forward with evidence. Nevertheless, this undertaking has become critical with the advent of the electronic age, the Web, and computer generated evidence.

The authentication of electronic communications has become an increasingly important topic that could be assisted by the use of presumptions if their purpose and effect were changed to what was originally proposed (shifting the burden of persuasion). For example, if an e-mail is proven to have originated from a computer terminal controlled by a specific individual, and the message purports to have been written by that individual, a presumption that he either wrote it or was responsible for it is reasonable. In addition, because of his access to and control of the computer terminal, it would be rational, fair and efficient to shift the burden to him to prove that he was not responsible. One can only wonder why this topic was set aside and why the Committee is now attempting to tackle the topic of privileges that was so controversial when the rules were enacted they were deleted from the code to ensure its passage. How can the codification of privilege have any more “certain results” than the codification of presumptions that most of us don’t understand?

While it is true, as the Committee noted, “that courts and litigants have had no problem in handling technological advances under the current Evidence Rules,”¹⁰² it is also true that despite their

100. The topic of presumptions and their potential value in the authentication of electronic evidence is explored in detail in Chapter V of my forthcoming book, PAUL R. RICE, *E-EVIDENCE: THEORY AND PRACTICE* (forthcoming ABA 2004).

101. Minutes of Nov. 12, 1996, *supra* note 38.

102. Minutes of Oct. 25, 1999, *supra* note 55.

ability to function under current rules, courts and litigants could function more effectively under improved rules. If this argument was legitimate, we would never have experienced the revolutionary changes that were brought about in Article X, which virtually eliminated best evidence objections at trial by creating the category of “duplicates” (electronically or mechanically produced copies) that are treated like originals.¹⁰³ Under the Best Evidence Rule, when proving the content of documents, the original must be produced or shown to be unavailable due to no fault of the proponent.¹⁰⁴ While this best evidence requirement was inconvenient and perhaps unnecessarily restrictive, the problems that it posed were being “handled adequately by the courts.”¹⁰⁵

ii. Article VI, witnesses

There is no specific rule on impeaching a witness with evidence of bias. While courts universally permit such evidence to be offered,¹⁰⁶ a conflict has arisen over whether a foundation must be laid before offering extrinsic evidence of bias.¹⁰⁷ This issue has

103. See FED. R. EVID. 1003 cmt. (1998) (commentary by Stephen A. Saltzburg et al.).

104. FED. R. EVID. 1002.

105. Minutes of Oct. 18, 2002, *supra* note 81.

106. See *United States v. Gambler*, 662 F.2d 834, 839 (D.C. Cir. 1981); *Chipman v. Mercer*, 628 F.2d 528, 530 (9th Cir. 1980). In criminal cases, demonstrating bias is part of the fundamental right of confrontation. *Davis v. Alaska*, 415 U.S. 308, 316 (1974).

107. Compare *United States v. Leslie*, 759 F.2d 366, 379–80 (5th Cir. 1985) (imposing a foundation requirement) and *United States v. Harvey*, 547 F.2d 720, 722 (2d Cir. 1976) (imposing a foundation requirement) with *United States v. Diggs*, 522 F.2d 1310, 1331 (D.C. Cir. 1975) (not imposing a foundation requirement for racial bias).

Within the circuits that require a foundation there is a split over whether the opportunity to confront and explain or deny must be afforded the witness. The following circuits have required that the witness be afforded the opportunity to explain or deny the prior statement during cross-examination. *United States v. Johnson*, 965 F.2d 460, 465 (7th Cir. 1992); *United States v. Devine*, 934 F.2d 1325, 1344 (5th Cir. 1991); *United States v. Cutler*, 676 F.2d 1245, 1249 (9th Cir. 1982); *United States v. De Napoli*, 557 F.2d 962, 964–65 (2d Cir. 1977); *United States v. Truslow*, 530 F.2d 257, 264 (4th Cir. 1975).

Other circuits have imposed a foundation requirement but have interpreted it as requiring only that the witness be afforded the opportunity to explain or deny the prior statement any time at trial. *United States v. Hudson*, 970 F.2d 948, 955 (1st Cir. 1992); *United States v. Lynch*, 800 F.2d 765 (8th

never been addressed by the Committee. Is this topic so unimportant that it does not need to be addressed, or have courts handled it so well there is no need to act? Neither is true. The issue frequently arises and courts have been inconsistent in requiring that a foundation be laid before extrinsic evidence is admissible to prove the same.

Another unmet need exists in Rule 608 which permits the use of character evidence and allows inquiry into a witness's past conduct.¹⁰⁸ While the Advisory Committee has conceded that the rule is poorly drafted and could stand to be clarified, the Committee passed over correcting the problems because the bad language had "acquired a recognized meaning."¹⁰⁹ When will the Advisory Committee get around to codifying the recognized meanings of terms employed throughout the Code, assuming the meanings are desirable? When does the accumulation of these issues tip the Committee's scales and compel a legislative response?

Cir. 1986); *Wammock v. Celotex Corp.*, 793 F.2d 1518, 1521–22 (11th Cir. 1986).

108. FED. R. EVID. 608. EVIDENCE OF CHARACTER AND CONDUCT OF WITNESSES

(a) OPINION AND REPUTATION EVIDENCE OF CHARACTER. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) SPECIFIC INSTANCES OF CONDUCT. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness.

109. See summary of minutes of Advisory Committee actions for 1994, *supra* note 14.

Rule 609, structuring the admission of prior convictions for impeachment purposes, involves so many problems the Committee has ignored it for fear it will “open a Pandora’s box.”¹¹⁰ Why does the Committee believe that the responsibility of wading through the problems should be left solely to trial judges to deal with on a case-by-case basis, rather than a new rule being crafted that is perhaps more logical and gives more direction and better guidance on when prior convictions are appropriately admitted?

iii. Article VII, opinion testimony

Under Rule 702, a scientific expert can testify on the basis of “scientific knowledge” provided the scientific principles, the methodologies through which the principles were employed and the particular application of both principles and methodologies, are shown to be “reliable.”¹¹¹ This was announced by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,¹¹² and *Kumho Tire Co. v. Carmichael*,¹¹³ and mirrored in the Committee’s revisions to this Rule.¹¹⁴ What neither the Supreme Court nor the Committee addressed, however, was the most fundamental question of why scientific standards of reliability must be met when scientific truths are not being sought in the courtroom, only the resolution of a social dispute by a preponderance of the evidence.¹¹⁵

Since the *Daubert* and *Kumho Tire* decisions, courts have been inundated with *Daubert* hearings in every trial in which scientific or technological evidence is employed.¹¹⁶ After the *Daubert*

110. Minutes of Sept. 30–Oct. 2, 1993, *supra* note 15.

111. Minutes of Apr. 6–7, 1998, *supra* note 45.

112. 509 U.S. 579 (1993).

113. 526 U.S. 137 (1999).

114. In *Daubert* the Court instructed trial judges to make a “preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.” 509 U.S. at 592–93. In response, Rule 702 was amended to require the trial judge to determine whether “the testimony is the product of reliable principles and methods,” and whether the expert witness “has applied the principles and methods reliably to the facts of the case.” FED. R. EVID. 702.

115. This matter is discussed in more detail below.

116. This has resulted from the *Daubert* decision because the *Frye* “general acceptance” test for admissibility was applicable only when *novel* science was employed. 509 U.S. at 585. In *Daubert* and *Kumho Tire*, by contrast, the Court made the new judicial gate-keeping role applicable to all scientific and

interpretation of Rule 702 was codified, and this problem materialized over the past decade, it appears that the Committee has made no attempt to guide judges on when, if ever, it may be appropriate to take judicial notice of principles, methodologies, and application, so as to avoid these time-consuming hearings. In the Committee's history, it has never addressed questions that have existed in Article II, Judicial Notice, either because "the rule was not used sufficiently"¹¹⁷ or "the Rule was not presenting a problem for courts or counsel."¹¹⁸ The fact that an article in the Code is not used, in itself, may reflect a problem. But even if identifiable problems have not materialized for courts, attention to the Article could produce solutions to other problems if the Committee reached out to hear new voices and ideas and looked for less predictable solutions to old problems. In this regard, it might be productive if the Committee began listening more closely to the advice it least expects.

Rule 703 permits experts to testify on the basis of inadmissible evidence if it was of a type reasonably relied upon by experts in the particular field.¹¹⁹ Experts are supposed to be assisting the finders of facts, not supplanting them. It is hard to understand, therefore, how the role of experts is not implicitly being changed by allowing them to testify on the basis of evidence that the finders of fact may not hear. If this changed role was unintended, why was Rule 703 amended to preclude the inadmissible evidence from being brought to the attention of the finders of fact unless its probative value is shown to "substantially outweigh" its prejudicial effect? This only further perpetuates and exacerbates the role change. We ought to be giving jurors (the sole finder of facts) more information about the basis of the expert's opinion, not less. Rather than making minor changes, now and again, here and there, the time has long passed when the entire series of expert opinion rules need to be reassessed.

Even if this new burden of demonstrating that value "substantially outweighs" prejudice is met, the Committee has left

technological evidence, not just novel principles, methodologies, and applications. FED. R. EVID. 702 advisory committee's note to 2000 Amendment.

117. Minutes of Sept. 30–Oct. 2, 1993, *supra* note 15.

118. Minutes of Nov. 12, 1996, *supra* note 38.

119. FED. R. EVID. 703.

unaddressed the question of the purpose for which the evidence can be used by the jurors who are permitted to hear it. If the otherwise inadmissible underlying basis is admissible only to assess the value of the expert's testimony, but not for its truth, this perpetuates the same illogical practice under the common law of letting doctors testify to a patient's statements of medical history and causation while instructing the jurors that they could not accept what was said for its truth. The jurors could accept the doctor's opinions premised on the truth of the evidence, but they could not use the evidence to draw the same conclusions! The practice made no sense then, and it makes no sense now.¹²⁰ Once the reliability of the evidence is demonstrated, it should be admissible for truth so that the jurors are doing what the expert who is assisting them has done—drawing factual conclusions based on evidence before them.

When an illogical practice has become entrenched, its reexamination in light of fundamental principles may radically change “established expectations,” but isn't that occasionally what has to be done if the rules are to be maintained properly? Too often the Committee's willingness to sweep aside issues in order to accommodate “established expectations” reflects little more than the Committee's unwillingness to confront established traditions and practices and, where necessary, educate the judiciary.¹²¹

The expert opinion rules in Article VII have become increasingly important with the increased use of scientific and technological evidence in the courtroom. Consequently, it is ill-advised to leave their interpretation and application to illogical traditions of past generations where their importance and impact were significantly less. These rules, with all of their warts and blemishes, should be the subject of a national debate without regard to the specific language of rules having been proposed by the

120. This illogical practice with physicians was solved in Rule 803(4) by permitting statements of medical history and causation to be considered for their truth if reasonably pertinent to the patient's diagnosis or treatment. H.R. DOC. NO. 93-46, at 128 (1973). Rule 703, however, perpetuates the problem for all other experts.

121. This has not only been a problem with Article VII and expert witness testimony, the manner in which the judiciary has limited parties' use of summaries under Rule 1006 has significantly eliminated the benefits of that exception to the original writing rule. See discussion *infra* text accompanying note 137.

Advisory Committee or of Supreme Court decisions that have interpreted those rules.

iv. Article VIII, hearsay

The definition of hearsay in Rule 801 incorporates the assertive/nonassertive distinction.¹²² This is a distinction that admits unintended statements of an out-of-court declarant as non-hearsay.¹²³ Even though the hearsay problems of perception, memory and ambiguity are still present, the statement is admitted for the truth of its content because, being unintended, the statement must be sincere.¹²⁴ This distinction is illogical to the point of being absurd. The most that a nonassertive statement can guarantee is that it (the statement) is sincerely erroneous. To make matters worse, courts are interpreting and applying the assertive/nonassertive distinction in different ways, one of which (revealed below) is inconsistent with the flawed theory upon which the rule is premised.

In *United States v. Zenni*, for example, the court applied the “unintentionally assertive” distinction to implied messages from words under Rule 801(a)(1).¹²⁵ In *Zenni*, an individual called an establishment that was under surveillance because it was believed to be a betting establishment and attempted to place a bet.¹²⁶ Because the caller intended to utter the bet, but probably did not intend to say that the establishment was a place that takes such bets, the court held

122. FED. R. EVID. 801. DEFINITIONS

The following definitions apply under this article:

. . . .

(c) Hearsay.—“Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Rule 802 makes hearsay inadmissible “except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.”

123. Rule 801(a) defines the term “statement” used in the definition of hearsay in subsection (c) as “(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.” The question posed by this definition is whether the last clause relating to the intention of the declarant relates to only (2), nonverbal conduct, or both verbal statements in (1) and (2).

124. FED. R. EVID. 801.

125. 492 F. Supp. 464, 465–69 (E.D. Ky. 1980).

126. *Id.* at 465.

that when evidence of the bet was repeated in court to prove the nature of the establishment, it was not hearsay.¹²⁷ Even though the utterance of the words was intentional, because the *implied message* being read into the words was not “intended,” the court held that it was trustworthy to prove the truth of the implied assertion about the establishment.¹²⁸ This result is nothing less than absurd! If the direct intended message, for whatever reason, is not trustworthy, by implication, the implied message is not trustworthy either. The offspring can be no more reliable than its source.

In contrast, the court in *United States v. Reynolds*, reversed a conviction because such an implied statement was used against the defendant.¹²⁹ In *Reynolds*, a suspect, while under arrest and being walked past his alleged co-conspirator, stated, “I didn’t tell them anything about you.”¹³⁰ The prosecution used this statement at trial as an implied assertion that the alleged co-conspirator being spoken to was guilty.¹³¹ Even though the suspect in custody did not intend his statement as an acknowledgment of the other’s guilt, thereby making it nonassertive and non-hearsay under the *Zenni* rationale, the court held that it was error to use the evidence against the second suspect.¹³² Because the absence of insincerity problems is the kingpin of the assertive/nonassertive distinction, it is difficult to understand how most verbal utterances would ever be nonassertive since intentional assertions are the principle reason for language and the use of words.

Following this line of reasoning, the Iowa Supreme Court interpreted the assertive/nonassertive distinction in an equivalent Rule 801(a) in the Iowa Rules of Evidence as not encompassing unintended assertions from speech.¹³³ Rejecting the logic of *Zenni*,

127. *Id.* at 469.

128. *Id.*

129. 715 F.2d 99 (3d Cir. 1983).

130. *Id.* at 103.

131. *Id.* at 104.

132. The *Reynolds* court apparently was so convinced that the assertive/nonassertive distinction did not apply to verbal utterances under subsection (a)(1) because such utterances always involve an intention to speak, and therefore injects potential insincerity back into the hearsay equation. The court didn’t even bother to discuss the distinction.

133. *State v. Dullard*, 668 N.W.2d 585, 594 (Iowa 2003).

unintended assertions of speech were held to be “statements” excluded by the hearsay rule.¹³⁴ The *Dullard* court explained:

Four dangers are generally identified to justify the exclusion of out-of-court statements under the hearsay rule: erroneous memory, faulty perception, ambiguity, and sincerity or misrepresentation. Yet, the distinction drawn between intended and unintended conduct or speech only implicates the danger of insincerity, based on the assumption that a person who lacks an intent to assert something also lacks an intent to misrepresent. The other “hearsay dangers,” however, remain viable, giving rise to the need for cross-examination. Moreover, even the danger of insincerity may continue to be present in those instances where the reliability of the direct assertion may be questioned. If the expressed assertion is insincere, such as a fabricated story, the implied assertion derived from the expressed assertion will similarly be unreliable. Implied assertions can be no more reliable than the predicate expressed assertion.

.....

We recognize this approach will have a tendency to make most implied assertions hearsay. However, we view this in a favorable manner because it means the evidence will be judged for its admission at trial based on accepted exceptions to the hearsay rule. It also establishes a better, more straightforward rule for litigants and trial courts to understand and apply.¹³⁵

Correcting this flawed rule has been avoided by the Committee because it would require a “wholesale overhaul of the hearsay rule” and would “require a massive re-education of the Bar.”¹³⁶ Why is this excuse justifiable now when it was not an excuse for recognizing the assertive/nonassertive distinction in the first instance? When is logic and reason to prevail?

134. *Id.*

135. *Id.* at 594–95 (citations omitted) (citing, inter alia, Paul R. Rice, *Should Unintended Implications of Speech be Considered Nonhearsay? The Assertive/Nonassertive Distinction Under Rule 801(a) of the Federal Rules of Evidence*, 65 TEMP. L. REV. 529, 538 (1992)).

136. Minutes of Jan. 9–10, 1995, *supra* note 19, at 4.

v. Article X, contents of writings, recordings,
and photographs

Article X, Contents of Writings, Recordings and Photographs, was the most progressive and successful among all of the Articles that were originally codified in the Federal Rules of Evidence. It virtually eliminated best evidence objections¹³⁷ during trial because it recognized “duplicates,” mechanically produced copies, and treated them like originals.¹³⁸ Rule 1006 permits summaries to be used in lieu of originals when they are so voluminous it is inconvenient to use them in court, provided the originals were made available to the opposing party for examination before trial.¹³⁹ Because this is an exception to the Best Evidence Rule, it was adopted with the intent that the summaries would be used *in lieu of* the originals and would be presented to the jury as a more convenient exhibit when used during jury deliberations.¹⁴⁰ Nevertheless, many courts have chosen

137. When the content of a writing is being proven, the Best Evidence Rule requires that the original be used as evidence, unless it is shown to be unavailable due to no serious fault of the proponent of secondary evidence. This is codified in Rules 1002 and 1004.

138. Federal Evidence Rules 1001(4) and 1003 provide as follows:

RULE 1001. DEFINITIONS

For purposes of this article the following definitions are applicable:

....

(4) Duplicate.—A “duplicate” is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.

....

RULE 1003. ADMISSIBILITY OF DUPLICATES.

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

139. RULE 1006. SUMMARIES

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

140. FED. R. EVID. 1006 advisory committee’s note.

to use summaries under this rule only as pedagogical devices that are given no evidentiary status, and have not accepted them as substitutes for the voluminous writings. Why did the Committee choose not to address this issue? Once judges understand the value and purpose of the summaries rule, they will probably find this tool as helpful as they have duplicates, under Rules 1001(4) and 1003 that are also admissible in lieu of originals. Perhaps re-educating the bench vis-à-vis summaries under the Best Evidence Rule is as abhorrent to the Committee as re-educating the members of the Bar vis-à-vis the definition of hearsay without the assertive/nonassertive distinction?

It is not acceptable for the Judicial Conference to continuously use the excuses that revising the rules will disturb accepted practices and expectations, is not a big enough problem, is being handled effectively by the courts, or that revision efforts will be too difficult and the results uncertain. Those arguments could have been made when the Federal Rules of Evidence were originally proposed with the radical changes to the Best Evidence Rule, the definition of hearsay, and the role played by experts in trials. After the Rules were adopted, their innovations should regularly have been reassessed and either enhanced where proven effective, or abandoned where proven faulty. Waiting until problems have caused significant delays before taking action is ineffective management by crisis intervention. It increases the risk of too little being done far too late with inadequate understanding of the totality of the problems at hand.¹⁴¹

b. Off-limit rules

The Advisory Committee's desire to avoid a confrontation with Congress has led, in part, to members of the Committee taking the position that it is inappropriate for the Committee to revise Congressional additions to the Evidence Rules that were added after the rules were initially codified.¹⁴² In other words, revisions that did

141. Besides, part of the Judicial Conference's responsibility is to make the rules better, not just functional. Consequently, there should be ongoing reassessments of every rule and the principles that underlie them—thinking about everything “outside the box”—regardless of whether a proponent can demonstrate that “serious” problems have been created.

142. See, e.g., FED. R. EVID. 301 (presumptions); FED. R. EVID. 413–415 (prior sexual assault evidence in sexual assault cases); FED. R. EVID. 704 (ultimate issue rules). Each is discussed below.

not originate with the Advisory Committee are not within its jurisdiction. This insistence that there are two types of evidence rules within the code is, at best, strange. It is not compelled by anything in the Rules Enabling Act and appears to be little more than an excuse for avoiding confrontations with Congress over the lack of wisdom in its prior enactments. There are three examples of where this has led to inaction—Rules 704(b), 413–15, and 301.

i. Rule 704(b)

Congress passed the Hinkley Amendment to Rule 704¹⁴³ after the trial of John Hinkley for the shooting of President Reagan. While Rule 704 continues to abolish the ultimate issue rule, the amendment states that “[n]o expert witness” can testify to whether a criminal defendant did or did not possess a particular mental state at the time the crime was committed.¹⁴⁴ Inconsistently, however, the last sentence of Rule 704 states that “[s]uch ultimate issues are matters for the trier of fact alone.”¹⁴⁵ Does the last sentence expand the scope of the rule to all witnesses (not just expert witnesses), thereby precluding lay witnesses from testifying to the apparent mental state of another? This matter will never be clarified by the Advisory Committee as long as the rule is off-limits. Were it not off-limits, perhaps the entire politically motivated amendment might be rescinded because it accomplishes virtually nothing, other than precluding testimony on the final conclusions about whether a particular state of mind existed at a specific time. The psychiatric experts can still testify to mental diseases, symptoms of those diseases, evidence of how advanced a disease may be in a defendant,

143. FED. R. EVID. 704. OPINION ON ULTIMATE ISSUE

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

144. FED. R. EVID. 704.

145. *Id.*

and conduct or mental states that could result under conditions similar to those that existed at the time of the charged crime. After such testimony, the final conclusion that would have been offered, but for this provision, will be patently obvious to those who have heard it. Consequently, jurors undoubtedly must wonder why the examining lawyer did not ask the expert whether the expert thought the defendant was insane, or had the mental capacity to know right from wrong, or to conform his conduct to the requirements of the law,¹⁴⁶ at the time the crime was committed.

This revision to Rule 704 was added by Congress because its members thought the Hinkley trial, with its parade of psychiatric experts testifying to contradictory conclusions, was a confusing spectacle and a national embarrassment to be avoided. Unfortunately, the amendment promulgated by Congress has had virtually no effect on the parade of psychiatrists. The same experts give the same testimony on the same mental states, except for the final contradictory conclusions that they may have reached.¹⁴⁷ The only thing the amendment seems to have done is to exclude the most helpful part of the psychiatrists' opinions, making jurors wonder why the experts were not explicitly asked to state conclusions that were implicit in their testimony.

ii. Rules 413–415

The politically motivated character provisions added by Congress in Rules 413–415 are another example of “off-limits” rules that were the product of Congressional initiatives that bypassed the Rules Enabling Act process.¹⁴⁸ The Advisory Committee had

146. Any mental state that is an element of the crime charged or of a defense thereto.

147. For example, the psychiatrist can testify to the defendant's condition, its severity, and the impact that it could have on the defendant's mental state. The psychiatrist, however, is not permitted to testify that in his or her opinion the defendant did not understand the criminality of his conduct, or did not know right from wrong (whatever the prevailing test may be), and therefore is insane.

148. Rule 413 admits evidence of prior sexual assault offenses committed by a criminal defendant. FED. R. EVID. 413. Rule 414 admits other instances of child molestation in prosecutions for child molestation. FED. R. EVID. 414. Rule 415 admits acts addressed in the previous rules in civil cases. FED. R. EVID. 415.

rejected proposals for such rules from members of Congress¹⁴⁹ for two reasons. First, there was insufficient evidence that the rules were needed in federal courts where such matters are rarely prosecuted (generally only on Indian reservations).¹⁵⁰ Second, the proponents could provide no empirical evidence establishing that child sexual abuse offenses were so much more predictive of future conduct than other types of offenses, they deserve special evidentiary rules.¹⁵¹ This type of evidence was also being adequately handled under Rule 404(b).¹⁵² Consequently, the rules were little more than a political statement about the proponents' opposition to sexual offenders. Therefore, when the proponents of these rules became part of the majority party in Congress, they passed these rules outside the Rules Enabling Act process.

As previously discussed,¹⁵³ these new character evidence rules direct the admission of this type of evidence in cases falling within their scope, with no explicit balancing of interests for unfair prejudice. Being off-limits, amending the rules to include discretionary balancing has been left to the trial judges with responsibility for applying them. Virtually all courts addressing the issue have imposed such a balance,¹⁵⁴ but the Advisory Committee has continued to refuse to act.

iii. Rule 301

Rule 301 was revised by Congress before the rules of evidence were originally enacted.¹⁵⁵ Under the original proposal sent to

149. These were proposed to the Advisory Committee in 1994 and 1995 and were rejected.

150. Minutes of Oct. 17–18, 1994, *supra* note 12.

151. *Id.*

152. See Memorandum from The Evidence Project, to the Federal Rules of Evidence Advisory Committee (Oct. 7, 1994) (submitted when Rules 413–415 were originally proposed) (on file with author). See, e.g., *United States v. Cuch*, 842 F.2d 1173, 1176 (10th Cir. 1988); David J. Kaloyanides, *The Depraved Sexual Instinct Theory: An Example of the Propensity for Aberrant Application of Federal Rule of Evidence 404(b)*, 25 LOY. L.A. L. REV. 1297 (1992).

153. See discussion *supra* text accompanying note 91.

154. See, e.g., *United States v. Sumner*, 119 F.3d 658 (8th Cir. 1997); *United States v. Larson*, 112 F.3d 600 (2d Cir. 1997); *United States v. Meacham*, 115 F.3d 1488, 1492 (10th Cir. 1997).

155. “The bill passed by the House substituted a substantially different rule in place of that prescribed by the Supreme Court. The Senate bill substituted

Congress, the minority view under the common law about the effect of presumptions (that they shifted the burden of persuasion to the party against whom presumptions operated) was adopted in lieu of the majority “bursting bubble” theory.¹⁵⁶ The “bursting bubble” theory shifted only the burden of going forward with evidence. Congress changed the rule back to the majority “bursting bubble” theory that had given rise to all of the complexities surrounding presumptions under the common law—the problems that the original drafters were attempting to avoid.¹⁵⁷

This action by Congress has had significant implications for presumptions that could accommodate the authentication problems created by the advent of electronic commerce through e-mail. Because the Advisory Committee has not touched Article III since its enactment, the common law complexities have continued to grow without clarification or direction.¹⁵⁸ In addition, no efforts have been

yet a further version, which was accepted by the House, was enacted by the Congress, and is the [current] rule.” FED. R. EVID. 301 Federal Judicial Center note.

156. Proposed Rule 301 provided as follows: “In all cases not otherwise provided for by Act of Congress or by these rules a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.” H.R. DOC. NO. 93-46, at 5 (1973).

157. FED. R. EVID. 301. PRESUMPTIONS IN GENERAL IN CIVIL ACTIONS AND PROCEEDINGS

In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

158. For example, when a presumption has been met by the opposing party with evidence of the non-existence of the presumed fact, under the “bursting bubble” theory the presumption is supposed to burst like a bubble and disappear. No instruction should be given to the jury about the presumption because it has served its purpose and vanished. Despite the theory, courts continue to mention the presumption to the jury after the bubble has burst, calling it evidence, treating it like the logical inference that often gives rise to the presumption, and requiring that a certain quantum of evidence be brought forward to rebut the presumption. Alternatively, some courts dissatisfied with the limited purpose assigned to the presumption instruct the jury that the opposing party must disprove the fact presumed. They also appear to be inclined to interpret statutory presumptions as burden of persuasion shifting

made to address the new and difficult issues arising with electronic commerce.

The first of these new and difficult issues is whether any common law presumptions have survived codification because none were specifically recognized in Article III. Since the Supreme Court has shown a tendency to employ the interpretation principle “if it ain’t there, it ain’t there,”¹⁵⁹ unless otherwise compelled by the logic of the rule,¹⁶⁰ there is more than a possibility that the Court will

presumptions. *See, e.g.*, *F.D.I.C. v. Schaffer*, 731 F.2d 1134, 1137 (4th Cir. 1984) (stating that a presumption that a properly mailed letter was received can be rebutted only by clear and convincing evidence); *N.L.R.B. v. Tahoe Nugget, Inc.*, 584 F.2d 293, 301–02 (9th Cir. 1978) (concluding that the non-statutory presumption in certain labor disputes shifted the burden of persuasion); *Child v. Beame*, 412 F. Supp. 593, 599 n.2 (S.D.N.Y. 1976) (shifting the burden of persuasion for a presumption that when an attorney appears on behalf of a client, the attorney is authorized to do so). For a discussion of these issues in the context of antitrust law, see Paul R. Rice & Slade Cutter, *Problems with Presumptions: A Case Study of the “Structural Presumption” of Anticompetitiveness*, 2002 ANTITRUST 557 (2001).

159. For example, in *United States v. Bourjaily*, 483 U.S. 171 (1987), the Court concluded that the co-conspirator admission offered into evidence under Rule 801(d)(2)(E) did not perpetuate the common law requirements that the existence of the conspiracy and the defendant’s participation in the conspiracy first be established with evidence independent of the content of the statement in question. This conclusion was reached because the rule only codified the skeletal outlines of the common law rule. Because this requirement was not explicit, the Court held that Congress had silently overruled centuries of established precedent.

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 588 (1993), the Court concluded that the failure to explicitly mention the standard for admitting novel scientific evidence in Rule 702 or accompanying Advisory Committee notes silently overruled decades of case law following the standard of “general acceptance” in the relevant science established in *United States v. Frye*, 293 F. 1013 (D.C. 1923), and followed throughout the federal judicial system both before and after the adoption of the Federal Rules of Evidence (20 years of precedence under Rule 702).

Similarly, in *Huddleston v. United States*, 485 U.S. 681 (1988), the Court held that prior act evidence introduced under Rule 404(b), did not perpetuate the common law requirement that the commission of the act had to be proven to the satisfaction of the presiding judge by clear and convincing evidence before the evidence could be heard by the jury. Because a standard was not explicitly stated, the Court concluded that the evidence only needed to be established by a preponderance of the evidence, and the ultimate responsibility for making the determination was shifted to the jurors.

160. In *Tome v. United States*, 513 U.S. 150 (1995), the Court held that a prior consistent statement had to be made before a motive to fabricate arose in

conclude that all common law presumptions have been silently abolished.

If common law presumptions have survived codification, despite the fact that they have not been delineated, the second issue is whether trial judges retain the power to change them to accommodate the unique needs of electronic communications. For example, the question exists whether judges can change the reply doctrine created for messages sent by mail to electronically transmitted messages sent by e-mail. If courts possess the power to create new presumptions or alter new applications of old ones, then do trial judges also have the power to make the newly created presumptions shift the burden of persuasion when that is essential to their effectiveness?

How much longer must we wait to get these issues addressed? But more importantly, why should the responsibility for maintaining an additional Article of the evidence code—Article V, Privileges—be codified and given to a quasi-legislative body that has demonstrated neither the willingness nor the ability to effectively manage the Rules that are currently in the code?

c. Minimal revisions—maintenance, not improvement

Throughout the years of its service, the Advisory Committee has decided, predominantly from reported decisions, whether conflicts have existed, and whether problems have materialized. This, however, is like determining the size of an iceberg from what is apparent on the water's surface. Since most evidentiary rulings are never the subject of published judicial decisions because they are rendered orally from the bench, the Committee's perceived need and the actual needs for action that exist may be quite different. Since the Advisory Committee does not regularly submit questionnaires to judges to ascertain the true size and shape of icebergs, its inaction based on lack of apparent need may be ignoring wrong-headed trends which, if addressed through corrective measures, could avoid future problems. The spectrum of organizations and individuals with different practice backgrounds permitted to be part of the Committee

order to be relevant to rehabilitate a witness who has been accused of recent fabrication, improper influence, or motive. Even though this requirement was not explicitly written into Rule 801(d)(1)(B), it was perceived as being a logical imperative.

process offers some insurance against undetected problems. This protection, however, is diminished by the time-constraints on members, the limited number of issues brought before them by the gatekeepers of Committee business, the limited voices that are heard before proposals are published for public comment,¹⁶¹ and the nature of the quasi-legislative process itself that is detached from the equities of specific factual situations upon which actions must be taken.

What the Judicial Conference has not addressed by way of ambiguities, inconsistencies, omissions, and ill-conceived ideas in the Federal Rules of Evidence vastly overshadows its accomplishments. These issues within the Evidence Code (many of which were mentioned above), were surveyed in a Report published by the Evidence Project at the American University Washington College of Law.¹⁶² This Report was submitted to the Evidence Advisory Committee in 1997. That Report, however, never saw the light of day and was not even brought to the attention of most of the Committee members because it was summarily rejected by the Committee's Reporter.¹⁶³ Subsequently, however, many of the problems addressed in the Report were identified in a paper written by the same Reporter.¹⁶⁴ Despite this exposure of issues and problems that had been swept under the rug for the past quarter of a century, little, if any, action has been taken to address and resolve them.

It appears as though the Committee, by mentioning the many problems identified within the Evidence Code, has been doing what

161. In this regard, it is important to note that this article on the propriety of codifying privilege rules, and the other articles addressing their content if codification goes forward, have neither been sought nor sponsored by the Advisory Committee on the Federal Rules of Evidence or the Judicial Conference of the United States. Without the initiative of the Board of Editors of the Loyola of Los Angeles Law Review these views likely would not have been sought, expressed, or heard before a decision by the Advisory Committee was made to go forward with specific provisions.

162. The Evidence Project, *supra* note 5.

163. Letters from Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, to Professor Paul R. Rice, (Dec. 23, 1996 and Nov. 14, 1997) (on file with author).

164. DANIEL J. CAPRA, CASE LAW DIVERGENCE FROM THE FEDERAL RULES OF EVIDENCE (Federal Judicial Center 2000).

many of us did as children when we were served food (peas in my case) that we did not wish to eat—we acknowledged their existence with our forks by spreading them around the plate, in an attempt to hide them under remnants of other food, rather than eating them. This ploy did not fool our parents and we should not be fooled now. The fact that the Committee and its Reporter have pushed the peas around its plate only confirms that the problems have been recognized. It does not camouflage the fact that the “peas” are still on the “plate,” unconsumed. But unlike our childish conduct, this demonstrates the Committee’s conscious disregard of its broader responsibilities to the Code. This is not a process to which our evidentiary privileges should be relegated.

Under the current Advisory Committee process, bad or inadequate rules may often not be addressed until the Advisory Committee is either forced to do it because Congress is beginning to act (as in the cases of Rules 702 and 703, and expert opinion rules, previously discussed) or pressured by the judiciary because judges are ignoring the provisions the Committee has been charged with maintaining. Rule 407 is the best example of the latter. While the explicit language of Rule 407 was limited to excluding evidence of such measures only when offered to establish “negligence” or “culpable conduct,”¹⁶⁵ the Judicial Conference did not get around to changing the language to encompass product liability actions (where negligence and culpability are not an issue), until more than a decade after the issue came to light and all federal circuits that had addressed the issue had ignored the language of the rule and applied it to product liability cases as well. Because of this type of intransigence, the codified rules only retard the evolution of evidence doctrine. In fairness to the current Advisory Committee, however, this was during the time when the Chief Justice had refused to create an Advisory Committee on the Federal Rules of Evidence and the other Committees (the Advisory Committee on the Federal Rules of Civil Procedure and the Advisory Committee on the Federal Rules of Criminal Procedure), to which the evidence rules were relegated, were ignoring them.

The refusal of the Judicial Conference to act to forestall problems has compelled judicial actions that many conservatives

165. FED. R. EVID. 407.

would criticize as judicial legislation. However, when those charged with the responsibility of maintaining the Code fail to fulfill their stewardship role, this usurpation of legislative power is inevitable because judges have the principal responsibility to apply the rules of evidence in a fashion that ensures justice in the resolution of disputes. When this quasi-legislative process has to be driven by the exercise of power by the judges from whom the power was taken through codification, the process is clearly flawed. If judges were permitted to change the rules as needed, and the Rules of Evidence were only advisory, the current process would make sense. Under the existing structure, however, it has come to resemble something akin to a Rube Goldberg contraption that is intentionally made far more complicated than is necessary to perform a simple task.

2. What Experience has Revealed About a Flawed Process

The inadequacies of this process vis-à-vis the common law case-by-case evolutionary process it replaced may be attributable to a number of factors. The first is its structure. The second is the influence of special interests. The third is the inside game—the interests and biases of those on the Committee. The fourth is the Committee’s tendency to mistake the forest for the trees, seeing and addressing only surface issues detached from their context.

a. Structure of the Advisory Committee

All members of the Evidence Advisory Committee are appointed by a single individual: the Chief Justice of the Supreme Court.¹⁶⁶ This, unfortunately and unnecessarily, tends to give rise to homogenous attitudes on a committee of individuals who are obedient to the rule-making philosophies of a single individual. If that philosophy is unsympathetic to proactive rule-making, the Committee becomes ineffective, and a hindrance to the evolution of evidentiary principles. In a previous article, I proposed that membership on this Committee be determined by the Chief Judge of each Judicial Circuit.¹⁶⁷ “Such a system would eliminate the undue influence of a single person, while ensuring the interests, experiences and problems of every circuit are voiced.”¹⁶⁸

166. 28 U.S.C. § 331 (2000).

167. Rice, *Tending to the Past*, *supra* note 5, at 831.

168. *Id.*

It was also suggested that the work of the Committee be more transparent from beginning to end.¹⁶⁹ Currently, the members of the bench and bar are not consulted until the Committee has decided to act, promulgated a proposed revision to a rule, affirmatively voted on the change, and posted it for public comment.¹⁷⁰ Why isn't the outside world engaged at the stage when it is being decided what revisions will be attempted?

b. Special interests groups

The second reason the Advisory Committee process has been an inadequate and largely ineffective method for maintaining the evidence rules is the introduction of special interest groups into the rule-making process. Under the common law, evidence rules evolved through case decisions, and special interests were only heard if given special permission to appear as *amicus curiae*. As a consequence, the current process is too susceptible to the influence of special interests, unlike the common law in which judges acted almost exclusively on the basis of demonstrated need, rather than in response to voiced desires and political pressure. The influence of special interests is not only seen in the deliberations of specific revisions being proposed, but also in the decisions about which "problem rules" will be addressed.

Special interests influencing which rules will be given attention by the Advisory Committee are particularly pernicious because it means that other more deserving problems are ignored. Clearly, all problems cannot be addressed at once. However, since needs are defined only as traffic-stopping problems, and problems are ignored that are otherwise being addressed through judicial activism, this selection process appears to have been strongly influenced by the particular interests of the Committee's members or the power of special interest groups. The latter type of power was illustrated in the multiple years of attention given to Rule 412 that excludes evidence of prior sexual activity of an assault victim (dubbed the rape shield law).¹⁷¹ Since rape is not even a charge that is commonly

169. *Id.*

170. *Id.* at 831–32. As previously noted, see *supra* note 161, there has been no solicitation of public comments from the Advisory Committee on whether privilege rules should be codified.

171. *Id.* at 820.

prosecuted in federal courts, something other than need was behind this attention. This, of course, was the lobbying efforts of women's groups, and the political power they wielded, either directly or indirectly through Congress.

The special interests of members may have been reflected in the revision to the co-conspirator admissions rule after the Supreme Court held that in determining the admissibility of an alleged co-conspirator's admission under Rule 801(d)(2)(E), the content of the statement in question could be considered with other evidence.¹⁷² While no judge had held that the court could rely exclusively on the content of the statement in question to determine its admissibility, the rule was amended to explicitly preclude this.¹⁷³ Since no problem existed, the Committee violated its own principle of "if it ain't broke, don't fix it," and did so at the behest of someone with a special interest. This, of course, demonstrated that the "fix when broken" principle is employed only as an excuse to ignore what is uninteresting, too politically sensitive, off limits because specifically enacted by Congress outside the Rules Enabling Act process, requires too great a change in practice, or requires too much study and time. A system that employs its own rules arbitrarily and is disproportionately hindered by the inaction of a few is not a system to which our privilege jurisprudence should be entrusted.

c. The inside game

A factor that inevitably influences the work of any organization is the interests of those running it. What they are concerned about is given attention and what they are not concerned about, or ideas that they do not agree with, are either ignored or are inadequately characterized and explained to make them unattractive. This was true of a proposed revision to Rule 703 put forth by the Evidence Project.¹⁷⁴

The Reporter developed an amendment to Rule 703 to address the problem of the rule being "used as a 'back-door' hearsay exception."¹⁷⁵ His response was an addition to the rule that would not permit the inadmissible basis of an expert's testimony to be delineated by the proponent until it had been demonstrated that the

172. See *supra* text accompanying note 98.

173. See *supra* text accompanying note 99.

174. The Evidence Project, *supra* note 5.

175. Minutes of Apr. 14–15, 1997, *supra* note 41.

probative value of the evidence substantially outweighed its prejudicial effect—a reverse of the standard in Rule 403 for the exclusion of otherwise admissible evidence.¹⁷⁶ This was the amendment that eventually was adopted by the Committee.¹⁷⁷ A competing proposal was made by an unidentified “public commentator”¹⁷⁸ that attempted to bring the use of expert witnesses in line with the principle that the exclusive finders of facts in a trial to a jury are the jurors, not the expert witnesses. The expert’s role is solely to assist the jurors. This is why the common law considered the testimony of the expert irrelevant to what a jury was being asked to decide when the expert did not testify on the basis of the same facts being considered by the jury.

This competing proposal would have required rescinding Rule 703 because it does just the opposite—it permits experts to rely on inadmissible evidence if it is of the type reasonably relied upon by experts in the particular field. Under Rule 703, experts are permitted to testify to a different case from the one presented to the jury. However, since the jury is permitted to accept the expert’s conclusions for their truth which are premised on the truth of that inadmissible evidence, the jurors are, in substance, accepting the basis of the conclusions and are doing so blindly if they are not permitted to hear that basis.

Acknowledging that experts are uniquely capable of “separating the wheat from the chaff”—assessing the reliability of facts that are otherwise inadmissible—the competing proposal would have created a hearsay exception for otherwise inadmissible hearsay evidence based on four factors: (1) the evidence was relied upon by experts whose testimony the court has determined to be admissible; (2) the expert is particularly capable of assessing its reliability; (3) the expert has applied his expertise to the evidence in question and made such an assessment; and (4) the expert is available to explain why the

176. *Id.*

177. *Id.*

178. Whether the origin of the proposal (The Evidence Project) was revealed to the members of the Advisory Committee is not known. Perhaps the Project’s proposal was characterized as having come from a single “commentator”—presumably myself as the Project’s Director—because the existence of The Evidence Project had not been brought to the attention of most members of the Committee. This was discovered from personal telephone conversations that I had with Committee members.

evidence was found to be reliable.¹⁷⁹ With such assurances of reliability, the jury should hear the evidence and be permitted to use it in the same way and for the same purpose as the expert. Otherwise, the expert who is permitted to base his opinions on that same evidence is being converted into a super-thirteenth jury offering conclusions as a *fait accompli*.¹⁸⁰

Without this explanation of the competing proposal, it was communicated to the members of the Advisory Committee as “[o]ne public commentator proposed that Rule 703 should be amended to prohibit the expert from relying on information not in evidence, and that a new hearsay exception be added to permit reliable information used by an expert to be admitted for its truth.”¹⁸¹ The proposal was rejected with no notice to the proponent, and no opportunity for the proponent to explain and defend the proposal, or respond to the Committee members’ claims that it was “too narrow, because it only dealt with hearsay information” and “too broad, because it could permit dubious hearsay to be considered for its truth.”¹⁸² While it is certainly true that experts often rely on more than inadmissible hearsay, when that non-hearsay evidence not personally known to the expert is testified to by the expert as the basis for his opinion, and offered for its truth, it would most certainly be hearsay in addition to whatever other characteristics it may have had that otherwise made it inadmissible. The objection that the competing proposal permitted “dubious hearsay” to be considered is quite interesting. If evidence relied upon were dubious, why was the expert relying on it (did her qualifications not permit her to separate the “wheat from the chaff?”), and why were the expert’s conclusions admissible when they had such a “dubious” basis? As is occasionally true of

179. See PAUL R. RICE, EVIDENCE: COMMON LAW AND FEDERAL RULES OF EVIDENCE § 8.02 [B][8], at 1111–1129 (LEXIS 4th ed. 2000); Paul R. Rice, *The Allure of the Illogic: A Coherent Solution for Rule 703 Requires More Than Redefining “Facts or Data”*, 47 MERCER L. REV. 495 (1996); Paul R. Rice, *Expert Testimony: A Debate Between Logic or Tradition Rather Than Between Deference or Education*, 87 NW. U. L. REV. 1166 (1993); Paul R. Rice, *Inadmissible Evidence as a Basis for Expert Opinion Testimony: A Response to Professor Carlson*, 40 VAND. L. REV. 583 (1987).

180. See sources cited *supra* note 179.

181. Advisory Committee on Evidence Rules, Minutes of the Meeting of Oct. 22, 1998, <http://www.uscourts.gov/rules/Minutes/1098evidenceminutes.htm>.

182. See *id.*

criticisms of members of the Advisory Committee, their objections to proposals are equally applicable to their own proposals and reveal deficiencies in rules that they fail to see or address.

As a result of the one-sided presentation by the sub-committee exploring amendments to Rule 703, what the Advisory Committee ultimately did was (1) perpetuate the existing conflict between the role of the expert as a witness and the role of the jury as the finder of fact, (2) fail to address the concern previously expressed in the Advisory Committee about expert witness testimony being a “back-door” means of getting hearsay admitted, and (3) fail to establish controls on when otherwise inadmissible evidence should appropriately have been relied upon by the expert and revealed in his testimony.

As previously noted, the assumption underlying Rule 703 is that experts have the ability to separate the “wheat from the chaff.” This assumption is probably sound, but nowhere in the rule is the proponent of the expert witness required to demonstrate that the expert has applied his expertise to the otherwise inadmissible evidence and assessed its reliability. It is just presumed that the expert has done it. As a consequence, psychiatric experts could rely on interviews with siblings, because they are the “type” of evidence that psychiatrists generally rely upon, even though the interview may have been conducted by a paralegal rather than a psychologist or psychiatrist. When the rule speaks of “type reasonably relied upon,”¹⁸³ is generic type sufficient? It shouldn’t be, because how evidence is acquired often directly impacts its reliability. This has been true, for example, with statements taken from children who are alleged to be victims of sexual abuse. Neither the rule nor the accompanying Advisory Committee Notes mention this aspect of its application. As a consequence, it is questionable whether judges consistently require proponents of expert witnesses to demonstrate that their expertise has been specifically applied to the evidence in question to assess its reliability.

d. Mistaking the trees for the forest

In its effort to provide guidance through the rules, the Committee has decided that “minimal departure[s] from the existing

183. FED. R. EVID. 703.

language” are preferable because they ensure that “important precedent construing well-established language might [not] be lost.”¹⁸⁴ While this approach has merit in some circumstances, it can be used as an excuse for not addressing fundamental problems and fighting the current of contemporary practice. If one is too concerned about preserving existing practice, the inadequacies of that practice can easily be overlooked. This appears to be what occurred with the Advisory Committee’s revisions to Rule 702.

After the *Daubert* decision,¹⁸⁵ in which the Court found that the standard for screening scientific evidence had been changed without comment in the Evidence Code, there was and continues to be, confusion and disagreement about the meaning and scope of the decision.¹⁸⁶ In response, the Committee instructed a subcommittee to study the problem and provide models for “general standards that would guide a trial court in determining whether expert testimony is sufficiently reliable.”¹⁸⁷ The subcommittee created a test that reflected the language of the opinion they were trying to “refine.” To determine the reliability of scientific testimony, the Committee came up with a three prong tautology—employing the very term they were supposed to assist judges in determining: 1) that there was a sufficient basis, (2) that *reliable* principles and methods were employed, and (3) that those principles and methods were *reliably* employed.

To preserve the trees in front of them, they ignored the forest of reliability. What standard of “reliability” must the judge ensure has been met? The scientific standard of reliability (which in some cases may be 95% or higher because science is pursuing scientific truths

184. Minutes of Apr. 6–7, 1998, *supra* note 45.

185. *See supra* text accompanying note 113.

186. For example, because *Daubert* dealt only with the screening of scientific evidence, courts initially circumvented the gate-keeping role it outlined by characterizing the evidence as “technological” rather than “scientific.” The Supreme Court stopped this in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), where it held that both types of evidence had to be screened for reliability. Beyond science and technology, what additional evidence has to go through the *Daubert* screening process? The language of Rule 702 that the Court was interpreting in both *Daubert* and *Kumho Tire* is “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact,” what “specialized knowledge” is going to be pulled into this time-consuming screening process? FED. R. EVID. 702.

187. Minutes of Oct. 20–21, 1997, *supra* note 42.

with the use of principles) or something less? Since courts are resolving social disputes by a preponderance of the evidence, and using the scientific evidence in conjunction with other evidence, why should the standard of reliability have to be higher than it is for any other type of evidence? If the persuasive value of scientific evidence compels a higher standard of reliability for use, what standard is appropriate and how should it be determined? Judges and lawyers need thoughtful direction, not repetition of that on which they need direction.

III. THE EVOLUTION OF THE ATTORNEY-CLIENT PRIVILEGE JURISPRUDENCE UNDER COMMON LAW PRINCIPLES SINCE THE ADOPTION OF THE FEDERAL RULES OF EVIDENCE

How would the attorney-client privilege have fared under a codified system managed through the Advisory Committee process? The answer, of course, cannot be predicted with certainty. However, the demonstrated deficiencies of the Advisory Committee process suggest that codification should be approached with caution. When the pace and quality of the evolution of the codified rules are compared to the evolution of privileges left to develop under the common law principles, interpreted by judges on a case-by-case basis, the evidence strongly suggests that the evolution of privileges would have been significantly restrained by codification. This is demonstrated by a brief examination of the evolution of a few elements of one of perhaps the most commonly raised privileges—the attorney-client privilege.

When legal assistance of any kind is sought from a professional legal advisor in his capacity as such, the attorney-client privilege protects from disclosure: “[C]ommunications relating to that purpose . . . made in confidence . . . by [a] client [or by the attorney in a responsive communication that reveals the content of the client’s prior communications], [unless] the protection [is] waived.”¹⁸⁸

The following are only a few of the areas that have experienced significant change since the drafting of the Federal Rules of Evidence in the early 1970s.

188. *Great Plains Mut. Ins. Co. v. Mut. Reinsurance Bureau*, 150 F.R.D. 193, 196 n.4 (D. Kan. 1993).

A. Client

In the corporate world the client is a fictitious legal entity.¹⁸⁹ Courts have held that only the board of directors, corporate officers and employees speaking about matters within the scope of the employment responsibilities personify the corporate client.¹⁹⁰ Only their communications with corporate counsel are protected by the privilege. Only these individuals could be privy to confidential attorney-client communications without waiving the privilege protection. As the strict enforcement of the confidentiality requirement is being relaxed,¹⁹¹ the courts have correspondingly accepted a broader circle of confidentiality vis-à-vis who personifies the corporate entity. Over the past half century, courts have also accepted former employees,¹⁹² and more recently, outside consultants¹⁹³ into the circle of confidentiality.

189. See *Upjohn Co. v. United States*, 449 U.S. 383, 389–90 (1981) (“an artificial creature of the law”).

190. While the Court in *Upjohn* rejected the “control group” test for determining who personifies the corporate entity for attorney-client privilege purposes, it did not explicitly adopt the alternative “subject matter” test. The “control group” test limited the scope of the corporate privilege to communications between corporate legal counsel and individuals within the corporate structure who were “in a position to control or even take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney.” *City of Philadelphia v. Westinghouse Elec. Corp.*, 210 F. Supp. 483, 485 (E.D. Pa. 1962). The “subject matter” test extended the privilege protection to all corporate employees who speak to legal counsel about matters within the scope of their corporate responsibilities. *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487, 491–92 (7th Cir. 1970). The *Upjohn* opinion, however, relied upon many of the same factors in concluding that the privilege was applicable than it would have had the “subject matter” test been adopted. *Id.* at 394. See John E. Sexton, *A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. REV. 443 (1982). See generally RICE, ATTORNEY-CLIENT PRIVILEGE, *supra* note 3, § 4:14 (discussing the “subject matter” test as an alternative to the more restrictive “control group” test).

191. See discussion *infra* in text beginning at note 221.

192. See *In re Allen*, 106 F.3d 582, 606 (4th Cir. 1997); *Admiral Ins. Co. v. United States Dist. Court*, 881 F.2d 1486, 1493 (9th Cir. 1989); *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 658 F.2d 1355, 1361 n.7 (9th Cir. 1981); *Miramar Constr. Co. v. Home Depot, Inc.*, 167 F. Supp. 2d 182, 184 (D. P.R. 2001); *Bank of N.Y. v. Meridien Biao Bank Tanz. Ltd.*, No. 95 CIV. 4856 (SS), 1996 WL 490710, at *3 (S.D.N.Y. Aug. 27, 1996); *Valassis v. Samelson*, 143 F.R.D. 118, 124 (E.D. Mich. 1992); *Stabilus, Div. of Fichtel & Sachs Indus., Inc. v. Haynsworth, Baldwin, Johnson*

Shareholders, while owning the corporation, do not personify the corporation. Therefore, shareholders can be denied access to confidential corporate communications because their interference could disrupt corporate activities. Nevertheless, in *Garner v. Wolfenbarger*,¹⁹⁴ the court held that corporate shareholders could gain access to those communications when they demonstrate good cause. The theory driving the decision was the fiduciary duty that corporate counsel owes the shareholders.¹⁹⁵ Subsequently, that

& Greaves, No. 91-6184, 1992 U.S. Dist. LEXIS 4980, at *4 (E.D. Pa. Mar. 31, 1992); *Command Transp., Inc. v. Y.S. Line (U.S.A.) Corp.*, 116 F.R.D. 94, 96 (D. Mass. 1987).

193. *In re Bieter Co.*, 16 F.3d 929, 938 (8th Cir. 1994) (The outside consultant was intimately involved on a daily basis in the client's attempts to succeed in a business venture. "[H]e was in all relevant respects the functional equivalent of an employee."); *In re Copper Mkt. Antitrust Litig.*, 200 F.R.D. 213, 218-19 (S.D.N.Y. 2001) (outside public relations firm); *Village of Kiryas Joel Local Dev. Corp. v. Ins. Co. of N. Am.*, No. 90 Civ. 4970 (JFK), 1992 U.S. Dist. LEXIS 405, at *10-11 (S.D.N.Y. Jan. 15, 1992) (An outside insurance specialist assisted a corporate employee in seeking legal advice. Communications at the meetings where he was present were held protected by the attorney-client privilege because the corporation had every reason to believe he was assisting in obtaining legal services and reasonably expected that the outside consultants would not disclose the substance of those communications.).

194. 430 F.2d 1093, 1103 (5th Cir. 1970).

195. The *Garner* Court explained:

It is urged that disclosure is injurious to both the corporation and the attorney. Corporate management must manage. It has the duty to do so and requires the tools to do so. Part of the managerial task is to seek legal counsel when desirable, and, obviously, management prefers that it confer with counsel without the risk of having the communications revealed at the instance of one or more dissatisfied stockholders. The managerial preference is a rational one, because it is difficult to envision the management of any sizeable corporation pleasing all of its stockholders all of the time, and management desires protection from those who might second-guess or even harass in matters purely of judgment.

But in assessing management assertions of injury to the corporation it must be borne in mind that management does not manage for itself and that the beneficiaries of its action are the stockholders. Conceptualistic phrases describing the corporation as an entity separate from its stockholders are not useful tools of analysis. They serve only to obscure the fact that management has duties which run to the benefit ultimately of the stockholders. For example, it is difficult to rationally defend the assertion of the privilege if all, or substantially all, stockholders desire to inquire into the attorney's communications

decision has been expanded to myriad situations where fiduciary duties have been found.¹⁹⁶ Would this expansion of the privilege's circle of confidentiality have happened under a codified rule of privilege in which this expansion was not explicitly sanctioned? Would the Committee have responded favorably to proposed expansions of the privilege in this fashion, or done nothing because things were "working well under an extensively developed case law"?¹⁹⁷ The track record of the Committee suggests that it would not have responded. The experience of the state of California, where privilege has been codified, suggests judicial expansion would have been unlikely as well.

In *Dickerson v. Superior Court*,¹⁹⁸ for example, a California court was asked to recognize the federal fiduciary duty exception even though it was not recognized in California's evidence code. While acknowledging the wisdom of this widely recognized federal exception, the court declined to incorporate the exception into

with corporate representatives who have only nominal ownership interests, or even none at all. There may be reasonable differences over the manner of characterizing in legal terminology the duties of management, and over the extent to which corporate management is less of a fiduciary than the common law trustee. There may be many situations in which the corporate entity or its management, or both, have interests adverse to those of some or all stockholders. But when all is said and done management is not managing for itself.

The representative and the represented have a mutuality of interest in the representative's freely seeking advice when needed and putting it to use when received. This is not to say that management does not have allowable judgment in putting advice to use. But management judgment must stand on its merits, not behind an ironclad veil of secrecy which under all circumstances preserves it from being questioned by those for whom it is, at least in part, exercised.

Id. at 1101 (citation omitted).

196. *Garner* was a shareholder derivative action. *Id.* at 1095. Initially, the decision was expanded to non-derivative actions. *Fausek v. White*, 965 F.2d 126, 130 (6th Cir. 1992); *Ward v. Succession of Freeman*, 854 F.2d 780, 786 (5th Cir. 1988); *Burghart v. Landau*, No. 82 Civ. 2181 (MJL), 1985 WL 209, at *5 (S.D.N.Y. Jan. 23, 1985); *Cohen v. Uniroyal, Inc.*, 80 F.R.D. 480, 484 n.4 (E.D. Pa. 1978); *Valente v. Pepsico, Inc.*, 68 F.R.D. 361, 367-68 (D. Del. 1975); *Bailey v. Meister Brau, Inc.*, 55 F.R.D. 211, 214 (N.D. Ill. 1972). Thereafter, the fiduciary duty exception was expanded beyond shareholder suits. For an exploration of those situations, see RICE, ATTORNEY-CLIENT PRIVILEGE, *supra* note 3, § 8:23.

197. Minutes of Apr. 14-15, 1997, *supra* note 41.

198. 185 Cal. Rptr. 97, 100 (Ct. App. 1982).

California law because unlike the federal position, California courts were no longer free to recognize new privilege doctrines.

The *Garner* court, on the other hand, was empowered to create this new exception by Rule 501 of the Federal Rules of Evidence¹⁹⁹ which provides that the rules of privilege “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.”²⁰⁰ This rule provides federal courts “with the flexibility to develop rules of privilege on a case-by-case basis.”²⁰¹ The California courts, however, are not free to create new privileges as a matter of judicial policy and must apply only those which have been created by statute.²⁰²

Would federal courts have responded in the same fashion? The answer cannot be known. It is clear, however, that without the explicit freedom given to courts under Rule 501, some would not have exercised the common law authority taken from them through codification. The result, of course, would be that our privilege jurisprudence would be less advanced than it is today. If the Advisory Committee’s answer to this problem is to give courts freedom to interpret and modify all codified privileges, what remains to be gained by codification?

B. Agent of Attorney

Prior to the promulgation of the Federal Rules of Evidence, certain individuals whose assistance was *necessary* to the attorney’s rendering of legal services were permitted to be privy to confidential attorney-client communications.²⁰³ These individuals could also communicate directly with the client and the communications would

199. *Garner*, 430 F.2d at 1098.

200. FED. R. EVID. 501.

201. *Trammel v. United States*, 445 U.S. 40, 47 (1980) (quoting 120 CONG. REC. 40,891 (1974) (statement of Rep. Hungate)).

202. *Dickerson*, 185 Cal. Rptr. at 100. This lack of power has continued to restrict the power of courts to either expand the privilege or recognize implied exceptions. See *Wells Fargo Bank v. Superior Court*, 990 P.2d 591, 594 (Cal. 2000); *McKesson HBOC, Inc. v. Superior Court*, 115 Cal. App. 4th 1229, 1236 (2004) (“In California, the attorney-client privilege is a legislative creation. The courts of this state have no power to expand it or to recognize implied exceptions.”) (citation omitted).

203. See RICE, ATTORNEY-CLIENT PRIVILEGE, *supra* note 3, § 3:3.

be privileged to the same extent as they would have been had the agent been the attorney. Throughout the past half century courts have increasingly permitted anyone who assists an attorney in rendering legal advice or assistance to a client to be privy to confidential attorney-client communications, so long as those individual agents were under the direct supervision of the attorney.²⁰⁴ Over time the necessity standard proved to be unrealistic. This is because many administrative assistants who had helped attorneys with chores such as typing, became increasingly nonessential as lawyers developed typing skills working on word processors and researching via the Internet. Many employees of past generations, who were essential to the lawyer's assistance, and therefore privy to confidential communications, technically were no longer necessary.

Nevertheless, both lawyers and judges have implicitly understood that lawyers must be able to provide legal advice and

204. *In re Grand Jury Proceedings*, 220 F.3d 568, 571 (7th Cir. 2000) (explaining that when law firms hire accountants to assist in the representation of the client, the privileged communications shared with those accountants remain privileged as long as that information was given to the attorney for the sole purpose of seeking legal advice); *Calvin Klein Trademark Trust v. Wachner*, 124 F. Supp. 2d 207, 209 (S.D.N.Y. 2000) (an investment banker was privy to confidential communications between the attorney and client because his services were helpful in drafting a document requiring an understanding of what was "material" from a business person's perspective); *Ramseur v. Reich*, No. CIV.A. 2:95-0382, 1997 WL 907896, at *9 (S.D.W.V. Mar. 31, 1997) (Because attorney stated that an individual "was working with me in my office on this instant case," the court found this dispositive of the question of the application of the attorney-client privilege to communications between the agent and the client. There was no inquiry into the need for the assistance.); *United States v. Beck*, No. 86-315, 1987 U.S. Dist. LEXIS 14988, at *21 (E.D. Ky. Mar. 14, 1989) (accountant worked at the direction, and pursuant to the instructions, of the attorney); *Cuno, Inc. v. Pall Corp.*, 121 F.R.D. 198, 204 (E.D.N.Y. 1988) ("[T]he weight of authority holds that the privilege applies to confidential communications with patent agents acting under the authority and control of counsel."); *Baxter Travenol Labs., Inc. v. Abbott Labs.*, No. 84 C 5103, 1987 WL 12919, at *8 (N.D. Ill. Jun. 19, 1987) (requiring that agents be under "the direct supervision of the attorney" in order to be protected by the privilege); *United States v. Brown*, 349 F. Supp. 420, 425 (N.D. Ill. 1972) ("There appear to be two key factors in determining whether the attorney-client privilege is applicable to the workpapers of an accountant. First, has the attorney been retained by the taxpayer prior to the preparation of the workpapers and reports by the accountant? Second, have the workpapers and reports been prepared by the accountant at the direction of the attorney?").

assistance in the most cost-efficient and effective manner possible. Attorneys must be able to use whomever they feel could be helpful without worrying about the necessity of the aid's assistance for the purpose of the attorney-client privilege. While courts still mouth the necessity standard, it is no longer rigorously enforced, if for no other reason than because questions are seldom asked and objections are seldom made about the roles of a lawyer's assistant.

Necessity continues to be actively inquired into only when the lawyer hires, as his "agent," an individual who otherwise would have provided direct assistance to the client, thereby making the agent's work discoverable. This issue has arisen most often with accountants who have been hired by the attorney to do what they likely would have done for the client without the attorney's involvement. Attempts by attorneys to manipulate the privilege for a client's unfair advantage have not gone unchallenged.²⁰⁵ If a necessity standard were part of a codified rule, would courts have been equally willing to roll with technological changes and relax the necessity requirement to facilitate efficient legal services? Would the Committee have waited until the courts took the lead and only then followed with codification; would the matter have been ignored, or if raised, tabled because it was "adequately being handled"?

205. See *United States v. Judson*, 322 F.2d 460, 462 (9th Cir. 1963) ("The accountants' role was to facilitate an accurate and complete consultation between the client and the attorney about the former's financial picture. The . . . documents constituted confidential communications within the attorney-client privilege."); *Cavallaro v. Unites States*, 153 F. Supp. 2d 52, 58-59 (D. Mass. 2001) (A party was not represented by lawyers. He was represented by an accounting firm. This accounting firm was not retained by any of the lawyers representing other parties who shared a common interest. Therefore, communications to, from, or in the presence of those accountants were not protected by the attorney-client privilege. The accountants were third parties whose presence breached the confidentiality of the privilege.); *Gerrits v. Brannen Banks of Fla., Inc.*, 138 F.R.D. 574, 577 (D. Colo. 1991) ("Although the attorney-client privilege may sometimes extend to communications to accountants or other experts providing assistance to an attorney, the communication must be made in confidence for the purpose of obtaining legal advice from the lawyer. If what is sought is not legal advice but only professional service, or if the advice sought is the professional's rather than the lawyer's, no privilege exists."); *United States v. Brown*, 349 F. Supp. 420, 425-26 (N.D. Ill. 1972) (attorney hired before accountant prepared the reports, and reports were prepared at the direction of the attorney).

In the corporate world the issue currently developing is the use of paralegals performing services previously performed by licensed attorneys. If the corporation's legal department hires and trains a paralegal to perform a specific task (like drafting particular kinds of contract provisions), will the paralegal's communications with corporate employees about legal matters within the scope of their responsibilities be privileged, regardless of whether there is immediate supervision or use of the communications by a licensed lawyer? This issue has not been addressed in any codification of the privilege in any state or federal jurisdiction and there are a limited number of reported decisions on the subject.²⁰⁶ What do courts look to for guidance in jurisdictions where the privilege is codified? If the answer is common law principles interpreted in light of reason and experience, what would be gained by codification, particularly if the Advisory Committee never gets around to addressing issues like this because they can adequately be addressed by judges on a case-by-case basis?

C. Communication

The privilege applies to communications, not information.²⁰⁷ Therefore, when information in prior communications with legal counsel is disclosed, this does not reveal the fact that the prior confidential communications to the lawyer contained those facts. Therefore, the disclosure does not waive the privilege protection for those prior attorney-client communications. Many courts, however, fail to understand or properly apply the distinction between communications and information. For example, when documents are being prepared for public filing, the exchange of drafts among the attorney and the client are privileged until the client approves the final draft. That authorization to file waives the privilege for only

206. See, e.g., *HPD Labs., Inc. v. Clorox Co.*, 202 F.R.D. 410, 417 (D.N.J. 2001) ("A non-lawyers's statements do not automatically become privileged simply because, at some point, that person interacted with or learned from an attorney." Otherwise, the court explained, it would "give in-house counsel a strategic incentive to impart basic legal knowledge to corporate employees and then, during litigation, claim that statements made by those employees in the regular course of business are protected because they build on or derive from counsel's teachings in some manner.").

207. See RICE, ATTORNEY-CLIENT PRIVILEGE, *supra* note 3, § 5:1.

the final draft.²⁰⁸ Many courts, however, have erroneously held that the filing of the papers waives the privilege for the previous drafts as well.²⁰⁹ Because this practice is so widespread, would the Committee have been willing to amend a codified rule to explicitly clarify this, or would it have ignored the error because things are “working well under an extensively developed [albeit wrong] case law,” or because the problem has not been demonstrated as being substantial enough?

The interpretation of the definition of the privilege has changed over the past thirty years. While the privilege still protects the confidential communications of the client to the attorney for the purpose of obtaining legal advice or assistance, the derivative theory for responsive attorney communications to the client has evolved in many state and federal courts. This has been due, in large part, to the definition of the privilege being paraphrased as protecting “communications *between* the attorney and client.”²¹⁰ This definition has prompted many courts to declare that the privilege affords a *direct* protection to the communications of the attorney regardless of whether they reveal prior client confidences.²¹¹ The Supreme Court

208. *Muncy v. City of Dallas*, No. CIV.A.3:99-CV-2960-P, 2001 WL 1795591, at *3 (N.D. Tex. Nov. 13, 2001); *United States v. Newell*, 192 F.R.D. 587, 588–89 (N.D. Ill. 2000); *Allegheny Ludlum Corp. v. Nippon Steel Corp.*, No. 89-5940, 1991 WL 61144, at *5 (E.D. Pa. Apr. 15, 1991). See generally RICE, ATTORNEY-CLIENT PRIVILEGE, *supra* note 3, Ch. 12 (providing an overview of choice of law, particularly as it relates to attorney-client privilege and Rule 501).

209. *In re Grand Jury Proceedings*, Thursday Special Grand Jury Sept. Term, 1991, 33 F.3d 342, 354–55 (4th Cir. 1994); *United States v. Pipkins*, 528 F.2d 559, 563 (5th Cir. 1976); *Heidelberg Harris, Inc. v. Mitsubishi Heavy Indus., Ltd.*, No. 95 C 0673, 1996 WL 732522, at *11 (N.D. Ill. Dec. 18, 1996); *Howes v. Med. Components Inc.*, 7 U.S.P.Q.2d 1511, 1512 (E.D. Pa. 1988); *United States v. Willis*, 565 F. Supp. 1186, 1207 (S.D. Iowa 1983).

210. The originally proposed attorney-client privilege rule, Proposed Rule 503, referred to the protection in this fashion. H.R. DOC. NO. 93-46, at 10 (1973).

211. While some of these have been blanket statements, see *In re Grand Jury Subpoena (Biermean)*, 765 F.2d 1014, 1018 (11th Cir. 1985) (“Communications between an attorney and his client made for the purpose of securing legal advice are protected under the attorney-client privilege.”), most of the cases giving a direct protection have involved the attorneys’ opinions. See *United States v. Frederick*, 182 F.3d 496, 501 (7th Cir. 1999) (In a discussion of how the privilege would operate to protect numerical information communicated to the attorney by the client, the court asserted that a lawyer’s

has added to this confusion by announcing in *Upjohn Co. v. United States*²¹² that the “privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice.”²¹³ Under the prevailing derivative theory, the Court got it backwards! The privilege protects communications from the client to the attorney *and also* the responsive communications from the attorney to the client until the client reveals the substance of prior

estimate of a client’s damages would be privileged because it would reflect “the lawyer’s professional assessment.” The court did not mention whether the assessment had to reveal the confidential communications of the client, but this may have been assumed since the assessment was premised on the truth of what the client had said.); *United States v. Amerada Hess Corp.*, 619 F.2d 980, 986 (3d Cir. 1980) (“Legal advice or opinion from an attorney to his client, individual or corporate, has consistently been held by the federal courts to be within the protection of the attorney-client privilege. Two reasons have been advanced in support of the two-way application of the privilege. The first is the necessity of preventing the use of an attorney’s advice to support inferences as to the content of confidential communications by the client to the attorney. The second is that, independent of the content of any client communication, legal advice given to the client should remain confidential. To the extent that the trial court predicated its ruling on the general inapplicability of the privilege to communications from the attorney to the client we disapprove of it.”) (citations omitted); *Zenith Elecs. Corp. v. WH-TV Broad. Corp.*, No. 01 C 4366, 2003 U.S. Dist. LEXIS 13816, at *9–10 (N.D. Ill. Aug. 7, 2003) (draft agreements containing notes from the attorney were protected because they were rendering legal advice); *Segerstrom v. United States*, No. C 00-0833 SI, 2001 WL 283805, at *2 (N.D. Cal. Feb. 6, 2001) (“The privilege extends to cover both the substance of the client’s confidential communications and the attorney’s advice in response thereto. All other communications from the attorney to the client are protected if the attorney’s communications would reveal confidential client communications.”) (citations omitted); *SmithKline Beecham Corp. v. Apotex Corp.*, 193 F.R.D. 530, 538 (N.D. Ill. 2000) (“Next, we note that several documents are described as agendas for meetings, many of which are authored by attorneys. Such a description makes it very unlikely that legal advice is implicated, nor would such documents ordinarily be expected to reveal confidential communications. These documents must be produced.”), *aff’d*, 2000 WL 1310669 (N.D. Ill. Sept. 13, 2000); *Maher v. Monahan*, No. 98Civ.2319 (JGK)(MHD), 2000 WL 777877, at *1–*2 (S.D.N.Y. June 15, 2000) (“All of these documents describe communications between attorneys and Lt. Zorpoli, and all reflect attorney advice, thus placing the communications squarely within the ambit of the privilege. The communications in question involve the rendering of legal advice and are therefore presumptively privileged.”) (citation omitted).

212. 449 U.S. 383 (1891).

213. *Id.* at 390.

confidential communications. Would the Committee revise the rule to reflect the language of the Supreme Court, as it did in its revisions to Rule 702 relative to the admissibility of the expert opinions, or would it be true to the theory of the privilege and correct the Supreme Court's misstatement and lower courts' erroneous practices?

This distinction that many courts are making between advice and other attorney communications has led to skewed decisions about what constitutes "advice." In *United States v. Bauer*,²¹⁴ for example, the Court held that the attorney-client privilege was violated when a former bankruptcy attorney was required to reveal that he had advised Bauer about his obligation to disclose assets that Bauer was charged with fraudulently failing to report in his petition. Bauer, of course, claimed that he had innocently withheld information about certain assets believing that they did not have to be reported.²¹⁵ The Court held that the prosecutor could not rely on the defendant's prior attorney to establish his knowledge, and therefore his perjury.²¹⁶

The trial judge required the disclosure by the bankruptcy attorney on the belief that when an attorney advises the client about the rules of the court, he is not acting as an attorney, but as an officer of the court conveying public information.²¹⁷ This decision was influenced by a well-established body of law holding that when an attorney notifies a client of the dates on which the client has been ordered by the court to appear for sentencing, there can be no reasonable expectation on the part of the client that such communications are confidential.²¹⁸ Consequently, the attorney can

214. 132 F.3d 504, 507 (9th Cir. 1997).

215. *Id.* at 510.

216. *Id.* at 509, 512.

217. *Id.* at 508.

218. *Id.* See also, *Antoine v. Atlas Turner, Inc.*, 66 F.3d 105, 110 (6th Cir. 1995) ("[A]n attorney's message to his client concerning the date and time of court proceedings is not a privileged communication."); *United States v. Franke*, No. 94-3062, 1995 U.S. App. LEXIS 11307, at *8-12 (10th Cir. May 16, 1995) (unpublished) ("At trial the government introduced the testimony of Carl Cornwell, an attorney who had formerly represented Franke on the mail fraud charges. Cornwell testified that two previous trial settings in the mail fraud case had been continued on his application due to conflicts with Cornwell's other trial settings in unrelated matters. Most significantly, Cornwell testified that he informed Franke that trial was scheduled for August

31, that Franke had requested that Cornwell again attempt to obtain a continuance, and that Cornwell had advised Franke that he would not seek another continuance because, in his opinion, there were no valid grounds for seeking further delay Franke's contention in the instant case invokes th[e] . . . confidential communication exception. The facts, however, do not support application of this principle to the testimony at issue. Franke argues that disclosure of the lawyer's communication regarding the time of trial and the lawyer's rejection of Franke's request to seek another continuance was in substance a disclosure of confidential communications, namely the existence of a dispute between Franke and his attorney regarding the attorney's preparedness and the 'proper tactical method to employ regarding scheduling.' We do not agree that the attorney's testimony can be equated with disclosure of confidential communications. All that was material to the offense charged was the attorney's testimony that the time of trial had been communicated to Franke and that Franke had been advised that no continuance would be requested. These communications were not privileged.") (citation omitted); *United States v. Posin*, 996 F.2d 1229 (9th Cir. 1993) (unpublished) (attorney required to appear before grand jury and disclose whether he informed client of sentencing date); *United States v. Gray*, 876 F.2d 1411, 1415 (9th Cir. 1989) (court allowed attorney to testify that he informed client of sentencing date finding that communication of trial date was not confidential); *McKay v. Commissioner*, 886 F.2d 1237, 1238 (9th Cir. 1989) (attorney could testify that he sent IRS deficiency notice to client); *United States v. Clemons*, 676 F.2d 124, 125 (5th Cir. 1982) ("An attorney's message to his client concerning the date of trial is not a privileged communication."); *In re Grand Jury Proceedings, Des Moines, Iowa*, 568 F.2d 555, 557 (8th Cir. 1977) ("Communications by a defense counsel to the client or by a client to the defense counsel regarding the time and place of trial are not confidential and therefore are not protected by the attorney-client privilege."); *cert. denied sub nom.*, *Black Horse v. United States*, 435 U.S. 999 (1978); *United States v. Uptain*, 552 F.2d 1108, 1109 (5th Cir. 1977) (attorney's notification to client of trial date not privileged communication); *United States v. Freeman*, 519 F.2d 67, 68 (9th Cir. 1975) (attorney's advising client of court order to appear not protected); *United States v. Bourassa*, 411 F.2d 69, 74 (10th Cir. 1969) ("Relating such notice [that the client must be present at the trial] to the client was counsel's duty as an officer of the court, and was not within the privilege."); *United States v. Hall*, 346 F.2d 875, 882 (2d Cir. 1965) ("We find no invasion of the attorney-client privilege resulting from [the lawyer's] formal testimony that he conveyed to his client the Assistant United States Attorney's routine message that the accused's presence was required at each calendar call. The relaying of this message is not in the nature of a confidential communication. Defense counsel served merely as a conduit for transmission of a message.") (citations omitted); *United States v. Franke*, Crim.A. No. 92-20029-01, 1994 WL 68513, at *4 (D. Kan. Feb. 16, 1994) (the attorney's communication of a trial date was not a confidential communication protected by the privilege); *United States v. Woodruff*, 383 F. Supp. 696, 698 (E.D. Pa. 1974) (communication to client of time and date of trial by attorney not privileged).

be required to reveal that the client was advised of the appearance date when he is later tried for failing to appear. The same result obtains in ascertaining when a deficiency notice from the IRS was received by the client so that the time from which a petition for review should have been filed can be established.²¹⁹

Without explaining why informing a client of where and when the law (represented in an order by the presiding judge or a notice of deficiency from the IRS) requires the client to *personally appear* is not legal assistance protected by the privilege, the court held that informing the client of where and when the law (represented in an act of Congress) requires that a client's *assets appear* is legal advice that is privileged.²²⁰ This decision was a product of the re-characterization of the attorney-client privilege as protecting communications "between" the attorney and client—affording a direct protection to all responsive attorney communications.

Under the classical derivative theory for responsive attorney communications, this attorney's communication about the abstract requirements of the law would not have been privileged because it did not apply or interpret those principles in light of the client's unique circumstances, and thus did not reveal prior privileged communications of the client. This also would be true regardless of whether the attorney's communications were characterized as "legal advice" or the "transmission of public information."²²¹

Some courts have interpreted the federal attorney-client privilege as embracing virtually everything transpiring between the attorney and client—even the communication of information that the attorney has acquired from third parties.²²² This is not federal law.²²³

219. *McKay*, 886 F.2d at 1238 (attorney could testify that he sent IRS deficiency notice to client).

220. *Upjohn Co. v. United States*, 449 U.S. 383, 398 (1981).

221. While the transmission of information about the law *could* reasonably be interpreted as "legal assistance," unless that "assistance" involved the application of the legal principles to the unique facts communicated by the client in a way that reveals that he had communicated those facts, there was no basis for extending the privilege protection.

222. *Sprague v. Thorn Ams., Inc.*, 129 F.3d 1355, 1370 (10th Cir. 1997) ("[S]ome courts have held that the privilege protects communications from the lawyer, regardless of whether the lawyer's communications reveal confidences from the client This broader approach has been applied in cases holding that any communication from an attorney to his client made in the course of giving legal advice is protected. The *LTV* opinion rejects the narrower view,

Why are federal courts distorting the privilege in this fashion? Do they not understand it, or are they being influenced by perceptions of the privilege in the state jurisdictions where they sit,

pointing out that the predictability of confidence is central to the role of the attorney and that 'adoption of such a niggardly rule has little to justify it and carries too great a price tag.' The *LTV* opinion concludes that a broader rule prevails in the federal courts, one that protects from forced disclosure any communication from an attorney to his client when made in the course of giving legal advice" The court followed the *LTV* precedent.) (citations omitted); *United States v. Mobil Corp.*, 149 F.R.D. 533, 536 (N.D. Tex. 1993) ("The attorney-client privilege protects two related, but different, communications: (1) confidential communications made by a client to his lawyer for the purpose of obtaining legal advice; and (2) any communication from an attorney to his client when made in the course of giving legal advice, whether or not that advice is based on privileged communications from the client."); *In re LTV Sec. Litig.*, 89 F.R.D. 595, 602-03 (N.D. Tex. 1981) ("In theory, the client states facts and the attorney gives advice; and in theory, if the advice to the client does not reveal what the client told him it is not privileged Whatever the conceptual purity of this 'rule,' it fails to deal with the reality that lifting the cover from the advice will seldom leave covered the client's communication to his lawyer. Nor does it recognize the independent fact gathering role of the attorney. Finally, enforcement of the rule would be imprecise at best, leading to uncertainty as to when the privilege will apply A broader rule . . . protects from forced disclosure any communication from an attorney to his client when made in the course of giving legal advice [W]e think the broader rule better serves the interests underlying the attorney-client privilege and is not inconsistent with the principle that the attorney-client privilege should be construed narrowly."). See generally, Paul R. Rice, *Attorney-Client Privilege: Continuing Confusion About Attorney Communications, Drafts, Pre-Existing Documents and the Source of the Facts Communicated*, 48 AM. U. L. REV. 967, 970-79 (1999) (recognizing that confusion exists as to the fundamental principles of the attorney-client privilege, partly due to a misunderstanding over the distinction between communication and information).

223. *Hickman v. Taylor*, 329 U.S. 495, 508 (1947); *TVT Records v. Island Def Jam Music Group*, 214 F.R.D. 143, 148 (S.D.N.Y. 2003) ("[T]he communication is not privileged to the extent it merely relays the content of the attorney's conversation with a third party."); *Gucci Am., Inc. v. Loehmann's Inc.*, No. 01 CIV.3904 MBM MHD, 2002 WL 1467851, at *1 (-S.D.N.Y. July 9, 2002) ("[T]he privilege—whether interpreted broadly or narrowly—does not protect a communication from the attorney to the client that simply reports the receipt of information from someone not a party to the privileged relationship."); *Boling v. First Util. Dist.*, No. 3:97-CV-832, 1998 U.S. Dist. LEXIS 21157, at *11 (E.D. Tenn. Oct. 5, 1998) ("On the other hand, correspondence from counsel to plaintiff which is based on information learned from any person outside the plaintiff's organization is not privileged.").

and where the judges perhaps practiced before being appointed to the bench? If the latter is true, it would be equivalent to the practice in federal courts prior to the adoption of the Federal Rules of Evidence when federal courts generally followed the evidence rules of the state jurisdictions in which they sat. Perhaps that is not such a bad idea for the attorney-client privilege, since lawyers generally have to be licensed under state law and both they and their clients operate under the assumption that state rules control the confidentiality of their relationship.²²⁴ Does the Committee intend to upset this applecart for the sake of consistency and thereby “upset settled expectations”? Without codification, perhaps choice of law principles will evolve vis-à-vis the attorney-client privilege so that state law will usually be followed in federal courts because it is the only law that attorneys and clients can reasonably anticipate will control communications being encouraged by the privilege. These principles usually take place long before any federal causes of action arise or are anticipated and suits are filed in federal court—the triggering mechanisms for applying federal law.²²⁵

D. Confidentiality

Previously an absolute necessity for the creation and continuation of the attorney-client privilege, the confidentiality requirement has evolved from strict secrecy from the point of the privilege’s creation, into little more than a condition precedent to the creation of the privilege, but not a necessary condition for its continuation.²²⁶ It has been treated as little more than a right of privacy that can be shared, within certain limitations. This, most notably, has resulted in courts (1) continuing to recognize the privilege even though confidentiality has been destroyed by the intentional

224. For a discussion of choice of law questions vis-à-vis the attorney-client privilege, see RICE, *ATTORNEY-CLIENT PRIVILEGE*, *supra* note 3, Ch. 12.

225. Federal Evidence Rule 501 provides in part “in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.” FED. R. EVID. 501. *See generally* RICE, *ATTORNEY-CLIENT PRIVILEGE*, *supra* note 3, § 12:6 (discussing Rule 501 and choice of law on privilege).

226. Paul R. Rice, *Attorney-Client Privilege: The Eroding Concept of Confidentiality Should Be Abolished*, 47 *DUKE L.J.* 853, 882 (1998).

acts of third parties (stealing documents, for example)²²⁷ and (2) recognizing the concept of “inadvertent disclosure” and excusing the voluntary breach of confidentiality by the client if reasonable efforts had been made to preserve the confidentiality.²²⁸ It is also reflected in the protective orders that courts regularly employ to expedite the pretrial discovery process.²²⁹ Through these orders, the voluntary

227. Compare *In re Grand Jury Proceedings Involving Berkley and Co.*, 466 F. Supp. 863, 868 (D. Minn. 1979) *aff'd* 629 F.2d 548 (8th Cir. 1980) (“The protection afforded by the privilege, however, does not apply to the documents obtained from Berkley’s former employee, for the privilege does not apply to stolen or lost documents.”) with *Crabb v. KFC Nat’l. Mgmt. Co.*, 952 F.2d 403 (6th Cir. 1992) (unpublished) (ex-employee’s possession of privileged document was excused, even though the breach of confidentiality was unexplained, because efforts to preserve confidentiality were perceived to have been adequate) and *Suburban Sew ‘N Sweep, Inc. v. Swiss-Bernina, Inc.*, 91 F.R.D. 254, 260 (N.D. Ill. 1981) (“[R]eview of the cases, and particularly of the evolving rule with respect to eavesdroppers, reveals that the privilege is not simply inapplicable any time that confidentiality is breached, as plaintiffs claim, and that the relevant consideration is the intent of the defendants to maintain the confidentiality of the documents as manifested in the precautions they took.”). See generally RICE, ATTORNEY-CLIENT PRIVILEGE, *supra* note 3, § 9:26 (stolen documents or purloined communications do not necessarily waive attorney-client privilege when the client is not responsible for the breach of confidentiality).

228. *Allread v. City of Grenada*, 988 F.2d 1425, 1434 (5th Cir. 1993) (“In our view, an analysis which permits the court to consider the circumstances surrounding a disclosure on a case-by-case basis is preferable to a *per se* rule of waiver. This analysis serves the purpose of the attorney client privilege, the protection of communications which the client fully intended would remain confidential, yet at the same time will not relieve those claiming the privilege of the consequences of their carelessness if the circumstances surrounding the disclosure do not clearly demonstrate that continued protection is warranted.”); *Stratagem Dev. Corp. v. Heron Intern. H.V.*, Nos. 90 Civ. 6328(SWK), 90 Civ. 7237(SWK), 1993 WL 6216, at *2 (S.D.N.Y. Jan. 6, 1993), *aff'd* 153 F.R.D. 535 (S.D.N.Y. 1994) (“The inadvertent disclosure doctrine balances two competing considerations. On one hand, errors must not be so freely forgiven that counsel will neglect to conduct careful document reviews. On the other hand, if the privilege evaporates as soon as any erroneous disclosure is made despite reasonable precautions, counsel will be compelled to conduct document reviews that consume inordinate amounts of their time and their clients’ money in an effort to attain perfection.”). See generally RICE, ATTORNEY-CLIENT PRIVILEGE, *supra* note 3, §§ 9:70–9:77 (discussing inadvertent disclosures of privileged communication to third parties).

229. *Osband v. Woodford*, 290 F.3d 1036 (9th Cir. 2002) (holding that the trial court had discretion to issue a protective order that limited the waiver of the attorney-client privilege to the action in which the ineffective assistance claim was made. The state was precluded from giving any information to

production of privileged communications is not considered a waiver under the protective order, and the client can assert the privilege after the opposing side has seen the communications. Some courts have excused disclosures of confidential privileged communications during negotiations for the sale of a company when the disclosures have prevented future litigation about matters addressed in the attorney-client communications.²³⁰ If privileges had been codified and these ideas had been proposed to the Committee, would they have been shunned because they not only “upset settled expectations” but also “would require a re-education of the Bar”?

In the corporate context, we have seen an expansion of the circle of confidentiality from corporate executives who make decisions

prosecutors who might want to use it if the defendant were retried.); *Navajo Nation v. Peabody Coal Co.*, No. 00-5072, 2001 WL 312117, at *2 (Fed. Cir. Mar. 29, 2001) (“The Order specifically indicated that ‘[p]roduction of documents for purposes of the present case shall not constitute a waiver of any right of Peabody to raise a claim of privilege as to these documents in any other present or future litigation.’”) (alteration in original); *In re Commercial Fin. Servs. Inc.*, 247 B.R. 828, 848–49 (N.D. Okla. 2000) (relative to a report prepared by the company’s lawyers, the petitioner sought and was granted a protective order that permitted it to produce the allegedly privileged report on the condition that the parties who wished to see it had to execute a “Non-waiver Agreement,” in which the recipient agreed to keep the report confidential and not argue to any forum that the waiver of the privilege with respect to the report resulted in a subject matter waiver for the information underlying the report.)

230. *Tenneco Packaging Specialty & Consumer Prods., Inc. v. Johnson & Son, Inc.*, No. 98 C 2679, 1999 WL 754748, at *2 (N.D. Ill. Sept. 14, 1999) (“SCJ has stated that DowBrands disclosed the opinion to SCJ during the course of due diligence, when the asset purchase deal was largely locked up. And DowBrands took substantial steps to ensure that the opinion would remain confidential. According to SCJ, ‘access to the opinion was controlled by specific procedures designed to prevent dissemination of its contents’; DowBrands showed the opinion to a limited number of SCJ representatives, and then only after they acknowledged that disclosure was subject to a confidentiality agreement. Thus, the opinion is privileged and need not be produced.”); *Hewlett-Packard Co. v. Bausch & Lomb, Inc.*, 115 F.R.D. 308, 311 (N.D. Cal. 1987) (The court refused to find a waiver when Bausch & Lomb disclosed an opinion letter to a non-party during negotiations concerning the sale of one of its divisions. “By refusing to find waiver in these settings courts create an environment in which businesses can share more freely information that is relevant to their transactions. This policy lubricates business deals and encourages more openness in transactions of this nature.”).

based on the legal advice sought,²³¹ to all individuals when the communications are about matters within the scope of their employment responsibilities,²³² and to outside consultants whose work makes them the equivalent of virtual employees.²³³ How long would the Committee have waited to see what the courts were willing to do without explicit authorization in the rules? How willing would judges have been to extend the coverage of a more restrictive codified privilege? If some courts would have taken the initiative and extended the rule, would the Committee have declined to act because the problem had “been handled adequately by the courts”?²³⁴ Perhaps the Committee would have concluded that addressing the issue would present “policy question[s] that most courts had already worked through.”²³⁵

The sharing of communications among joint clients (clients with a common attorney) was permitted prior to the promulgation of the Federal Rules of Evidence. Subsequently, the concept of sharing without waiving was expanded to encompass “joint defense” (individuals with separate attorneys jointly preparing a defense strategy in pending litigation).²³⁶ Thereafter, the concept evolved

231. *City of Philadelphia v. Westinghouse Elec. Corp.*, 210 F. Supp. 483, 485 (E.D. Pa. 1962).

232. *Upjohn Co. v. United States*, 449 U.S. 383 (1981); *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487 (7th Cir. 1970). *See generally* RICE, ATTORNEY-CLIENT PRIVILEGE, *supra* note 3, § 4:13 (recognizing the difficulty in defining the “control group” of individuals within a corporate structure who make decisions based on the legal advice of counsel).

233. *In re Bieter Co.*, 16 F.3d 929, 938 (8th Cir. 1994); *In re Currency Conversion Fee Antitrust Litig.*, MDL No. 1409, M 21-95, 2003 U.S. Dist. LEXIS 18636, at *7 (S.D.N.Y. Oct. 21, 2003) (outside public relations firm); *In re Copper Market Antitrust Litig.*, 200 F.R.D. 213, 218 (S.D.N.Y. 2001) (outside public relations firm); *H.W. Carter & Sons, Inc. v. William Carter Co.*, No. 95 Civ. 1274 (DC), 1995 WL 301351 (S.D.N.Y. 1995) (outside public relations consultant assisted lawyer in advising client on how to respond to the plaintiff’s lawsuit); *Village of Kiryas Joel Local Dev. Corp. v. Ins. Co. of N. Am.*, No. 90 Civ. 4970 (JFK), 1992 WL 8207 (S.D.N.Y. 1992); *Carte Blanche (Sing.) PTE., Ltd. v. Diners Club Int’l, Inc.* 130 F.R.D. 28, 34 (S.D.N.Y. 1990).

234. Minutes of Oct. 18, 2002, *supra* note 81.

235. *Id.* at 12.

236. *United States v. Bay State Ambulance and Hosp. Rental Serv., Inc.*, 874 F.2d 20 (1st Cir. 1989); *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989); *In re Beville, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 126 (3d Cir. 1986); *United States v. Hsia*, 81 F. Supp. 2d 7, 16 (D.D.C.

into a “common interest” or “community of interests” principle that permitted individuals not preparing litigation strategy to share communications when they shared legal interests.²³⁷ At first the “legal interests” that had to be shared had to be *identical*.²³⁸ Over time, we have experienced a relaxation of that requirement.²³⁹ Would a proposal to recognize such an expansion before it was accepted by judges without explicit authorization have been tabled because it would have “substantially changed the case law” or

2000) (“It [a joint defense agreement] permits a client to disclose information to her attorney in the presence of joint parties and their counsel without waiving the attorney-client privilege and is intended to preclude joint parties and their attorneys from disclosing confidential information learned as a consequence of the joint defense without permission.”); *Go Med. Indus. PTY, Ltd. v. C.R. Bard, Inc.*, No. 3:95 MC 522(DJS), 1998 WL 1632525, at *3 (D. Conn. Aug. 14, 1998) (“The common interest rule extends the application of the attorney-client privilege in circumstances where the parties are represented by separate counsel but join in a legal defense or enterprise. Under the common interest rule, parties and counsel involved in a joint defense or enterprise may disclose privileged information to each other without destroying the privileged nature of those communications.”) (citations omitted).

237. *See, e.g., In re Grand Jury Subpoena*, 274 F.3d 563, 572 (1st Cir. 2001) (“Because the privilege sometimes may apply outside the context of actual litigation, what the parties call a ‘joint defense’ privilege is more aptly termed the ‘common interest rule.’”); *In re Application of the Fed. Trade Comm’n (Avrett Free & Ginsberg)*, No. M18-304 (RJW), 2001 WL 396522, at *3 (S.D.N.Y. Apr. 19, 2001) (“Only communications made in the course of an ongoing legal enterprise, and intended to further the enterprise, are protected. However, it is not necessary that there be actual litigation in progress for the common interest rule to apply.”) (citations omitted).

238. *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1172 (D.S.C. 1974) (Parties have a community of interests “where they have an identical legal interest with respect to the subject matter of a communication between an attorney and a client concerning legal advice The key consideration is that the nature of the interest be identical, not similar, and be legal, not solely commercial.”). The *Duplan* decision was widely followed. *See generally* RICE, ATTORNEY-CLIENT PRIVILEGE, *supra* note 3, § 4:36 (discussing the “community of interests” standard as it relates to attorney-client privilege).

239. Common legal interest was a recurring characterization in the following cases. *In re Auclair*, 961 F.2d 65, 69 (5th Cir. 1992); *Libbey Glass, Inc. v. Oneida, Ltd.*, 197 F.R.D. 342 (N.D. Ohio 1999); *Browne of N.Y. City, Inc. v. AmBase Corp.*, 150 F.R.D. 465 (S.D.N.Y. 1993); *Am. Colloid Co. v. Old Republic*, No. 93 C 0665, 1993 WL 195270 (N.D. Ill. 1993); *In re Mortgage & Reality Trust*, 212 B.R. 649 (C.D. Cal. 1997).

because “any amendment would require more than a simple substitution of one word for another”?²⁴⁰

E. Legal Advice or Assistance

The concept of “legal advice or assistance” has never been defined with particularity. As a consequence, matters that previously would not have been thought sufficiently “legal” in nature, like legislative drafting and lobbying,²⁴¹ have been brought within the scope of the privilege by judicial decisions when they have been tied to other traditional legal work being performed by lawyers.²⁴² The same has been true of public relations advice and assistance.²⁴³ Recently, in the unpublished opinions in the consolidated MDL Microsoft cases,²⁴⁴ we held²⁴⁵ that confidential communications could be shared with outside public relations consultants who were assisting the attorney in putting a public face on pending litigation. Assuming this is a reasonable extension of the privilege, would courts have ever ventured into this uncharted water if the privilege had been codified? Would the Committee have shied away and done

240. Minutes of Oct. 25, 1999, *supra* note 55, at 7.

241. *Westinghouse Elec. Corp. v. Rio Algom Ltd.*, 448 F. Supp. 1284 (N.D. Ill. 1978) (preparing a report for use in Congressional testimony and public advocacy not legal assistance); *U.S. Postal Serv. v. Phelps Dodge Ref. Corp.*, 852 F. Supp. 156, 164 (E.D.N.Y. 1994) (letter describing lobby efforts not legal services).

242. *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir. 1978) (preparing client for Congressional hearings was legal assistance); *In re Microsoft Corp. Antitrust Litig.*, MDL Docket No. 1332 (D. Md. 2003) and *Coordination Proceedings: Microsoft I-V Cases*, J.C.C.P. No. 4106 Class Action (Sup. Ct. Cal. 2003) (special counsel held that the services of lawyers and those working with the legal team was considered legal when Congressional hearings were being held and private actions involving the same subject matter were ongoing).

243. *H.W. Carter & Sons, Inc. v. William Carter Co.*, No. 95 Civ. 1274 (DC), 1995 WL 301351 (S.D.N.Y. 1995) (outside public relations consultant assisted lawyer in advising client on how to respond to the plaintiff’s lawsuit).

244. *In re Microsoft Corp. Antitrust Litig.*, MDL Docket No. 1332 (D. Md. 2003) and *Coordination Proceedings: Microsoft I-V Cases*, J.C.C.P. No. 4106 Class Action (Cal. 2003).

245. I served as special counsel with John Cooper of Farella Braun & Martel, San Francisco, CA, to Judge Renfrew, special master for Judge Motz, who was coordinating the resolution of privilege claims for both the MDL and Consolidated California actions.

nothing if a suggestion had been made because they were afraid their actions may have opened “a Pandora’s box”?²⁴⁶

F. Waiver

The grounds of waiver have also expanded. In *Hearn v. Rhay*,²⁴⁷ the court held that when a claim is made, which necessarily implicates the client’s communications with legal counsel (e.g., claiming good faith, lack of knowledge, and estoppel) because those communications with counsel are vital to a defense of those claims, the client impliedly waives the privilege protection through his affirmative conduct.²⁴⁸ While the decision has not been without its detractors,²⁴⁹ it has been overwhelmingly accepted throughout the federal and state systems.²⁵⁰ Would the Committee have been too fearful of the consequences to experiment with such an established principle?

IV. BACK TO THE FUTURE

The legislative or quasi-legislative process of the Rules Enabling Act addresses evidentiary issues in a manner that is completely and profoundly inconsistent with the common law tradition through which our rules originally evolved. Created under the common law as a result of evidentiary needs in individual cases, the rules took shape through their application in factual situations giving rise to equities that judges had no choice but to address. Each judge knew that his or her interpretation and application of a rule was binding only in the particular case. It became part of the evolution of the rule when it was applied in other cases and to other factual situations, only to the extent that the judge’s logic was compelling. The desires of special interest groups seldom, if ever, played a role unless they were parties to the suit.

246. Minutes of Sept. 30 – Oct. 2, 1993, *supra* note 15.

247. 68 F.R.D. 574 (E.D. Wash. 1975).

248. *Id.* at 579–80.

249. *See*, *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851 (3d Cir. 1994); *Allen v. West Point-Pepperell Inc.*, 848 F. Supp. 423 (S.D.N.Y. 1994); *Ryall v. Appleton Elec. Co.*, 153 F.R.D. 660 (D. Colo. 1994).

250. *See* RICE, ATTORNEY-CLIENT PRIVILEGE, *supra* note 3, § 9:50; PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE: STATE LAW (Rice Publishing CD-ROM 2004).

In contrast, the quasi-legislative process beginning with the Evidence Advisory Committee is *not required* to address anything. The judges that predominate on the Committee have the choice of promulgating and approving rules that address no immediate needs that demand their creative attention, or maintaining the status quo and letting their brethren deal with the identified problems on a case-by-case basis. Their natural and understandable tendency is to do little or nothing, because as one member of the Committee explained, each change has the potential of creating more problems than it resolves.²⁵¹ Being the pragmatists as their profession compels, judges, with dockets that are often overwhelming, chose to do as little as possible because they would rather live with the devil they know than confront the devil they don't know.

As procedural instruments, evidence rules are inherently different from other procedural codes. The codes of civil and criminal procedure, for example, establish uniform methods for the initiation of legal actions; they address the procedural niceties for the progression and resolution of the myriad, but common, procedural problems that arise throughout litigation. While the evidence rules do much the same, they are different in kind because they address the evidentiary details of the actions that vary in type: nature of the evidence, how the evidence was obtained, when the evidence is being used, what the evidence is being used to prove, and general principles of trustworthiness, fairness and unfair prejudice. The promulgation and imposition of new, untested rules in broader contexts is too daunting an undertaking to expect judges, regardless of their experience, to be confident that they can successfully accomplish without creating bigger problems than the ones they recognize and are trying to resolve. Once this reality is appreciated, we can begin to understand why the common law method for developing evidence rules on a case-by-case basis, in which judges are expected to react only to the equities of each rule's immediate application, is far superior to the broader-reaching bureaucratized process under the Rules Enabling Act. This reality also explains why the rule-making process has evolved into a mechanism with the disadvantages of both the legislative process (with its delays,

251. Minutes of Apr. 25, 2003, *supra* note 83, at 15.

bureaucracy, and special interest), and the common law system that it was supposed to replace (with its uncertainties and slow evolution).

The best, rather than the worst, of both the common law and codification could be achieved if (1) the common law evidentiary rule-making authority were officially recognized by abolishing the Federal Rules of Evidence as a *binding* code, and (2) the role of the Advisory Committee on the Federal Rules of Evidence were changed to facilitating the judiciary's development of rules by crystallizing current practices in a coherent framework by exposing problems and offering preferred solutions to both existing and developing issues—compelling nothing, but influencing through reason and structure. Such a committee would function as something equivalent to the Commission on Uniform State Laws vis-à-vis the development and evolution of state evidentiary rules. Abolishing a binding code of evidence may bring several other significant benefits. First, Congress may be less inclined to tinker with evidentiary rules for political reasons. Second, the members of the Advisory Committee may be more willing to engage in broader and deeper explorations of model rules and propose meaningful rule changes since those changes would not bind anyone, and the members would not have to anticipate all specific evidentiary contexts. Third, rules would evolve solely on the basis of need rather than on the basis of the desires of special interests and pressures from Congress.

Consistency among federal judges, which was significantly furthered in the past by codification of rules and procedures, will not be jeopardized if binding codification were abandoned. With the Internet and its instantaneous world-wide communication of judicial decisions, coupled with the research assistance each federal judge's law clerk provides and guidance from a new Advisory Committee process, we no longer need to trade the flexibility of the equity-driven common law for the bureaucratized, doubt-laden, time-restricted, and too often special interest influenced rule-making process of our current system. I have confidence in the integrity and competence of the judges in our federal judiciary. They have demonstrated through their experience with privilege rules that they do what the Advisory Committee does, much better and faster than the Advisory Committee. It's time that the predominantly judge-manned Advisory Committee acknowledge the superiority of their collective brethren in our new Internet age, given radically changed

communications, and put down for good this tired old dog of privilege codification. It is also time for Congress to recognize the limits of the legislative process in the judicial arena and take a giant step back into the future and do for all evidence rules what it did for privileges in the current Evidence Code—leave their development to the judicial wisdom of the common law that has effectively served the needs of judicial systems for hundreds of years.