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A Practitioner's Guide to the Federal Rules of Evidence

COMMENT

A PRACTITIONER'S GUIDE TO THE FEDERAL RULES OF EVIDENCE

I. INTRODUCTION

On July 1, 1975, the Federal Rules of Evidence went into effect. President Ford's signature on Public Law 93-595 was the culmination of nearly twenty years of study, drafting, and debate. Obviously the decision to codify federal evidence law was not lightly made, but the desire for uniformity ultimately made the Rules possible. As with all major legislation, compromise was necessary and certain areas of the law were left untouched. Criminal presumptions represent one such area. In other areas, such as privilege, only minimal codification was possible. The final result is a good set of rules, but one which might not be uniformly applied.

Most of the debate is expected to continue in the areas of privilege, presumption, character and hearsay. The purpose of this note is to analyze these controversial portions of the Rules and compare them with existing federal and Virginia common law. This approach should enable the practising attorney to make a smooth transition to the new world of statutory rules of evidence.

II. SCOPE

The Rules do not apply to all proceedings within federal jurisdiction. Rule 1101 details when the Rules apply in whole or in part.[1] Its provisions may seem complicated, but a useful rule of thumb has been suggested and is reprinted here.

> Whenever the Judge (or Magistrate, or Referee in Bankruptcy, or Court of Claims Commissioner) is presiding over a proceeding to determine one of the material or ultimate facts in the dispute between the parties, the new Federal Rules of Evidence govern. With the exception of Rules of privilege which apply at all stages of all actions, cases, and proceedings, the Rules do not ordinarily govern preliminary stages of litigation, criminal or civil, or preliminary fact-finding relating to the application of an evidentiary Rule as opposed to fact-finding relating to the merits of the case.[2]

It should be noted that a distinction is drawn between preliminary proceedings and actual adjudications, and that rules of privilege are given special treatment. In addition, the Rules are expressly made inapplicable

1. FED. R. EVID. 1101.

2. K. REDDEN & S. SALTZBURG, FEDERAL RULES OF EVIDENCE MANUAL 387 (1975) [hereinafter cited as REDDEN & SALTZBURG].

to grand jury proceedings, preliminary hearings on criminal cases, proceedings for extradition or rendition, sentencing and probation revocation hearings, and proceedings for a warrant, summons or bail.[3] Part (e) of Rule 1101 makes the Rules applicable in part to certain proceedings governed by existing statutes to the extent that evidentiary matters are not covered in those statutes. Finally, the Rules do not expressly cover District of Columbia "local" courts, the Tax Court or the military tribunals; however, these courts may elect to follow the Rules.[4]

III. PRESUMPTIONS

In certain instances, the law grants one party the benefit of a presumption. One of the most familiar of these is the presumption of innocence in a criminal case. The defendant need present no proof whatsoever and may rely entirely on this presumption for his case. The Rules, however, do not deal with criminal presumptions, and their application to civil presumptions requires more analysis than the familiar example above.

A presumption could be described as a legal, and often logical, inference derived from established facts. A presumption must normally rest on some basic facts from which the ultimate fact will then be presumed. Such a situation might arise in a case contesting the death of an insured. The party with the burden of proving death which is the ultimate fact, (*i.e.* the beneficiary), may do so with a presumption. Once there is evidence of an unexplained absence for the required statutory period, the basic facts have been established and death is legally presumed. Since a presumption may be the determining factor in a case, the rules that govern a presumption's effect and rebuttability are of great significance to the practitioner.

The Federal Rules of Evidence, as initially proposed, contained three sections relating to presumptions.[5] Rule 303 dealing with criminal presumptions was eliminated,[6] but Rules 301 and 302 were modified and

3. FED. R. EVID. 1101(d).

4. REDDEN & SALTZBURG, *supra* note 2, at 387.

5. J. SCHMERT, PROPOSED FED. R. EVID., Rules 301-03, at 48-54 (1974).

6. Proposed Rule 303 defined recognized criminal presumptions and expressly forbade the judge to direct the jury to find a presumed fact against the accused. However, where the presumed fact established guilt or an element of the offense, the judge could submit the fact to the jury if that fact could be found beyond a reasonable doubt. Where the presumed fact had a lesser effect, the judge could submit it to the jury when its existence was supported by the weight of the evidence. *Id.* at 52.

The rule was deleted by the House of Representatives since the Judiciary Committee wished to review the entire matter of criminal presumptions in light of proposed changes in Title 18 of the United States Code. H.R. REP. No. 650, 93d Cong., 2d Sess., 4 U.S. CODE CONG. & ADMIN. NEWS, 7075, 7079 (1974).

retained for civil actions and proceedings.[7]

The Rules, as adopted, treat the burden of proof as composed of two elements: the burden of going forward with the evidence and the burden of persuasion. Under Rule 301 a presumption shifts the burden of going forward with the evidence but does not shift the burden of persuasion.[8] If the party against whom a presumption operates offers no contradictory evidence, the court must instruct that the ultimate fact may be presumed (assuming the basic facts have been established).[9] However, once evidence contradicting the presumption is offered, the court cannot instruct on the presumption itself but may instruct the jury that they may infer the ultimate fact from the basic facts.[10] In the latter case, the jury will be left to evaluate two opposing inferences: one raised by facts logically supporting the presumption, and one raised by facts tending to defeat such an assumption.

While the Rules do not state how much evidence is necessary to rebut a presumption, it is probably that amount necessary to avoid a directed verdict.[11] Whatever the amount, once a presumption is rebutted the trier of fact is left with a permissible inference only. The inference acquires no special status merely because it was once a presumption.[12]

The effect of Rule 301 is in accord with federal case law.[13] A presumption is not evidence and may not be balanced against evidence of a fact. Once a fact in conflict with a presumption is proven, the presumption disappears and the fact so proven must be found.[14] However, since a rebutted pre-

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7. FED. R. EVID. 301 & 302 provide:

Rule 301. 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.

Rule 302. In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law.

8. FED. R. EVID. 301.

9. CONFERENCE REP. No. 1597, 93rd Cong., 2d Sess., 4 U.S. CODE CONG. & AD. NEWS, 7098, 7099 (1974). The Senate's Amendment to Rule 301 was the version finally adopted by Congress. S. REP. No. 1277, 93d Cong., 2d Sess., 4 U.S. CODE CONG. & ADMIN. NEWS, 7051, 7056 (1974).

10. *Id.*

11. *See* REDDEN & SALTZBURG, *supra* note 2, at 48. *But see* 8 CYC. FED. PROC. § 26.289 (3rd ed. 1968).

12. *See* note 9 *supra.*

13. 8 CYC. FED. PROC. § 26.290 (3d ed. 1968).

14. *See* Blakeslee v. Smith, 26 F. Supp. 28 (D. Conn.), *aff'd*, 110 F.2d 364 (2d Cir. 1940).

sumption may leave an inference from the basic facts, this inference will usually be considered by the trier of fact as tending to disprove contradictory facts. Thus, the presumption itself will receive no evidentiary weight, but any inference established from the underlying facts may.[15]

The Virginia law on presumptions is basically the same as that in Rule 301 with two possible exceptions.[16] In some cases Virginia requires (a) a shift in the burden of persuasion, and (b) a greater quantum of evidence to rebut a presumption.

As noted earlier, the burden of persuasion does not shift under Rule 301.[17] This is the rule in Virginia for most presumptions,[18] but there are a few exceptions. While the cases are not always clear, the following presumptions seem to require more evidence for rebuttal than that required by the Federal Rules: presumption that death was accidental in some insurance cases,[19] presumption that a lost will was destroyed by the testator,[20] presumption of sanity in some cases,[21] and the presumption of an heir's legitimacy.[22] In these exceptions the burden of persuasion does shift, and the opponent must rebut the presumption by a preponderance of the evidence.[23]

Rule 302 requires federal courts to use state presumptions in civil cases "respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision. . . ."[24] Since this rule is limited to civil actions and proceedings, the more involved problems found in criminal presumptions are not in issue.[25] All that is necessary for a state presumption to qualify under this rule is (a) that it have a rational connec-

15. *See* McGrew's Estate v. Commissioner, 135 F.2d 158 (6th Cir. 1943).

16. *See generally* M. MARSHALL, J. FITZHUGH & J. HELVIN, THE LAW OF EVIDENCE IN VIRGINIA AND WEST VIRGINIA §§ 208-15 (C. Nash ed. 1954) [hereinafter cited as MARSHALL, FITZHUGH & HELVIN].

17. *See* note 7 *Supra.*

18. *See* MARSHALL, FITZHUGH & HELVIN, 18, *supra* note 16, at § 211.

19. *Id.* § 217.

20. *Id.* § 225.

21. *Id.* § 233.

22. *Id.* § 240.

23. *Id.* § 211, at 376 & n.41.

24. *See* note 7 *supra.*

25. *See* Skagen, *Presumptions*, 27 ARK. L. REV. 187, 196-97 (1973). Since the state must prove guilt beyond a reasonable doubt, only permissive presumptions may be used (*i.e.*, jury *may* but is *not required* to find the presumed fact). Furthermore, a presumption need only be rebutted by a reasonable doubt and the burden of proof is never shifted from the state. These factors must be considered in addition to the rational-connection test of Mobile, J. & K.C.R.R. v. Turnipseed, 219 U.S. 35 (1910).

tion with the facts proven,[26] (b) that it relate to a fact which is an element of a claim or defense in issue,[27] and (c) that the issue be one properly determined by state law.[28]

Part (a) of this three part rule is a constitutional restriction and will only apply to state substantive rather than procedural presumptions.[29] As such, the Rule follows *Erie v. Tompkins*,[30] which requires federal courts to apply state substantive and federal procedural law in cases where federal substantive law is not controlling. Although conflicts about what is substantive and what is procedural abound, the Rule is a codification of the *Erie* doctrine for presumptions.[31] Part (c) of Rule 302 goes even further, however, to clarify and expand *Erie's* application to presumptions by reaching cases "as to which State law supplies the rule of decision. . . ." This particular wording has special judicial significance and requires precise application. For this purpose, *rules of decision* have been defined as "the rules and principles which guide the conduct and rights of all persons in all courts where applicable."[32] Furthermore, in keeping with modern interpretations of *Erie*, the rule is not to be limited merely to diversity cases.[33]

While apparently clear, Rule 302 is attendant with application problems. Aside from all of the usual *Erie* problems in distinguishing substance from procedure,[34] there could be some confusion between Rules 301 and 302.[35]

State law may differ from Rule 301 in dealing with the effect of a presumption when rebutted, in the amount of evidence necessary for rebuttal, and on a presumption's effect on the burden of persuasion. However, Rule 301 expressly states that it is subject to the other rules, and thus Rule 302 would govern any time state law supplies the rule of decision. Conse-

26. *See* Minski v. United States, 131 F.2d 614 (6th Cir.), *aff'd*, 319 U.S. 463 (1942).

27. FED. R. EVID. 302.

28. *Id.*

29. *See* 8 CYC. FED. PROC. § 26.267 (3d ed. 1968).

30. 304 U.S. 64 (1937).

31. FED. R. EVID. 302 (Advisory Committee's Note).

32. Skagen, *Presumptions*, 27 ARK. L. REV. 187, 192 (1973).

33. The Advisory Committee stated that while *Erie* was a diversity case, it has been applied to any claim or issue having its source in state law. FED. R. EVID. 302 (Advisory Committee's Note), *citing* Vestal, *Erie R.R. v. Tompkins: A Projection*, 48 IOWA L. REV. 248, 257 (1963); H.M. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 697 (1953); I MOORE, FEDERAL PRACTICE, para. 0.305 [3] (2d ed. 1965); WRIGHT, FEDERAL COURTS 217-18 (1963).

34. Chayes, *The Bead Game*, 87 HARV. L. REV. 741 (1974); Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974).

35. P. ROTHSTEIN, RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND MAGISTRATES 51-52 (1973).

quently, an attorney must be prepared to argue for admission of not only the presumption, but also its effect when rebutted and the amount of evidence necessary for rebuttal.

The language of Rule 302 seems to encompass all of these other aspects of presumptions by saying the "effect of a presumption," but there is room for confusion and court interpretation. Can it reasonably be said that the burden of proof necessary to rebut a presumption is an "effect" of the presumption? If not, then Rule 302 would seem to require the application of a state presumption, but allow rebuttal evidence to be measured by a federal standard,[36] and then a return to state standards for a determination of the presumption's effect once rebutted. Such problems may be resolved within a judge's discretion[37] and will probably depend at least in part on the state policies behind a particular presumption,[38] since the rule "apparently reflects notions of comity" between federal and state courts.[39] Thus, Rule 302 is basically a flexible codification of existing federal case law.[40]

IV. CHARACTER EVIDENCE

Article IV of the Federal Rules of Evidence includes the new law on permissible character evidence. The statutory version is generally consistent with both federal law and Virginia common law, but there are a few significant changes.

Before these changes can be discussed, however, a general explanation of legal relevancy under Article IV is necessary since this is the basis for excluding character evidence. The definition of relevancy in Rule 401 forms a foundation for the rest of the article.

> "Relevant evidence" means evidence having any tendency to make the

36. No federal standard has been established by the Rules, and as suggested in the text *infra*, the point may be subject to some litigation.

37. These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined. FED. R. EVID. 102.

38. *See* Byrd v. Blue Ridge Rural Elec. Co-op., 356 U.S. 525 (1950). *See also* Judicial Conference, 48 F.R.D. 39, 69-72 (2d Cir. 1969); Weinstein, *The Uniformity-Conformity Dilemma Facing Draftsmen of the Federal Rules of Evidence*, 69 COLUM. L. REV. 353, 363-75 (1969).

39. REDDEN & SALTZBURG, *supra* note 2, at 57.

40. *See* FED. R. EVID. 302 (Advisory Committee's Note). *But see* Sherman, *Analysis of Federal Decisions Dealing with Evidence Published During 1967*, 69 COLUM. L.REV. 377, 379 (1969). Statistics seem to suggest that state rules of decision were not always followed in federal courts where their application was possible. Such a result, however, is understandable considering the interpretation problems surrounding Erie v. Tompkins, 304 U.S. 64 (1937).

> existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.[41]

This definition is in keeping with existing federal law, although there have been slight interpretational differences between the circuits.[42] While not phrased in the same language, the application of this Rule is also consistent with Virginia practice.[43]

However, the lenient admissibility provisions of Rule 401 must be considered with the limitations imposed by Rules 402 and 403.[44] Of particular significance is the amount of judicial discretion afforded in Rule 403, limited only by the categories defined therein. These guidelines provide considerable latitude for the court's decision to exclude relevant evidence and, as such, recognize traditional common law principles.[45]

Character evidence, though often "relevant" as the term is defined in Rule 401, is usually excluded because other interests outweigh the contribution such evidence may make to the case. While Rule 403 provides for this judicial determination of legal relevancy, Rule 404 limits this discretion. Rule 404 is a general rule of exclusion with limited exceptions and was apparently drafted to apply to both civil and criminal cases. While the rule's general terms are not so limited, exceptions (1) and (2) are clearly applicable to criminal cases only.

> (a) *Character evidence generally.*—Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:
>
> (1) Character of accused.—Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;
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> (2) Character of victim.—Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the

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41. FED. R. EVID. 401.

42. *See* MCCORMICK ON EVIDENCE § 185, at 437-38 (2d ed. 1972) [hereinafter cited as MCCORMICK].

43. Authorities have characterized Virginia law as admitting "all facts having a rational probative value . . . unless some specific rule forbids." MARSHALL, FITZHUGH & HELVIN, *supra* note 16, § 75, at 123 n.6, *citing* I WIGMORE, EVIDENCE § 10, at 293 (3d ed. 1940).

44. FED. R. EVID. 402 & 403 provide:

> Rule 402. All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.
>
> Rule 403. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

45. FED. R. EVID. 403 (Advisory Committee's Note).

same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of witness.—Evidence of the character of a witness, as provided in rules 607, 608, and 609.[46]

(b) *Other crimes, wrongs, or acts.*—Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.[47]

Character is excluded under the rule any time its admission is sought to prove conforming conduct. But when character is an operative issue of a claim or defense, it will be legally relevant and admissible.[48]

Exceptions (1) and (2) of Rule 404(a) merely codify federal case law and allow the prosecution to rebut character evidence put in issue by a criminal defendant.[49] The language of these sections limits their applicability to criminal cases and is consistent with the general view that character is irrelevant in a civil case.[50] However, the search for admissibility cannot be confined to Rule 404; even in a civil case, once character is in issue it becomes relevant and admissible under Rule 402. Defamation and malpractice cases are two examples in which character would be at issue and thus relevant. There is also authority for making character relevant in any civil case where "moral intent is marked and prominent in the nature of the issue. . . ."[51] As this type of evidence arguably falls outside the prohibition of Rule 404(a), it might be admissible under Rule 402 as relevant evidence offered in mitigation of damages.

Part (a)(3) of Rule 404 greatly complicates the area of relevant character

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46. These sections are discussed in detail *infra*.

47. FED. R. EVID. 404.

48. FED. R. EVID. 404(a).

49. *See* I WIGMORE, EVIDENCE §§ 58, 62, 63 (3d ed. 1940) [hereinafter cited as WIGMORE].

50. *See* I WIGMORE § 64. *But see* United States v. Genovese, 133 F. Supp. 820 (D.N.J. 1955) (admitted defendant's character evidence in fraudulent citizenship action).

51. I WIGMORE § 64, at 478-79. Virginia cases, however, seem to be limited to actions in which character is in issue. *See* Weatherford v. Birchett, 158 Va. 741, 164 S.E. 535 (1932) (libel and slander); Fry v. Leslie, 87 Va. 269, 12 S.E. 671 (1891) (seduction).

West Virginia has taken a more expansive position and allows character evidence in mitigation of puntive damages in an assault, Raines v. Faulkner, 131 W. Va. 10, 48 S.E.2d 393 (1947); or breach of promise to marry when defendant's character was attacked, Dent v. Pickens, 34 W. Va. 240, 12 S.E. 698 (1890). Both West Virginia and Virginia have allowed character evidence to determine if there was probable cause to mitigate damages in a malicious prosecution case. Southern Ry. v. Mosby, 112 Va. 169, 70 S.E. 517 (1911); Clairborne v. C. & O.R.R., 46 W. Va. 363, 33 S.E. 262 (1899); Vindal v. Core, 18 W.Va. 1 (1881).

evidence since the practitioner must apply the Rules in Article VI, which deal with the character of witnesses. Rule 607 allows an attack on any witness' credibility by either party.[52] When read in conjunction with Rule 404, this means that character evidence is admissible to impeach a witness and may be offered by either party without the traditionally required showing of surprise or hostility when impeaching one's own witness.[53] Furthermore, Rule 405 allows this proof in either reputation or opinion form.[54] But it should be noted that Rule 607 is absolute; thus, credibility may apparently be attacked with any type of relevant evidence.[55]

Rule 608 details when reputation, opinion and/or specific acts may be used to attack or support witness credibility.[56] Inquiries may be as to the past acts of a witness or to those acts of any other witness about whose character he has testified.[57] However, when a witness is questioned about his past conduct, he retains the privilege against self-incrimination.[58] As is the majority rule, credibility can only be supported if attacked, and all

52. "The credibility of a witness may be attacked by any party, including the party calling him." FED. R. EVID. 607.

53. MCCORMICK § 38, at 76 *citing* Comment, 49 VA. L. REV. 996, 1009 (1963). *See* III A WIGMORE § 905 n.6 and VA. CODE ANN. § 8-292 (Repl. Vol. 1957) for the federal and Virginia positions supporting the common law rule against impeaching one's own witness.

54. *See* note 105 *infra.*

55. The Advisory Committee on FED. R. EVID. 607 points out an additional change when impeachment is sought through prior statements. Such statements are not hearsay under Rule 801(d)(1) and may thus be admitted for their truth and not merely for impeachment. This liberality departs from previous federal law and existing Virginia law. *See* VA. CODE ANN. § 8-292 (Repl. Vol. 1957); MCCORMICK § 251, at 61.

56. (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 his credibility, 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 his 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 his privilege against self-incrimination when examined with respect to matters which relate only to credibility. FED. R. EVID. 608.

57. FED. R. EVID. 608(b).

58. *Id.* This rule is essential in light of constitutional decisions. *See, e.g.*, Griffin v. California, 380 U.S. 609 (1965); Ferguson v. Georgia, 365 U.S. 570 (1961).

evidence is limited to the particular trait of truthfulness rather than to bad character in general.[59]

Part (b) of Rule 608 admits evidence of specific acts to reflect on a witness' character for truth and veracity but only in narrowly defined situations. Some criminal convictions will be admitted under Rule 609 and are provable with extrinsic evidence.[60] All other specific acts will only be admitted if in the judge's discretion they are "probative of truthfulness or untruthfulness."[61] However, the judge's discretion will be influenced by the exclusion factors of Rule 403 in which prejudice, confusion and delay are balanced against relevance.[62] These specific acts may not be proven by extrinsic evidence (*i.e.*, the examiner will be bound by the witness' answer) and may only be explored on cross-examination.[63]

A discretionary use of specific acts to prove or disprove a witness' truthfulness is consistent with previous federal law and existing Virginia law.[64] The Rules are, however, less concerned with the method of examination employed. They do not require the traditional method of examination in which a witness was questioned about an "alleged or reputed" act of another.[65] In so doing, the Congress has followed Wigmore's rationale for eliminating this formalism,[66] while at the same time imposing necessary safeguards to prevent abuse.[67] While there is no express requirement that the examining party use good faith in questioning about specific acts,[68] the

59. III A WIGMORE § 923 n.2. For a good discussion of Virginia's position see 16 VA. L. REV. 733 (1930); Lendvay v. Sobgito, 211 Va. 548, 178 S.E.2d 532 (1971).

60. In the report of the House and Senate Conferees, crimes of dishonesty and false statement were to include such crimes as perjury, criminal fraud, embezzlement, false pretense or "any other offense in the nature of crimen falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully." REDDEN & SALTZBURG, *supra* note 2, at 192.

61. FED. R. EVID. 608(b).

62. FED. R. EVID. 403.

63. FED. R. EVID. 608(b).

64. III A WIGMORE § 987 n.1, at 907.

65. MCCORMICK § 191 n.74, at 457. *See also* Annot., 47 A.L.R.2d 1258 (1956); Kanter v. Commonwealth, 171 Va. 524, 199 S.E. 477 (1938).

66. *See* III A WIGMORE § 988, at 920-21, wherein three reasons for eliminating this form of question are given: (1) such testimony violates the fundamental rule of fairness noted in § 979 (*i.e.* the jury will still associate the witness with the act); (2) specific acts are introduced with hearsay, and (3) the party wronged has no defense against such statements.

67. The Court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment. FED. R. EVID. 611(a).

68. Kanter v. Commonwealth, 171 Va. 524, 199 S.E. 477 (1938) (cross-examination confined to the limits of good faith and fair dealing). *See also* Annot., 71 A.L.R. 1504 (1931).

language of Rule 611 should easily encompass such a requirement.[69]

Rule 609 completes the trilogy of sections explaining the admissibility of a witness' character.[70] It is divided into five parts which delineate what type crimes will be admissible to test credibility and what effect subsequent events will have on their admissibility. Part (a) establishes the general rule that evidence of a crime committed by a witness may always be received during cross-examination if it involved dishonesty or a false statement. In addition, the court may admit evidence of any crime punishable by death or imprisonment in excess of one year if the probative value of the evidence outweighs its prejudice. The remaining four parts codify standards for admissibility when other factors such as intervening time or an appeal relate to the crime.[71]

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69. FED. R. EVID. 611(a).

70. (a) *General rule.*—For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime may be elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

(b) *Time limit.*—Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) *Effect of pardon, annulment, or certificate of rehabilitation.*—Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment or other equivalent procedure based on a finding of innocence.

(d) *Juvenile adjudications.*—Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) *Pendency of appeal.*—The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible. FED. R. EVID. 609.

71. *Id.*

Rule 609(a) restates existing law for both the federal and Virginia courts.[72] Note, however, that nondefendant witnesses are not spared the barbs of a searching cross-examination. The only prejudice considered is that of the defendant. Thus, a nondefendant witness can still be subject to considerable embarrassment when the past ten years of his life include a felony conviction. Parts (b) through (e) add specificity and limitations to the rule's general admissibility grant. The ten-year limitation found in part (a) was not previously recognized in either federal or Virginia law but was adopted for "practical considerations of fairness and relevancy."[73] However, the judge still has discretion to admit older convictions once opposing counsel has received written notice of intent and a chance to contest the admission.[74]

Similar policy considerations apparently affected part (c) of Rule 609 which controls the effect of a pardon on a conviction's admissibility. Once a person has been rehabilitated, the state has, at least in form, vouched for his credibility.[75] As such, if he has not been subsequently convicted of another crime punishable by death or imprisonment of a year or more, he may not be impeached with the conviction.[76] Such a rule is commendable and certainly in keeping with a policy of restoring a convict's rights once he has been rehabilitated.[77] Note, also, that unlike parts (a) , (b) and (d), there is no judicial discretion allowed in part (c). The prohibition is absolute once a proper showing of rehabilitation has been made. Furthermore, while it is not clear who has the burden of proof on subsequent convictions, it would seem wise for presenting counsel to be prepared with a clean record if challenged or so requested by the court.

Past juvenile adjudications are covered in Rule 609(d) and are generally not admissible. However, where the offense involves dishonesty or false statement, it may be admitted if the court is satisfied that it is "necessary for a fair determination" of guilt or innocence.[78]

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72. *See generally* III A WIGMORE § 987; Harmon v. Commonwealth, 212 Va. 442, 185 S.E.2d 48 (1971) (admissibility of felony convictions); McLane v. Commonwealth, 202 Va. 197, 116 S.E.2d 274 (1960) (court's duty to prevent improper cross-examination); VA. CODE ANN. § 19.1-265 (Repl. Vol. 1960).

73. FED. R. EVID. 609(b) (Advisory Committee's Note).

74. FED. R. EVID. 609(b).

75. *See* Smith v. Commonwealth, 161 Va. 1112, 172 S.E. 286 (1934) (pardon held admissible to rehabilitate witness impeached with former conviction).

76. FED. R. EVID. 609(c).

77. Under the Rules, only pardons based on a finding of rehabilitation will exclude an otherwise impeachable prior conviction. When a pardon is based on rehabilitation, the criminal conviction loses its relevance as an impeachable offense. *See* III A WIGMORE § 980(3) n.3.

78. FED. R. EVID. 609(d).

Before the new rules became law, juvenile proceedings were generally not admissible for impeachment purposes in federal courts.[79] The rationale behind this rule is found in *Cotton v. United States*,[80] wherein the court stated:

> [T]he appellant has not been convicted of a crime or even prosecuted as a criminal under the Juvenile Delinquency Act [18 U.S.C. § 5032]. The adjudication of a status rather than the conviction of a crime would seem to fall within the rationale of the rule which generally excludes evidence of arrest or indictment without conviction.[81]

In addition, the Advisory Committee noted that other policy factors tend toward exclusion. Juvenile hearings are informal, generally of a confidential nature, and frequently less proof is required for an ultimate decision than in a criminal case.[82] Furthermore, since juvenile hearings are designed to foster counselling and rehabilitation rather than to punish as in a criminal trial, they should not have the same value for impeachment as does a criminal conviction.[83]

However, by allowing admission of the juvenile adjudication in some instances, the rule expressly recognizes Wigmore's criticism of absolute exclusion.

> A typical delinquent is a girl of corrupt environment or nymphomaniac tendency; such a girl is often the cause of injustice to an innocent man by making false charges of rape or indecent liberties . . . ; and the revelations in the juvenile court may be the best or even the only means of exposing the testimonial untrustworthiness of the witness.[84]

The Rules have thus adopted the best of both worlds and allow some flexibility in keeping with their general truth-seeking purpose.

Virginia law on the admissibility of juvenile actions for impeachment is well settled. *Kiracofe v. Commonwealth*[85] is a leading case for the exclusion of past juvenile proceedings. The court quoted section 16.1-179 which provides:

> Except as otherwise provided, no adjudication or judgment upon the status

79. FED. R. EVID. 609 (Advisory Committee's Note (d)), *citing* Cotton v. United States, 355 F.2d 480 (10th Cir. 1966) *and* Thomas v. United States, 121 F.2d 905 (D.C. Cir. 1941).

80. 355 F.2d 480 (10th Cir. 1966).

81. *Id.* at 482, *citing* III A WIGMORE §§ 980(a), 982, 985-87.

82. *See* FED. R. EVID. 609 (Advisory Committee Note (d)).

83. Ladd, *Some Highlights of the New Federal Rules of Evidence*, 1 FLA. ST. U.L. REV. 191, 225-27 (1973).

84. III A WIGMORE § 980, at 834.

85. 198 Va. 833, 97 S.E.2d 14 (1957).

> of any child under the provisions of this law shall operate to impose any of the disabilities ordinarily imposed by conviction for a crime. . . .[86]

However, the court never fully considered section 16.1-162 of the 1950 Code which provided a discretionary disclosure of juvenile records to those persons with a direct interest therein.[87] In light of the "except as otherwise provided" language of section 16.1-179, discretionary disclosure would seem to have been permitted for impeachment purposes.

Amendments to section 16.1-162 have not clarified the situation, but new arguments are now available to both sides. The amended statute reads in part as follows:

> Except as hereinafter provided, the records of all such [juvenile] cases . . . shall be withheld from public inspection but they shall be open to the child's parents and attorney and to such other persons as the judge or the judge of a court of record in his discretion decides have a proper interest therein; provided, however, that in cases involving criminal offenses by juveniles, the judge may make public the name of the offender, the names of the parents of the offender and the nature of the offense, if he deems it to be in the public interest.[88]

The "except as hereinafter" language of amended section 16.1-162 brings this section within the general exclusion of section 16.1-179. However, as noted above, section 16.1-179 has similar language so the two sections make mutual exceptions, and neither is expressly excluded by the other. The policy statement in the annotations to section 16.1-179, however, seems to favor exclusion.[89] On the other hand, the express language of section 16.1-162 permits public disclosure of criminal juvenile offenses. When considered alone, it is consistent with Rule 609(d) and in keeping with Wigmore's philosophy to prevent injustice.[90]

While there is no case law on point, there is dicta supporting the position

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86. *Id.* at 844, 97 S.E.2d at 21; VA. CODE ANN. § 16.1-179 (Repl. Vol. 1960).

87. VA. CODE ANN. § 16.1-162 (Cum. Supp. 1956), *as amended*, (Cum. Supp. 1975) reads in part:

> The records of all such [juvenile] cases, . . . shall be withheld from public inspection but they shall be open to [those persons] [who] the judge . . . decides have a direct interest therein.

88. VA. CODE ANN. § 16.1-162 (Cum. Supp. 1975)

89. Statutes of this character originated in a policy not to permit the same uses to be made of records of juvenile courts as are frequently made of criminal records of courts of general jurisdiction, for the reason that juvenile proceedings are corrective in nature rather than penal. VA. CODE ANN. § 16.1-179 (Repl. Vol. 1960), as construed in Kiracofe v. Commonwealth, 198 Va. 833, 97 S.E.2d 14 (1957).

90. *See* FED. R. EVID. 609 (Advisory Committee's Note (d)); I WIGMORE § 196; III A WIGMORE §§ 924a, 980.

that a juvenile adjudication is admissible for impeachment purposes in Virginia. In *Cradle v. Peyton*,[91] the court noted that "[j]uvenile court proceedings that result in confinement may be deemed the equivalent of trials."[92] Although the court was considering the due process implications of *In re Gault*,[93] its language recognized the criminal trial nature of some juvenile proceedings. With this recognition, the value of juvenile proceedings for impeachment purposes has been increased and, in a proper case, may be admissible under section 16.1-162.

The only other case which considered section 16.1-162 was *Woody v. Commonwealth*,[94] in which the Commonwealth sought to exclude evidence of prior juvenile acts on the authority of *Kiracofe*.[95] The court did not reach any decision on section 16.1-162 but distinguished *Kiracofe* since in *Woody* there had yet been no formal juvenile proceedings. Testimony of juvenile prosecution witnesses about prior burglaries still pending trial was admissible to show possible bias in favor of the Commonwealth. In so ruling, the court provided at least some basis for arguing that section 16.1-162 is authority for admitting a prior juvenile proceeding for impeachment purposes.

The above considerations may be of minimal importance, however, if Virginia follows the West Virginia Supreme Court in *State v. Thomas*.[96] There the court held that a prior conviction would be admissible where the juvenile had been *tried as an adult*. West Virginia's law on the exclusion of juvenile convictions is similar to Virginia's,[97] and both states provide for conviction of certain juvenile offenses in a court of record capable of imposing full criminal penalties.[98] Since the Commonwealth would generally seek to transfer impeachable offenses, the fact that a witness was a juvenile when convicted may rarely bar admission of the record in the future.

Finally, part (e) of Rule 609 makes a conviction admissible regardless of a pending appeal. Evidence of the appeal is, however, admissible as a qualifying circumstance. This treatment is consistent with the majority of

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91. 208 Va. 243, 156 S.E.2d 874 (1967).

92. *Id.* at 248, 156 S.E.2d at 878.

93. 387 U.S. 1 (1967).

94. 214 Va. 296, 199 S.E.2d 529 (1973).

95. 198 Va. 833, 97 S.E.2d 14 (1957).

96. ___ W. Va. ___, 203 S.E.2d 445 (1974).

97. *Compare* W. VA. CODE ANN. § 49-7-3 (1966) *with* VA. CODE ANN. § 16.1-179 (Repl. Vol. 1960).

98. *See* W. VA. CODE ANN. § 49-5-3 (1966) (juvenile courts denied jurisdiction for capital offenses); VA. CODE ANN. § 16.1-176 (Cum. Supp. 1975) (permissive transfer from juvenile court to a court of record).

federal decisions[99] and apparently with Virginia law.[100] In making evidence of an appeal admissible, the Rules have also solidified one small area of conflict between the federal circuits. Federal courts have differed in their treatment of rehabilitating explanations.[101] The Virginia decisions are clear on this point, however, and have allowed explanations to rehabilitate a witness limited only by considerations of irrelevance, issue confusion and wasted time.[102] The Rules, in allowing evidence of an appeal, have provided a witness with at least one approach to rehabilitation. By shedding even a slight doubt on the finality of conviction, the jury is given some basis for accepting the witness' testimony if they so desire.

Part (b) of Rule 404 codifies the existing common law on specific acts.[103] Specific acts, like other forms of character evidence, are generally inadmissible to show conforming conduct, although there are well recognized specific-acts exceptions.[104] Exceptions are enumerated in Rule 404(b). They include the use of such evidence to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Other provisions of the Rules[105] provide for the use of specific acts in situa-

99. *See* United States v. Soles, 482 F.2d 105, 107 (2d Cir. 1973). *Contra*, Campbell v. United States, 176 F.2d 45 (D.C. Cir. 1949). *See also* Annot., 16 A.L.R.3d 726 (1967); McCormick § 43, at 87 & n.66; 98 C.J.S. *Witnesses* § 507(f), at 414 (1957).

100. It is clear that evidence of a prior conviction is inadmissible in a subsequent trial de novo for the same offense. *See* Griffin v. Wilkerson, 335 F. Supp. 1272 (W.D. Va. 1972) *citing* Malouf v. Roanoke, 177 Va. 846, 13 S.E.2d 319 (1941) and other cases. But there are no cases that have directly decided whether a different crime pending an appeal is admissible. Futhermore, the court from which appealed may affect admissibility. In *Malouf v. Roanoke, supra* 177 Va. at 855-56, 13 S.E.2d at 322, the court held that appeals from a court not of record make "the judgment appealed from . . . completely annulled, and . . . not thereafter available for any purpose." This fact may be of small consequence, however, since most impeachable offenses will be originally tried in courts of record.

101. While the following cases do not deal expressly with an appeal's admissibility, they do illustrate the way the courts have ruled on former conviction denials and explanations. *See generally* United States v. Plante, 472 F.2d 829 (1st Cir.), *cert. denied*, 411 U.S. 950 (1973) (refused to allow explanation); United States v. Crisafi, 304 F.2d 803 (2d Cir. 1962) (explanation allowed subject to court's discretion); Bank of America Nat'l Trust & Sav. Ass'n v. Rocco, 241 F.2d 455 (3d Cir. 1957) (explanation allowed subject to the court's discretion); McCormick § 43 nn. 83 & 84; IV Wigmore § 1117(3).

102. *See* Kiracofe v. Commonwealth, 198 Va. 833, 97 S.E.2d 14 (1957); Coffey v. Commonwealth, 188 Va. 629, 51 S.E.2d 215 (1949); Smith v. Commonwealth, 161 Va. 1112, 172 S.E. 286 (1934).

103. McCormick § 190 n.32. *See* note 47 *supra* and accompanying text.

104. For an illustration of the rationale for excluding specific acts, see I Wigmore § 194, at 650 *quoting* Smith, *Irrelevancy and Immateriality* (State Bar Ass'n Proceedings) Texas L. Rev. Special Number at 220 (Oct. 1923).

105. (a) *Reputation or Opinion.*—In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry

tions which were recognized at common law.[106]

Rule 405 makes a significant departure from common law. Part (a) of the Rule provides for character to be proven with either reputation or opinion evidence. At common law, proof of character was only permitted through reputation,[107] although specific acts could be explored on cross-examination.[108] It is significant to note that the rule also eliminates previous restrictions on the form in which questions about specific acts could be asked.[109] The use of opinion evidence is limited by Rule 701 to those opinions "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue."[110] Part (b) of Rule 405 codifies the existing common law and makes specific acts admissible when character becomes an operative issue.[111] This treatment is consistent with the previous rules discussed which generally exclude character evidence except for the limited purpose of establishing a pertinent trait[112] such as truth and veracity.[113]

V. PRIVILEGE

Article V, consisting of only one rule, has been the subject of much discussion and literature.[114] Rule 501 governs the applicability of the various state and federal privileges while it does not specifically delineate any of them.[115]

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is allowable into relevant specific instances of conduct.

(b) *Specific instances of conduct.*—In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct. FED. R. EVID. 405.

106. *See* Annot., 47 A.L.R.2d 1258 (1956); MCCORMICK § 187.

107. *See* MCCORMICK § 186; V WIGMORE § 1610. Virginia law is in accord but the courts appear to have blurred the distinction between reputation and opinion. *See* Zirkle v. Commonwealth, 189 Va. 862, 55 S.E.2d 24 (1949) (opinion of people in the community); Mitchell v. Commonwealth, 141 Va. 541, 127 S.E. 368 (1925) (general reputation).

108. *See* III A WIGMORE § 981; *accord*, Zirkle v. Commonwealth, 189 Va. 862, 55 S.E.2d 24 (1949); Kanter v. Commonwealth, 171 Va. 524, 199 S.E. 477 (1938).

109. *See* note 65 *supra* and accompanying test.

110. FED. R. EVID. 701.

111. *See* MCCORMICK § 187; I WIGMORE §§ 202-13. *See, e.g.*, Wilson v. Commonwealth, 132 Va. 824, 111 S.E. 96 (1922); Barker v. Commonwealth, 90 Va. 820, 20 S.E. 776 (1894).

112. FED. R. EVID. 404(a).

113. FED. R. EVID. 609(a).

114. *See* REDDEN & SALTZBURG, *supra* note 2, at 112-35. The only Rule to receive a greater page allocation was Rule 803 on hearsay. *See also* 120 CONG. REC. 12253-54 (daily ed. Dec. 18, 1974).

115. Proposed Article V contained 13 rules delineating 9 separate privileges, all of which were deleted when it appeared that a consensus could not be reached.

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof 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. However, 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.[116]

As adopted, this rule is "pregnant with litigious mischief."[117] The problems arise in civil cases[118] where there is a conflict between state and federal law.

The Rule has attempted to resolve these conflicts in accordance with existing common law. The Hon. William L. Hungate, Chairman of the House Subcommittee on Criminal Justice stated: "The House rule of privilege [as finally adopted] is intended to leave the Federal law of privilege where we found it. The Federal courts are to develop the law of privilege on a case-by-case basis."[119]

The second sentence of Rule 501, however, creates new problems in civil cases. As in Rules 302 and 601, a party is faced with the language "a claim or defense as to which State law supplies the rule of decision."[120] Thus before one determines privilege applicability, he may have to wrestle with the multitudinous questions that accompany *Erie v. Tompkins*.[121]

An additional problem is created when state and federal claims are tried together. When the state and federal privilege laws conflict, two results are possible. Either one body of law or the other will predominate over both claims, or each claim will be tried under its own law of privilege. Professor

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116. FED. R. EVID. 501.

117. SEN. REP. No. 1277, 93d Cong., 2d Sess., 4 U.S. CODE CONG. & AD. NEWS, 7051, 7059 (1974).

118. The Rule's application should not prove difficult in criminal cases, since federal courts have rarely used state rules of evidence under Rule 26 of the Federal Rules of Criminal Procedure. *See* C. WRIGHT, LAW OF FEDERAL COURTS § 93, at 409-10 (2d ed. 1970) [hereinafter cited as WRIGHT]. FED. R. CRIM. P. 26 provides:

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

119. 120 CONG. REC. 12253-54 (daily ed. Dec. 18, 1974).

120. FED. R. EVID. 501.

121. 304 U.S. 64 (1937); *See* notes 29 & 34 *supra* and accompanying text.

Wright has made an analysis of this point and urges that the interests behind various privileges should control the outcome of each conflict.[122]

> As a matter of policy it seems appropriate that the states should not be permitted to say when the federal courts must refrain from hearing useful testimony in a matter involving federal law. A different result seems most tenable in diversity litigation. . . . [Where] the litigation is on a state-created right, there is no federal interest that justifies such an interference with the state's decision that the relation [*i.e.*, husband and wife, doctor and patient, etc.] is more important than the litigation.[123]

While the case law is unsettled,[124] at least one authority in the field has urged a similar approach.[125] The Senate Committee on the Judiciary, however, would have taken a different approach. Based on Rule 43(a) of the Federal Rules of Civil Procedure (before amendment, 1975), the committee would have had the court apply the rule favoring admissibility.[126] In such a situation the court would be able to make a quick determination of what rule to apply to a particular piece of evidence without having to explore the various state and federal interests behind different rules of privilege.

The position Congress eventually took on this subject was that Rule 501 should insure that "federal law should not supercede that of the States in substantive areas such as privilege absent a compelling reason."[127] The House Committee on the Judiciary went on to state that they believed that "in civil cases in the federal courts where an element of a claim or defense is not grounded upon a federal question, there is no federal interest strong enough to justify departure from State policy."[128] The protection that this legislative history affords state privilege rules is further buttressed by federal statute.[128.1]. Under this statute, amendments to the Rules are submitted to Congress by the Supreme Court and automatically become law in 180 days if no action is taken. However, any amendment creating, abolishing, or modifying a privilege requires express approval by an act of Congress.

As noted above,[129] there should be no problem in applying Rule 501 to

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122. WRIGHT § 93.

123. *Id.* at 414-15.

124. *Id.* at 414.

125. REDDEN & SALTZBURG, *supra* note 2, at 113.

126. SEN. REP. NO. 1277, 93d Cong. 2d Sess. 4 U.S. CODE CONG. & AD. NEWS 7051, 7059 n.17 (1974).

127. H.R. REP. NO. 650, 93d Cong., 2d Sess., 4 U.S. CODE CONG. & AD. NEWS, 7075, 7082 (1974).

128. *Id.*

128.1. 28 U.S.C.A. § 2076 (1975).

129. Note 118 *supra*.

criminal cases; however, in civil cases, one must look to the law which supplies the rule of decision for the proper law of privilege. Some instances will arise in which both federal and state law are involved. Since one item of evidence may affect the application of both state and federal law, both bodies of law must be examined for privilege. As a practical matter only one privilege can be applied, and an advocate should be prepared to argue the policy favoring the use of the desired privilege.

VI. HEARSAY

Created to insure judicial accuracy, the hearsay rule has developed through a changing legal environment. The rule never excluded all hearsay evidence, however. The need for first-hand knowledge and testimony has been balanced against the trustworthiness of some hearsay evidence. The result was a list of narrowly drawn exceptions to the rule. In fact, some courts became so involved with categorical exceptions, they lost sight of the rule's original purpose of insuring trustworthiness. It was against this background that the hearsay rules were codified in Article VIII of the Federal Rules of Evidence. While hearsay properly deserves a note of its own, the discussion here will be confined to an overview of the article and an analysis of its general exception provisions.

Rule 801[130] is a significant departure from the common law.[131] Hearsay

130. (a) *Statement.*—A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(b) *Declarant.*—A "declarant" is a person who makes a statement.

(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.

(d) *Statements which are not hearsay.*—A statement is not hearsay if—

(1) Prior statement by witness.—The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut express or implied charge against him of recent fabrication or improper influence or motive, or

(2) Admission by party-opponent.—The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. FED. R. EVID. 801.

131. REDDEN & SALTZBURG, *supra* note 2, at 246.

is therein defined in common-law terms[132] but exclusions, not exceptions, mark the departure. Admissions and prior consistent and inconsistent statements are no longer exceptions to the hearsay rule; they simply are not hearsay.[133] While this may at first seem to be a startling departure, the end result should be in keeping with common law principles.[134]

There is, however, one important, although subtle, distinction that should be noted. Rule 801(d)(2)(D) makes the statement of an agent or servant concerning a matter within the scope of his agency or employment admissible against his employer. No longer is there a requirement for the employee to have been expressly authorized to make such a statement.[135] Most employers will probably not appreciate the significance of this change, and notice of this fact could eliminate some damaging future testimony.

Rule 802 is a statement of hearsay inadmissibility coupled with a legislative restraint on judicial expansion of the existing rule.[136] As will be seen, however, under the rule's general exception provisions[137] flexibility has not been entirely foreclosed. Hearsay exceptions are specifically enumerated in Rules 803 and 804, and both rules have liberalized existing common law hearsay exceptions.[138] Rule 803, in the areas of business records,[139] public records,[140] learned treatises,[141] and previous convictions,[142] has significantly

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132. *Compare* FED. R. EVID. 801(c) *with* MCCORMICK § 246, at 584.

133. FED. R. EVID. 801(d)(1), (2).

134. REDDEN & SALTZBURG, *supra* note 2, at 249.

135. *See* Nuttall v. Holman, 110 Utah 375, 173 P.2d 1015 (1946); MCCORMICK § 267.

136. "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress." FED. R. EVID. 802.

137. *See* note 148 *infra* and accompanying text.

138. *See generally* REDDEN & SALTZBURG, *supra* note 2, at 274-83, 312-16.

139. *Records of regularly conducted activity.*—A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. FED. R. EVID. 803(6).

140. *Public records and reports.*—Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions

expanded the scope of previous common law exceptions.[143] Rule 804 has similarly liberalized hearsay exceptions when the declarant is unavailable.[144] Unavailability is first defined in Rule 804(a)[145] with the applicable sections thereafter listed. Noteworthy departures from the common law are found in dying declarations[146] and in statements against interest.[147]

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and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness. FED. R. EVID. 803(8).

141. *Learned treaties.*—To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits. FED. R. EVID. 803(18).

142. *Judgment of previous conviction.*—Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility. FED. R. EVID. 803(22).

143. *See generally* REDDEN & SALTZBURG, *supra* note 2, at 274-83 for a detailed discussion of Rule 803 and its variations from the common law of hearsay.

144. *See generally* REDDEN & SALTZBURG, *supra* note 2, at 312-16.

145. *Definition of unavailability.*—"Unavailability as a witness" includes situations in which the declarant—

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or

(2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of his statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b) (2), (3), or (4), his attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying. FED. R. EVID. 804(a).

146. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death. FED. R. EVID. 804(b)(2).

147. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasona-

While the common-law expansions noted above are significant, the most controversial exception is stated with identical language in both Rule 803 and 804.

> *Other exceptions.*—A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness [is admissible] if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it his intention to offer the statement and the particulars of it, including the name and address of the declarant.[148]

This exception was adopted to insure continued flexibility in the hearsay rule.[149] In maintaining the viability of common law development, the exception also provides suitable guarantees of trustworthiness.

The Rules do not, however, contemplate unfettered judicial discretion.[150] In this regard, Rule 802 is one restraint,[151] but it may be of minimal

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ble man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. FED. R. EVID. 804(b)(3).

148. FED. R. EVID. 803(b)(5).

149. In discussing the general exception provisions of Rules 803 and 804, the Advisory Committee noted that:

> Exception (24). The preceding 23 exceptions of Rule 803 and the first five exceptions of Rule 804(b), *infra*, are designed to take full advantage of the accumulated wisdom and experience of the past in dealing with hearsay. It would, however, be presumptuous to assume that all possible desirable exceptions to the hearsay rule have been catalogued and to pass the hearsay rule to oncoming generations as a closed system. Exception (24) and its companion provision in Rule 804(b)(6) are accordingly included. They do not contemplate an unfettered exercise of judicial discretion, but they do provide for treating new and presently unanticipated situations which demonstrate a trustworthiness within the spirit of the specifically stated exceptions. Within this framework, room is left for growth and development of the law of evidence in the hearsay area, consistently with the broad purposes expressed in Rule 102. *See* Dallas County v. Commercial Union Assur. Co., 286 F.2d 388 (5th Cir. 1961). FED. R. EVID. 803 (Advisory Committee's Note (24)).

150. *Id.*

151. "Hearsay is not admissible except as provided by these rules or other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress." FED. R. EVID. 802.

effect depending on the judicial interpretation of the general exception in Rules 803 and 804. A much more powerful restraint is found in the sixth amendment to the United States Constitution.[152] The express right of confrontation is therein guaranteed for criminal cases and was emphasized by the Supreme Court in *United States v. Wade*.[153] This restraint was recognized when the proposed rules were under consideration.[154] As a result of this and similar criticisms, Rules 803 and 804 were clarified and made more restrictive, protecting both criminal and civil defendants alike.[155]

The approach taken by Congress to allow a natural expansion of the hearsay exceptions has been urged by scholars for some time.[156] This approach has also found substantial support in the federal courts as illustrated by *Dallas County v. Commercial Union Assurance Co.*,[157] wherein the court had to determine the cause of a structure's collapse. A 50-year-old newspaper clipping was introduced to explain the presence of charred timbers and thus rebut a desired inference that lightning had caused the collapse. While the clipping did not fit into any recognized hearsay exception, it was admitted as sufficiently trustworthy since the court did not believe that a small-town reporter would report a fire that had not occurred.

Although modern federal case law forms the basis for the flexible approach of the Rules, Virginia courts have consistently refused to depart from the strict common law exceptions.[158] Under existing state law, if the evidence offered cannot be squeezed into an exception, it is inadmissible

152. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." U.S. CONST. amend. VI.

153. 388 U.S. 218 (1967) (right to counsel at pretrial identification necessary to preserve a meaningful confrontation at trial). *See also* Willner v. Committee on Character, 373 U.S. 96 (1963); Bridges v. Wixon, 326 U.S. 135 (1945); Snyder v. Massachusetts, 291 U.S. 97 (1934); Delaney v. United States, 263 U.S. 586 (1924). *But see* United States v. Nugent, 346 U.S. 1 (1952) (selective service registrant denied access to his F.B.I. conscientous objector background report).

154. Judicial Conference, 48 F.R.D. 39, 55 (2d Cir. 1969). Proposed FED. R. EVID. 803(24) and 804(b)(5) read: "A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness."

155. As specified in FED. R. EVID. 803(24), the statement must be evidence of a material fact, more probative than any other reasonably available evidence, and best serve the interests of justice through its admission.

156. *See* V WIGMORE § 1427; MCCORMICK § 327.

157. 286 F.2d 388 (5th Cir. 1961). *See also* United States v. 60.14 Acres of Land, 362 F.2d 660 (3d Cir. 1966); United States v. Barbati, 284 F. Supp. 409 (E.D.N.Y. 1968) and cases cited therein.

158. *See* Facchina v. Richardson, 213 Va. 440, 192 S.E.2d 791 (1972) (plaintiff's lost wages summary was hearsay but admission was harmless error); Coureas v. Allstate Ins. Co., 198 Va. 77, 92 S.E.2d 378 (1956) (hearsay evidence incompetent and inadmissible unless it falls within one of the recognized exceptions).

hearsay no matter how clarifying, probative or essential it may be.[159] The mechanics of the hearsay rule often overshadow its truth-seeking purpose in Virginia.

VII. CONCLUSION

Although the federal courts must now deal with a codified evidence system, there should be few problems in transition. The Rules are basically a concise statement of the common law with suitable flexibility to allow for growth and transition as the law changes. In the areas of presumption and privilege the Rules have remained general to allow a gradual resolution of federal-state conflicts. In using the Rules, one should interpret them with their purpose in mind, and that purpose is to insure fair and efficient justice.

G.G.R.

159. Facchina v. Richardson, 213 Va. 440, 192 S.E.2d 791 (1972).