TEN YEARS AFTER: A RECONSIDERATION OF THE CODIFICATION OF EVIDENCE LAW IN MASSACHUSETTS

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INTRODUCTION

On December 30, 1982, by a divided vote, the Justices of the Massachusetts Supreme Judicial Court rejected a codification of evidence law for Massachusetts.¹ That rejection of the Proposed Massachusetts...

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1. Announcement Concerning The Proposed Massachusetts Rules of Evidence (SJC-2787, Dec. 30, 1982) [hereinafter SJC Announcement], reprinted in KENNETH B. HUGHES, MASSACHUSETTS PRACTICE app. I at 508 (William G. Young et al. eds., Supp. 1992). Since the action of the Supreme Judicial Court was by way of announcement rather than reported decision, the text of the court's explanation for rejecting the proposal is neither in the Massachusetts nor North Eastern Reporter systems and accordingly is difficult to access easily. For ease of reference in using this Article, the following is the entire text of the SJC Announcement:

On November 22, 1976 the Supreme Judicial Court, upon the request of the Commissioners on Uniform State Laws and of the Presidents of the Massachusetts and Boston Bar Associations, appointed an advisory committee to consider whether the Massachusetts rules of evidence should be codified or promulgated. In July of 1980 the advisory committee transmitted proposed Rules of Evidence to the [court].

The Justices received briefs and comment from numerous parties and bar associations concerning the Proposed Massachusetts Rules of Evidence. Oral arguments were heard on September 9, 1982. The Justices express their appreciation for the efforts of the advisory committee and the Reporters who worked on
Rules of Evidence left the commonwealth a "common-law" evidence state with many statutory accretions and adjustments. Since that rejection, at least two important events have occurred. First, both state and federal courts have cited, discussed, and occasionally adopted individual portions of the proposed Massachusetts rules. Second, a

these Proposed Rules, as well as to the various parties who have submitted their comments and briefs. The Justices have given careful consideration to the views expressed.

The Justices recognize that if the Proposed Rules were to be adopted, (1) there would have to be careful coordination with the Legislature to repeal, revise, or modify many statutes which deal with the admissibility and effect of evidence; (2) many of the Proposed Rules involve departures from the principles set forth in the Federal Rules of Evidence; and (3) some of the Proposed Rules are subject to significant and arguably valid criticisms.

A majority of the Justices conclude that promulgation of rules of evidence would tend to restrict the development of common-law principles pertaining to the admissibility of evidence. The valid objective of uniformity of practice in Federal and State courts would not necessarily be advanced because the Proposed Rules, in their present form, depart significantly from the Federal Rules of Evidence. Additionally, in the view of some of the Justices of [sic] the Federal Rules of Evidence have not led to uniform practice in the various Federal courts and are, in some instances, less well adapted to the needs of modern trial practice than current Massachusetts law. Accordingly, a majority of the Justices have concluded that it would not be advisable to adopt the Proposed Massachusetts Rules of Evidence at the present time. The Proposed Rules have substantial value as a comparative standard in the continued and historic role of the courts in developing principles of law relating to evidence. Parties are invited to cite the Proposed Rules, wherever appropriate, in briefs and memoranda submitted.
great many more jurisdictions have adopted a "code" form of evidence. In addition, current litigation conditions suggest that a codified system of evidence would advance the cause of justice in all Massachusetts forums.

Accordingly, in this tenth anniversary year of the rejection of the proposed Massachusetts rules, a reconsideration of the codification effort and process is appropriate. Part I of this Article will recount the history of the Proposed Massachusetts Rules of Evidence project. Part II of this Article will chronicle the experience of Massachusetts courts in using the proposed rules since their rejection. Part III will review codification movements in other states since 1982. Part IV will explore reasons why codification would improve the administration of justice in the courts of the commonwealth. Part V of this Article will identify some remaining issues regarding codification.

I. THE PROPOSED MASSACHUSETTS RULES OF EVIDENCE PROJECT

On November 22, 1976, the Supreme Judicial Court appointed an advisory committee to consider whether the evidence law of the commonwealth should be codified. The appointment was made at the request of the Commissioners on Uniform State Laws and of the Presidents of the Massachusetts and Boston Bar Associations. The court also may have been influenced by the impact of the Federal Rules of Evidence, which became effective the previous year.

The original chairman of the committee was a Massachusetts Superior Court judge, the Honorable A. David Mazzone. Upon Judge Mazzone's elevation to the federal bench, the Honorable John E. Fenton, Jr., then a member of the Massachusetts Land Court (and now the Chief Administrative Justice of the Trial Court Department), suc-

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4. See infra text accompanying notes 234-313.
5. See infra text accompanying notes 314-432.
6. SJC Announcement, supra note 1.
ceeded him.\textsuperscript{10} The original reporter of the committee was Professor Richard H. Field, professor emeritus at Harvard Law School.\textsuperscript{11} Upon Professor Field's untimely death, Professor Charles M. Burnim of Suffolk University Law School succeeded him.\textsuperscript{12}

Under Judge Fenton and Professor Burnim, the advisory committee\textsuperscript{13} reported on its work and conducted a forum at the annual meeting of the Massachusetts Bar Association in June, 1978, where it received comment on its draft set of rules.\textsuperscript{14} In July, 1980, the committee submitted to the court a set of rules based mainly upon the Federal Rules of Evidence and partly upon the Proposed Federal Rules of Evidence (as suggested by the United States Supreme Court but not enacted by Congress),\textsuperscript{15} the Uniform Rules of Evidence and other codifications.\textsuperscript{16} The full text of the Proposed Massachusetts Rules of Evidence and advisory committee's notes were published in the \textit{Massachusetts Lawyers Weekly} shortly thereafter.\textsuperscript{17}

An exhaustive analysis of the Proposed Massachusetts Rules of Evidence themselves is beyond the scope of this Article.\textsuperscript{18} However, some discussion of the proposed Massachusetts rules is essential to an understanding of the court's later declination of the rules.

Initially, the advisory committee "adopted as a working policy the acceptance of [a] federal rule [of evidence] as a starting point, with a departure from the federal rule to be made only when reasons of policy or of well-established Massachusetts practice dictated otherwise."\textsuperscript{19} As a result, there were many proposed Massachusetts rules that were identical to their federal counterparts and which either

\begin{itemize}
\item \textsuperscript{10} \textit{Id.} Judge Mazzone continued to serve the committee as a consultant even after he moved to the federal court. \textit{SJC Rejects Evidence Code}, 11 MASS. LAW. WKLY. 457 (1983).
\item \textsuperscript{11} \textit{Id.}
\item \textsuperscript{12} \textit{Id.}
\item \textsuperscript{13} The other members of the advisory committee were the Honorable Lawrence D. Shubow, Vice Chairman; Attorneys Richard W. Renehan, Secretary, Richard D. Gelinas, and John F. Keenan; Senator Alan D. Sisitsky; and Professor Stephen N. Subrin of Northeastern University School of Law.
\item \textsuperscript{14} \textit{Id.}
\item \textsuperscript{15} \textit{See infra text accompanying notes 250-67.}
\item \textsuperscript{16} Assembling the proposed Massachusetts rules was an exhausting task, as chronicled by the committee. \textit{Id.}
\item \textsuperscript{17} \textit{Id.}
\item \textsuperscript{18} The arguments in the brief of the Boston Bar Association alone ran for 70 pages. \textit{See generally}, Brief for the Boston Bar Association, \textit{In re Proposed Mass. Rules of Evidence} (1982) [hereinafter BBA Brief]. Again, references to the proposed rules are contained in the analyses of their common-law counterparts in \textit{Liacos}, \textit{supra note 2}.
\item \textsuperscript{19} \textit{Id.}
\end{itemize}
would not have changed existing Massachusetts evidence law\textsuperscript{20} or would have changed existing law for the better. However, as the committee reviewed its efforts, it became persuaded that “at times . . . the . . . federal rule, examined in the light of developing case law, was not necessarily sound.”\textsuperscript{21} As a result, there were many situations in which the advisory committee departed significantly from federal counterparts. Some examples of these departures, traced article by article through the proposed rules, demonstrate this point.

Article I (“General Provisions”) and Article II (“Judicial Notice”) closely parallel the actual federal rules.\textsuperscript{22} However, Article III (“Presumptions”) is radically different from its federal counterpart. In Federal Rule 301, the effect of a presumption is merely to shift the burden of \textit{production} of the presumed fact to the party not carrying the burden of persuasion.\textsuperscript{23} Proposed Massachusetts Rule 301, however, shifts the burden of \textit{persuasion} on the presumed fact to the party opposing the presumption.\textsuperscript{24} As well as effecting a substantial change in Massachusetts law,\textsuperscript{25} the change would cause a significant impact in those federal court cases where the state rule would be “borrowed.”\textsuperscript{26}

\begin{notes}
\item[20] BBA Brief, supra note 18, at 4-5.
\item[21] ADVISORY COMMITTEE HISTORY, supra note 9, at second page (unnumbered).
\item[22] Proposed Rule 101 (“Scope [of the Rules]”) was modified to fit a state court context. Prop. Mass. R. Evid. 101 advisory committee’s note, supra note 2. Proposed Massachusetts Rule 104 (“Preliminary Questions”) contained two departures from the federal rule. First, part “(a)” was modified with respect to findings by the trial judge on the existence of a conspiracy and on motions to suppress evidence. Second, a new subdivision “(f)” was added with respect to criminal defendants contesting dying declarations and confessions. See BBA Brief, supra note 18, at 9.
\item[23] FED. R. EVID. 301. This is the so-called “Thayer view” or “bursting-bubble view” of a presumption. For the evolution of FED. R. EVID. 301, see infra text accompanying notes 259-63.
\item[25] See BBA Brief, supra note 18, at 11-15.
\item[26] Federal Rule 302 provides that “[i]n 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.” FED. R. EVID. 302. While, typically, Federal Rule 302 applies in diversity of citizenship claims under 28 U.S.C. § 1332 (1988), the federal court will also look to state presumption law in what used to be called “pendent” or “ancillary” claims and what are now known as “supplemental subject matter jurisdiction” claims under 28 U.S.C. § 1367 (Supp. 1990). See
\end{notes}
The proposed Massachusetts rule also departed from the Federal Rules of Evidence in providing for “prima facie evidence” and presumptions in criminal cases. Proposed Article IV (“Relevancy and Its Limits”) was relatively faithful to the then-existing Federal Rules of Evidence. Proposed Massachusetts Rule 404 (“Character Evidence”) omitted the subparagraph permitting a criminal defendant (and the prosecutor in rebuttal) to offer evidence of the pertinent character trait of the victim of a crime. Proposed Massachusetts Rule 406 (“Habit: Routine Practice”) was somewhat more restrictive of habit and routine practice evidence than its federal counterpart. However, Proposed Massachusetts Rule 408 (“Compromise and Offers to Compromise”) was somewhat more protective of settlement offers than its federal counterpart. Proposed Massachusetts Rule 410 adopted the 1975 version, rather than the 1979 version, of Federal Rule 410. Finally, with respect to Article IV, the advisory committee did not provide for a separate rule of evidence to parallel Federal Rule 412 concerning rape victims.


28. Id. at Rule 302.
29. Federal Rule 404(b) was recently amended to require the proponent of prior bad acts evidence to give notice to an opponent in advance of trial of the proponent’s intention to offer evidence of other bad acts for one of the purposes permitted under subparagraph “(b).” FED. R. EVID. 404(b) (effective Dec. 1, 1991).
30. Prop. Mass. R. Evid. 404(a), supra note 2. Apparently, the advisory committee was concerned that, beyond the rape-victim protections provided for in MASS. GEN. L. ch. 233, § 21B (1990), and self-defense considerations developed through the common law, the victim subparagraph in Proposed Rule 404(a) would inappropriately expand admissible evidence in a criminal case. See Prop. Mass. R. Evid. 404 advisory committee’s note, supra note 2; BBA Brief, supra note 18, at 19.
31. Prop. Mass. R. Evid. 406, supra note 2. Proposed Rule 406(a) would exclude habit or routine practice evidence on the issue of negligence, and Proposed Rule 406(b) would require habit or routine practice to be proved by numerous specific instances of conduct (as opposed to reputation or opinion evidence). See BBA Brief, supra note 18, at 21-22. For a discussion of the committee’s reasons for the restrictions, see Prop. Mass. R. Evid. 406 advisory committee’s note, supra note 2.
32. Prop. Mass. R. Evid. 408, supra note 2. Proposed Rule 408 contained language to protect offerors of settlement who were co-defendants, third-party defendants, and even non-parties to the lawsuit. See BBA Brief, supra note 18, at 23.
34. This omission was probably because of existing Massachusetts statutory law on the admissibility of the past sexual behavior of an alleged rape victim. See MASS. GEN. L. ch. 233, § 21B (1990).
involved Article V ("Privileges"). In fairness, the advisory committee was in a no-win situation with respect to codifying privileges. On the one hand, the detailed codification of the federal rules regarding privilege submitted to Congress by the Supreme Court\textsuperscript{35} had been rejected by Congress in favor of a single provision, telling the federal courts to develop privilege in a common-law manner and to look to state privilege law where directed.\textsuperscript{36} Thus, the Massachusetts advisory committee had no authoritative federal rules to copy. On the other hand, the Supreme Judicial Court has always been very deferential to the Massachusetts legislature on the recognition of privileges.\textsuperscript{37} Caught in this dilemma, the advisory committee endeavored to structure codified privilege rules for Massachusetts drawn substantially from the Proposed Federal Rules of Evidence and the Uniform Rules of Evidence.\textsuperscript{38} In so doing, the committee basically adopted the restrictive wording of Proposed Federal Rule 501 and Uniform Rule 501, and deleted Proposed Federal Rule 502 as redundant.\textsuperscript{39} The committee then proceeded to respect certain existing Massachusetts statutory privileges and to challenge others.\textsuperscript{40}

Regarding the individual proposed rules on privilege, Proposed Massachusetts Rule 502 ("Lawyer-Client Privilege") chose as its definition for "representative of the client" the restrictive "control-group" test.\textsuperscript{41} The committee suggested that this provision might be the most controversial within the proposed rule,\textsuperscript{42} mainly because the provision was taken from the uniform rule model,\textsuperscript{43} and no such definition was contained in the proposed federal rule.\textsuperscript{44} More significantly, within a

\textsuperscript{35} See 1972 Proposed Federal Rules, supra note 24, at 413-46 (Rules 501-06).


\textsuperscript{38} Prop. Mass. R. Evid. 501 advisory committee's note, supra note 2.

\textsuperscript{39} Id.

\textsuperscript{40} Id.

\textsuperscript{41} Id. at Rule 502(a)(2) advisory committee's note. The control-group test extends the circle of confidentiality between lawyer and client to those persons who have "authority to obtain professional legal services or to act on advice rendered pursuant thereto, on behalf of the client." Id. at Rule 502(a)(2). See also City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483 (E.D. Pa. 1962), mandamus and prohibition denied sub. nom. General Elec. Co. v. Kirkpatrick, 312 F.2d 742 (3d Cir. 1962), cert. denied, 372 U.S. 943 (1963).

\textsuperscript{42} Prop. Mass. R. Evid. 502(a)(2) advisory committee's note, supra note 2.

\textsuperscript{43} Unif. R. Evid. 502(a)(2) (1974).

\textsuperscript{44} Proposed Federal Rule 503 contained no definition of "representative of a client" because the federal advisory committee preferred to leave that definition, somewhat disin-
year, the United States Supreme Court would reject the control-group test definition of “representative of a client” as too restrictive for the attorney-client relationship.\(^{45}\) Somewhat overlooked in the controversy were the positive changes the proposed Massachusetts rules would have brought to the attorney-client relationship in the commonwealth, such as broadening the definition of “client” to include organizations as well as natural persons,\(^{46}\) broadening the definition of “lawyer” to include those a client reasonably believes to be licensed to practice,\(^{47}\) and broadening the definition of “confidential” to include within the privilege those communications that the client intended to remain confidential even if an eavesdropper overheard them.\(^{48}\)

Unfortunately, other privileges proposed for codification were also controversial. Proposed Massachusetts Rule 503 (“Psychotherapist-Patient Privilege”) challenged the existing statutory privilege\(^{49}\) in numerous respects, with the advisory committee implicitly calling for the repeal of that statute.\(^{50}\) Proposed Massachusetts Rule 504 (“Husband-Wife Testimonial Privilege and Disqualification”) would have slightly expanded the beneficial and traditional privilege regarding unfavorable testimony in a criminal case, with the witness-spouse being

45. Upjohn Co. v. United States, 449 U.S. 383 (1981). As a result of the Upjohn decision, the National Conference amended the Uniform Rule to conform to the Supreme Court’s standards in Upjohn. See UNIF. R. EVID. 502(a)(2) (1986).


47. Id. at Rule 502(a)(3). This is particularly important in light of the inconsistency of the Supreme Judicial Court in interpreting definitions within statutory privileges. For example, in Commonwealth v. Collett, 439 N.E.2d 1223, 1226 (Mass. 1982), the court expansively defined “persons consulting” a social worker within the social worker privilege. See generally MASS. GEN. L. ch. 112, § 135A (1990). However, in Commonwealth v. Mandeville, 436 N.E.2d 912, 922 (Mass. 1982), the court narrowly defined “psychotherapist” within the patient-psychotherapist privilege. See generally MASS. GEN. L. ch. 233, § 20B (1990). Interestingly, the court in Mandeville included a footnote conceding that “Rule 503(a) of the Proposed Massachusetts Rules of Evidence might well produce a different result in this case.” Mandeville, 436 N.E.2d at 923 n.11. See also Collett, 439 N.E.2d at 1229 n.4. See generally Jeremiah F. Healy III, Case & Statute Comments: Evidence—Privileges—Psychotherapist—Reporter—Social Worker, 68 MASS. L. REV. 83 (1983).

48. Prop. Mass. R. Evid. 502(a)(5), (b), supra note 2 (“A client has a privilege to . . . prevent any other person from disclosing confidential communications.”).


50. Prop. Mass. R. Evid. 503 advisory committee’s note, supra note 2. The committee also included the following in its Advisory Committee History: “The members [of the committee] working on Article V spent endless hours attempting to draft a working rule which would accommodate the existing Massachusetts statutes on the psychotherapist and social worker privileges, a task compounded by a belief that the existing statutes created more problems than they solved.” ADVISORY COMMITTEE HISTORY, supra note 9, at second page (unnumbered).
the holder of the privilege. However, Proposed Massachusetts Rule 504 also would have perpetuated the oft-criticized disqualification of husband and wife as competent witnesses to testify to their "private conversations" and would have expanded that disqualification to "confidential communications." While many of the other departures in the Proposed Massachusetts Rules of Evidence from the Proposed Federal Rules of Evidence on privilege may have been justifiable, Proposed Massachusetts Rule 512 ("Comment Upon or Inference from Claim of Privilege in Criminal Cases") would have prohibited comment upon the claim of a privilege only in criminal cases, not in both criminal and civil cases as provided for in its Proposed Federal and Uniform Rule counterparts.

Article VI ("Witnesses") for the most part tracked the actual Federal Rules of Evidence. One striking exception was Proposed Massachusetts Rule 609 ("Impeachment by Evidence of Conviction of Crime"), which followed neither the actual federal counterpart nor the existing Massachusetts statute on impeachment by criminal conviction. A second striking exception was Proposed Massachusetts Rule 611 ("Mode and Order of Interrogation and Presentation"), which departed from its federal counterpart in retaining the "wide-open" or "Massachusetts Rule" regarding scope of cross-examination. A third, but less striking, exception was Proposed Massachusetts...
setts Rule 612 ("Writing or Object Used to Refresh Memory"), which purportedly maintained the substance of the federal rule while merely changing the federal rule's format.\(^{60}\)

In Article VII ("Opinions and Expert Testimony"), the advisory committee adhered to the federal rules language,\(^{61}\) including Proposed Massachusetts Rule 703 ("Bases of Opinion Testimony by Experts"), which permits an expert witness to rely upon facts not admitted (and, indeed, not admissible) into evidence in forming an expert opinion.\(^{62}\) Proposed Massachusetts Rule 706 ("Court Appointed Experts") differed from its federal counterpart by expressly denying the trial judge discretion to disclose to the jury the fact that a given expert had been appointed by the court.\(^{63}\)

Article VIII ("Hearsay") contained relatively few differences from the federal rules despite the difficulty of the subject.\(^{64}\) Proposed Massachusetts Rule 801 ("Definitions") was identical to the federal rule.\(^{65}\) Proposed Massachusetts Rule 802 ("The Hearsay Rule") was similar to the federal rule in that it recognized the possibility of hearsay exceptions outside the four corners of the rules codification. Unfortunately, the advisory committee did not comprehensively list the existing outside exceptions in the same manner as the federal rule.\(^{66}\)

Departures from the Federal Rules of Evidence did crop up in the hearsay exceptions gathered under Proposed Massachusetts Rule 803 ("Hearsay Exceptions; Availability of Declarant Immaterial") and Proposed Massachusetts Rule 804 ("Hearsay Exceptions; Declarant case, including credibility. In the interests of justice, the judge may limit cross-examination with respect to matters not testified to on direct examination." Id. This is the mirror image of Federal Rule 611(b), which permits cross-examination on matters not testified to on direct examination only at the discretion of the judge. See FED. R. EVID. 611(b).

\(^{60}\) Prop. Mass. R. Evid. 612, supra note 2. But see the criticism of this "format" change as affecting substantive discretion of the trial judge in BBA Brief, supra note 18, at 47.

\(^{61}\) It should be noted that Federal Rule 704 was amended in 1984 to split the rule into subsections "(a)" and "(b)", and to include in Rule 704(b) a restriction against ultimate issue testimony in certain criminal cases having to do with mental condition, as a response to the litigation over John Hinckley's attempt to assassinate then-President Ronald Reagan in 1981. Insanity Defense Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 2067.


\(^{63}\) Prop. Mass. R. Evid. 706, supra note 2. See the criticism of this departure from the federal rule in BBA Brief, supra note 18, at 51-52.


\(^{65}\) Prop. Mass. R. Evid. 801, supra note 2; FED. R. EVID. 801.

\(^{66}\) Prop. Mass. R. Evid. 802, supra note 2; see FED. R. EVID. 802 advisory committee's note.
Unavailable”). For the most part, these variations were trivial.67 Some significant departures should be noted, however.

In Proposed Massachusetts Rule 803(1) (“Present Sense Impression”), the committee included language (not contained in the federal rule) that would permit a trial judge to exclude an otherwise qualifying hearsay statement when such statement is made under circumstances indicating untrustworthiness.68 In Proposed Massachusetts Rule 803(18) (“Learned Treatises”), the committee deleted language (contained in the federal rule) that would have permitted the use of learned treatises on direct examination of an expert.69 Finally, the committee deleted from the Proposed Massachusetts Rules of Evidence the residual or “catch-all” exception found in Federal Rule 803(24) (“Other Exceptions”).70

The advisory committee also departed from the federal rules in Proposed Massachusetts Rule 804. In Proposed Rule 804(a) (“Definition of Unavailability”), the committee deleted certain parenthetical preconditions to eligibility for the hearsay exceptions under Proposed Rule 804(b).71 Under Proposed Massachusetts Rule 804(b)(5), the committee again deleted the sister residual exception, which is found in the federal rule, and replaced that residual exception with language incorporating a statutory hearsay exception for certain declarations of a deceased person.72

In Article IX (“Authentication and Identification”) of the Proposed Massachusetts Rules of Evidence, the advisory committee

67. See, for example, the deletion of Federal Rule 803(15) (“Statements in Documents Affecting an Interest in Property”) on the ground that “[t]rustworthiness [of such statements] is considered insufficient and the need for such an exception is marginal.” Although the committee deleted this exception, it reserved the slot for the rule. Prop. Mass. R. Evid. 803(15) advisory committee’s note, supra note 2 (“Reserved”).

68. Prop. Mass. R. Evid. 803(1), supra note 2. The advisory committee believed this modification was justified by “[c]oncerns of reliability of statements potentially admissible under the federal formulation.” Id. at Rule 803(1) advisory committee’s note.

69. Id. at Rule 803(18). This deletion was strongly criticized on efficiency grounds in the BBA Brief, supra note 18, at 58-59. See infra note 173 for a discussion of the recent adoption of Proposed Massachusetts Rule 803(18) by the Supreme Judicial Court.

70. Prop. Mass. R. Evid. 803(24), supra note 2 (“Reserved”). This deletion by the committee was also strongly criticized, on consistency and judicial administration grounds, in the BBA Brief, supra note 18, at 60-61.

71. Prop. Mass. R. Evid. 804(a), supra note 2. The precondition required the proponent of a hearsay statement under certain hearsay exceptions in part “(b)” to depose or otherwise obtain the past testimony of a declarant, who by the time of trial has become unavailable. See Fed. R. Evid. 804(a).

72. Prop. Mass. R. Evid. 804(b)(5), supra note 2. Again, this deletion and substitution was criticized (on consistency, judicial administration and redundancy grounds) in the BBA Brief, supra note 18, at 63.
tracked the corresponding federal rules closely, making internal changes only to reflect the different governmental labels applicable to agencies at the state level. The committee did add to Proposed Massachusetts Rule 902 ("Self-authentication") a subparagraph, not found in the federal rule, for hospital and other medical records. Additionally, the committee drafted Proposed Massachusetts Rule 903 ("Subscribing Witness’ Testimony Unnecessary") to reflect concerns exclusive to the state, which were more narrow than those behind the federal counterpart. The advisory committee tracked exactly the federal rule language for all of Article X ("Contents of Writings, Recordings and Photographs"), which deals with the concerns of the "Best Evidence Rule." Drawing from the Uniform Rules of Evidence, the committee, in Article XI ("Miscellaneous Rules"), provided for the general applicability of the code in the courts of the commonwealth, exceptions to the code’s applicability in certain proceedings, and a citable title for the code.

In summary, the codification submitted by the advisory committee to the Supreme Judicial Court was organized substantially along the structural lines of the Federal Rules of Evidence, with a number of departures from specific federal provisions, many of which are controversial. Shortly after the proposed Massachusetts rules were submitted in July, 1980, the court asked a number of organizations, including the Boston Bar Association, to comment on the proposal. On June 21, 1982, the court requested briefs regarding the proposed rules, and numerous organizations responded. The brief of the Boston Bar Association, which included seventy pages of argument, was an attempt at a comprehensive treatment of the rules. Though impossible

74. Id. at Rule 902(11).
75. Id. at Rule 903. The basis for this narrower approach was Maine’s version of the rule. Id. at Rule 903 advisory committee’s note. See ME. R. EVID. 903.
77. Id. at Rule 1101(a).
78. Id. at Rule 1101(b).
79. If adopted, the code would have been cited as “Mass. R. Evid.” See id. at Rule 1102.
80. BBA Brief, supra note 18, at 1.
81. Id.
83. BBA Brief, supra note 18. The contributors to the brief included two successive chairmen of the Committee on Civil Procedure of the Boston Bar Association, Daniel B. Bickford and Robert J. Sherer, and Civil Procedure Committee members William H. Baker, Jean F. Farrington, F. Anthony Mooney, Stuart T. Rossman, and the author of this Article, most of whom met weekly over the course of the fall of 1980, to the spring of 1981, to discuss and analyze the proposed code.
to assess with precision, it was this author's impression that most of
the interested organizations believed that codification of Massachu­
setts evidence law was sensible, especially if it was modeled on the
federal rules, and that the only real issue to be decided by the Supreme
Judicial Court was the authoritative version of the wording of certain
individual rules. Consequently, the Boston Bar Association brief
spent only five pages extolling the virtues of a codified system of evi­
dence and its remaining sixty-five pages carefully analyzing and sug­
gesting improvements in the wording of individual proposed rules.

It came as a bit of a shock, therefore, when at oral argument on
September 9, 1982, a majority of the court sitting en banc appeared
to be more interested in discussing the overall issue of codification
rather than perspectives on individual proposed rules. Some advocates
realized belatedly that efforts to make the code more perfect might
result in no code at all, and at least one short article was written as a
plea to the court to adopt some codification, preferably based on the
federal rules, as the evidence law of the commonwealth.

Unfortunately, on December 30, 1982, the court declined codifi­
cation in a short "announcement." After thanking all involved for
their efforts, the announcement indicated that the proposed rules
presented at least three problems: "(1) careful coordination with the
Legislature" would be required "to repeal, revise, or modify many
statutes which deal with the admissibility and effect of evidence; (2)
many of the Proposed Rules involve[d] departure[s] from the princi­
ples set forth in the Federal Rules . . . ; and (3) some of the Proposed
Rules [were] subject to significant and arguably valid criticisms." While the announcement did not specify which proposed rules in cate­
gories (2) and (3) troubled the court, "a majority of the Justices" had
a more philosophical opposition to the Proposed Rules. Part of the
opposition stemmed from a conclusion that "promulgation of rules of

84. For instance, the Civil Procedure Committee of the Boston Bar Association was
"unanimous in favoring a codification of rules governing evidence in the courts of the
[commonwealth]" and supported "strongly ... basing the codification upon the actual (and
proposed) Federal Rules of Evidence . . . departing from that basis only rarely." BBA
Brief, supra note 18, at 1-2.

85. Id. at 1-70. See also Paul G. Garrity & Samuel Nagler, Impeachment and Reha­
bilitation of Witnesses by Evidence of Character and Past Conduct Under Proposed Massa­

86. SJC Announcement, supra note 1.

87. Jeremiah F. Healy III, Codification of Massachusetts Evidence Law, 11 MASS.
LAW. WKLY. 153 (1982).

88. SJC Announcement, supra note 1.

89. Id.

90. Id.
evidence would tend to restrict the development of common-law principles pertaining to the admissibility of evidence."91 Another factor was "the view of some of the Justices that the Federal Rules of Evidence [had] not led to uniform practice in the various Federal courts."92 A third reason for the opposition was the opinion that the federal rules were, "in some instances, less well adapted to the needs of modern trial practice than current Massachusetts law."93

Therefore, "a majority of the Justices . . . concluded that it would not be advisable to adopt the Proposed Massachusetts Rules of Evidence at the present time."94 The announcement went on to suggest that the proposed rules had "substantial value as a comparative standard in the continued and historic role of the courts in developing principles of law relating to evidence . . . [and] invited [parties] to cite the Proposed Rules, wherever appropriate, in briefs and memoranda submitted."95

Shortly after the announcement, a number of individuals associated with the proposed rules project were interviewed. Some accepted the decision graciously, others were surprised or disappointed.96 Judge Fenton, the chairperson of the advisory committee indicated that he thought "the Proposed Rules [would] still be used as a standard for developing rules of evidence on a case by case basis."97 As the next section of this Article will demonstrate, the chairperson's comment was at least partly prophetic.

II. THE MASSACHUSETTS COURTS' TREATMENT OF THE PROPOSED RULES

The Supreme Judicial Court's invitation to the bar to cite to the proposed code was repeated in the Chief Justice's next annual report98 and in many subsequent cases.99 However, even before the proposed

91. Id.
92. Id.
93. Id.
94. Id. (emphasis added).
95. Id. (emphasis added).
96. SJC Rejects Evidence Code, supra note 82, at 483. Advisory committee member Richard D. Gelinas, one of those "surprised by the [court's] decision," was quoted as saying he "was not aware of any great body of opposition to the Proposed Rules and . . . really thought they would be . . . adopted." Id.
97. Id.
Massachusetts rules were officially submitted to the court in July, 1980, both the Supreme Judicial Court and the Massachusetts Appeals Court began citing to them. Indeed, prior to the rejection of the proposed code on December 30, 1982, the commonwealth's highest court cited to the proposed Massachusetts rules in thirty cases, and the commonwealth's intermediate appellate court cited to the proposed rules in fourteen cases. An exhaustive review of all the cases dealing with the proposed Massachusetts rules is not possible here. However, an overview of the types of citations made and an analysis of selected cases is helpful to understanding how the rules have been used in case law.

Prior to the December, 1982, rejection of the proposed code, the overwhelming majority of Supreme Judicial Court citations to the Proposed Massachusetts Rules of Evidence noted the ways in which the rules supported existing Massachusetts law. Several cases cited to both the Proposed Massachusetts Rules and the Federal Rules of Evidence. Occasionally, within a single case, the court would cite both to proposed rules that supported existing Massachusetts law and to proposed rules that contrasted with such law.

After the Supreme Judicial Court rejected the proposed code in December, 1982, courts continued to cite to those proposed Massachusetts rules that supported existing Massachusetts law. In some


102. See MCNAUGHT & FLANNERY, supra note 2, for a collection of these citations.


105. See, e.g., Commonwealth v. Collett, 439 N.E.2d 1223, 1229 n.4, 1232 (Mass. 1982) (noting that Proposed Massachusetts Rule 503 is contrary to existing statutory privilege laws, but Proposed Massachusetts Rule 104(a) supports existing common law on a trial judge's determination of legal questions); Commonwealth v. Bohannon, 434 N.E.2d 163, 169-70 & n.8 (Mass. 1982) (stating that Proposed Massachusetts Rule 804(a)(5) regarding unavailability of a hearsay declarant is consistent with existing Massachusetts law, but Proposed Rule 804(a), in general, would expand existing Massachusetts law on unavailability).

106. See, e.g., Commonwealth v. Amral, 554 N.E.2d 1189, 1196 (Mass. 1990) (citing
such situations, the court also continued to pair the proposed state rule with the federal rule. However, more diversity of citation also began to appear. The courts began to contrast existing Massachusetts law with proposed rule counterparts more frequently. The courts also cited to the proposed Massachusetts rules with little or no discussion either because the parties to the litigation had failed to argue the code standard, or because the proposed rule was not applicable to the facts of the current case. The courts even occasionally used the rules arguendo.

Without question, however, the Supreme Judicial Court's most important citations to the proposed code have been the surprisingly few situations in which the court has either adopted or rejected individual provisions of proposed rules as the common law of the commonwealth. Accordingly, a closer examination of these cases is appropriate.

The first case in which the Supreme Judicial Court appeared to embrace an aspect of the proposed code was Commonwealth v.
Weichell,\textsuperscript{112} which was argued to the court \textit{en banc}\textsuperscript{113} prior to the December, 1982, rejection of the proposed rules, but decided after that rejection had been announced.\textsuperscript{114} In Weichell, the defendant asked the court to reverse his conviction for first degree murder on a number of grounds, including the admission against him of a photostatic copy of an "Identikit" composite created by a police officer with the help of an eyewitness.\textsuperscript{115} Massachusetts common law, as it existed at that time, dictated that the court exclude composites when offered as substantive evidence of identification of the defendant as the culprit.\textsuperscript{116} In an intervening case, \textit{Commonwealth v. Blaney,}\textsuperscript{117} the court did not reach the issue of the admissibility of an "Identikit" composite because it determined that the composite drawing in Blaney could not have been prejudicial to the defendant.\textsuperscript{118} The composite in Weichell was offered at trial only for corroboration of the witness' in-court identification of the defendant,\textsuperscript{119} a use the court had previously held not to be hearsay on the ground that evidence of corroboration is not offered to prove the truth of the matter asserted in the corroborating statement.\textsuperscript{120} Despite those earlier holdings, the court in Weichell stated that a composite, though perhaps not even a "statement" under Proposed Massachusetts Rule 801(a),\textsuperscript{121} is clearly within the 801(d)(1)(C)\textsuperscript{122} exception to the definition of "hearsay" and therefore


\textsuperscript{113} Since the defendant had been convicted in the Massachusetts Superior Court of murder in the first degree, his appeal went directly to the Supreme Judicial Court rather than the Massachusetts Appeals Court. \textit{Mass. Gen. L. ch. 278, § 33E} (1990).

\textsuperscript{114} \textit{Weichell}, 453 N.E.2d at 1038.

\textsuperscript{115} Id. at 1042. Justice Liacos described in some detail the process of "composing" a composite. \textit{Id.} at 1049 (Liacos, J., dissenting).


\textsuperscript{117} 442 N.E.2d 389 (Mass. 1982).


\textsuperscript{120} \textit{Id.} (citing prior cases).

\textsuperscript{121} Proposed Massachusetts Rule 801(a) provides as follows: "Definitions—The following definitions apply under this article: (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." \textit{Prop. Mass. R. Evid. 801(a), supra note 2.}

\textsuperscript{122} Proposed Massachusetts Rule 801(d)(1)(C) provides as follows: "(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 . . . (C) one of identification of a person after perceiving him." \textit{Id.} at Rule 801(d)(1)(C).
is admissible on the issue of identity for substantive purposes, and not merely for corroboration. However, despite this analysis, the majority ultimately "concluded" that an "Identikit" composite is admissible as substantive evidence on identity without citing to Proposed Massachusetts Rule 801(d)(1)(C) as authority.

Justice Liacos filed a vigorous dissent in which he argued that the risk of prejudice to the defendant was high because the eyewitness' opportunity to observe the perpetrator was slight and because the prosecutor emphasized the composite in closing argument. In the dissent's view, the reliability of a composite is too questionable and its status as hearsay too clear, especially given the court's abandonment in earlier cases of any distinction between fully "substantive" and merely "corroborative" evidence on identification. However, Justice Liacos discussed the proposed Massachusetts rule only in a footnote and then only by way of paraphrasing the non-hearsay effect of the rule itself.

The next case to discuss an aspect of the proposed Massachusetts rules cast some doubt on the court's intention in Weichell. In Commonwealth v. Daye, the court attempted to resolve several difficult issues involving out-of-court statements on the identification issue. At the trial level, two eyewitnesses to a shooting could not, or would not, identify the defendant in the courtroom as the perpetrator. On the stand, Witness A denied having made a prior identification of the defendant from a photographic array. Witness B recalled having selected a few photos from the array that Witness B thought showed the perpetrator. The prosecutor subsequently called to the stand a police officer who testified that both Witnesses A and B had positively

123. Commonwealth v. Weichell, 453 N.E.2d 1038, 1044 (Mass. 1983), cert. denied, 465 U.S. 1032 (1984). The court did indicate, however, that while the composite was admissible substantively, if it were standing alone as the only evidence of identification, it might not be sufficient to sustain a conviction. Id. at 1044 n.8.
124. Id. at 1045. Presumably, the majority used the word "conclude[d]" because its ruling on substantive admissibility was technically not a "holding," since the composite had been entered into evidence at the trial level with an instruction limiting its effect to corroboration. Id. at 1043.
125. Id. at 1048 (Liacos, J., dissenting).
126. Id. at 1048-49 (Liacos, J., dissenting).
127. Id. at 1052 (Liacos, J., dissenting).
128. Id. at 1051 n.5 (Liacos, J., dissenting). Justice O'Connor also dissenting in Weichell, referring to his dissenting opinion in Blaney. Id. at 1053 (citing Commonwealth v. Blaney, 442 N.E.2d 389, 397-99 (Mass. 1982) (O'Connor, J., dissenting)).
130. Id. at 486.
131. Id.
132. Id.
identified a photo of the defendant from the array as the gunman at the scene. The trial judge instructed the jury that the officer's testimony could be used as evidence of defendant's guilt.

When the defendant appealed this aspect of the case, the Massachusetts Appeals Court reversed. That court believed that the officer's testimony regarding Witness A was improperly admitted because Witness A had explicitly disclaimed making the prior photographic identification, and thus the defendant's opportunity to cross-examine Witness A at trial would not afford the defendant a genuine opportunity to test the officer's testimony regarding Witness A's alleged earlier photographic identification. By contrast, the Massachusetts Appeals Court upheld the admissibility of the officer's testimony regarding Witness B on the ground that Witness B had admitted on the stand that he had made a prior identification from the array.

At first, the Massachusetts Appeals Court decision seems odd in light of Weichell. If the Supreme Judicial Court had intended to adopt Proposed Massachusetts Rule 801(d)(1)(C) in Weichell, then testimony from the officer regarding the prior identifications by both witnesses should have been admissible in Daye on the face of the rule. The opinion in Weichell was rendered by the Supreme Judicial Court after Daye was argued at the Massachusetts Appeals Court level, but before it was decided. However, the Massachusetts Appeals Court decision in Daye cited to Weichell only briefly, to Federal Rule 801(d)(1)(C) only in passing, and to Proposed Massachusetts Rule 801(d)(1)(C) not at all.

The Supreme Judicial Court granted further review in the Daye case. After discussing several of its common-law precedents in the area of identification, the majority elaborated upon its decision in Weichell. The court believed that it correctly decided in Weichell that

133. Id. at 487.
134. Id.
136. Id. at 504.
137. Id. at 505-06.
138. See supra note 122.
140. Daye, 454 N.E.2d at 505.
141. Id. at 506.
142. Daye, 469 N.E.2d at 485.
143. Id. at 487-88.
testimony by a nonidentifying witness (such as the police officer in Daye) concerning an extrajudicial identification by another witness could be admitted as substantive evidence of identification and not merely as corroboration of the identifying witness’s testimony. The court also reaffirmed the probative worth of prior identifications because, by definition, they are made closer in time to the litigated incident than are identifications at trial. However, the court disaffirmed the probative value of a nonidentifying witness testifying to an alleged prior identification of an “identifying” witness when the latter denies ever having made the prior identification. Accordingly, the majority implied that it did not adopt Proposed Massachusetts Rule 801(d)(1)(C) in Weichell and stated that it agreed with authorities that have construed Federal Rule 801(d)(1)(C) as prohibiting such nonidentifying witness testimony where the “identifying” witness denies the prior identification. The majority in Daye therefore concluded that the officer’s testimony regarding Witness A’s prior identification should not have been admitted. The majority also concluded that the officer’s testimony regarding Witness B’s prior identification should not have been admitted, apparently because the prosecution failed to have Witness B identify at trial the photo that Witness B had selected from the array. Analysis of Daye for the purposes of this Article is complicated by the other major identification issue dealt with in the case: the admissibility of certain grand jury testimony. At trial, after Witness A denied making the photographic array, the prosecutor asked him whether he had identified the defendant as the perpetrator before the grand jury. The prosecutor was then permitted to have the witness read from the transcript of his grand jury testimony. Witness A thereafter recanted his grand jury identification testimony, saying he had “exaggerated” and “told things that weren’t true” in that testimony. At trial, the prosecutor argued successfully that such grand jury testimony fit under the hearsay exception for past recollection recorded and thus was admissible substantively on the issue of identification of the defendant as the perpetrator. On appeal, the prosecutor argued instead that the grand jury testimony should have been admitted because the Supreme Judicial Court should adopt Proposed Massachusetts Rule 801(d)(1)(A). The text of Proposed Massachusetts Rule 801(d)(1)(A) provided as follows:

(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.


The Supreme Judicial Court quickly dismissed the viability of the prosecution's reli-
Since the court in Daye believed a new trial was necessary, it explored the prosecution's request regarding the proposed rule, again expressly recognizing the value of the proposed code "as a comparative standard for the common-law evolution of our evidentiary law." After reviewing common-law precedents holding the "orthodox" view that prior inconsistent statements are hearsay when offered substantively, the court justified that view on the ground that the jury generally would be asked to credit a statement made without the declarant having been under oath, subject to cross-examination, or even in the presence of the jury when the statement was made. However, after reviewing more "modern" views, the majority expressed a preference for the "moderate modern" view reflected in Proposed Massachusetts Rule 801(d)(1)(A) that probative value and substantive use should be accorded only to "those prior inconsistent statements given under oath in instances where a record of the statement is likely to be available." The majority felt that even though Witness A in the Daye case recanted his earlier grand jury testimony on the stand, the fact that Witness A admitted making the grand jury statements provided the defendant with sufficient capacity to effectively cross-examine Witness A on his prior inconsistent statement. After conducting a "head count" of the states, most of which permit the substantive use of grand jury testimony under one "modern" theory or another, the majority in Daye seemed about to adopt Proposed Massachusetts Rule 801(d)(1)(A) in toto. However, the court expressly declined to do so, saying that it deferred to "the incremental process of common-law development" to determine the admissibility of other forms of prior inconsistent statements, arguably permitted under Proposed Massachusetts Rule 801(d)(1)(C), but not

ance upon past recollection recorded, as the witness/declarant denied that the statement before the grand jury was true when it was made. Daye, 469 N.E.2d at 490. The prosecution briefed the issue of substantive use of prior inconsistent statements in its brief to the Massachusetts Appeals Court, but that court did not discuss this issue in its opinion. Id. at 490 n.12. Even though this argument was never raised by the Commonwealth at trial, the Supreme Judicial Court nevertheless permitted the prosecution to argue prior inconsistent statement admissibility on appeal. Id.

150. Daye, 469 N.E.2d at 490.
152. Id. at 490-91.
153. Id. at 491 (quoting CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 251, at 601 (2d ed. 1972)).
154. Id.
155. Id.
156. Id. at 491-92.
157. Id. at 493 n.14.
presented by the record in the Daye case itself. The majority also imposed two express conditions to admissibility: a requirement that the witness/declarant at trial have a recollection of the events to which the statement relates and a requirement that the prior statement have been "that of the witness, rather than that of the interrogator" asking fact-filled, yes-or-no questions. The court thus permitted the substantive use at trial of a witness' prior inconsistent statements before a grand jury for the reasons behind Proposed Massachusetts Rule 801(d)(1)(A), without adopting the rule itself.

Justice Liacos, while concurring in the need for a new trial, again dissented vigorously to the court's exploration of another proposed rule of evidence. His concerns centered on unanswered state constitutional questions regarding confrontation rights of the defendant, the questionable value of later grand jury statements as probative of the events being litigated, and the chance that permitting prior inconsistent statements made before the grand jury would also permit the police officer's testimony of Witnesses A and B's prior identification, despite the majority's purported avoidance of this possibility.

Some of Justice Liacos' concerns about the expansive use of statements from grand jury testimony were borne out in a later case discussing Proposed Massachusetts Rule 801(d)(1)(A), Commonwealth v. Berrio. In Berrio, the prosecution alleged that the defendant/father

158. Id. at 493. In an earlier note in the Daye case, the majority opinion referred to several other categories of Proposed Massachusetts Rule 801(d)(1)(A) statements, such as depositions in civil cases and testimony from probable cause hearings or prior trials. Id. at 485 n.2.

159. Id. at 495. The court in Daye, consistent with its decision in Weichell, also stated that prior inconsistent grand jury testimony, while admissible substantively, would not be sufficient standing alone to support a conviction. Id. For a discussion of Weichell see supra note 122.

160. Id. at 492. These are mainly concerns about intimidation of witnesses resulting in trial testimony unhelpful to the prosecution. There was apparently a significant possibility of witness intimidation in the Daye trial. See id. at 486 n.6.

161. Id. at 495-96. The court also indicated that its limitations on the use of prior inconsistent statements could not be avoided by resorting to Proposed Massachusetts Rule 801(d)(1)(C) on prior identifications, even though that rule "is consistent with our cases governing probative use of extrajudicial identifications." Id. at 488 n.9.

162. Id. at 496 (Liacos, J., concurring in part and dissenting in part). Justice Liacos was joined by Justice O'Connor, who also dissented in Weichell. See supra note 128.


164. Daye, 469 N.E.2d at 497 (Liacos, J., concurring in part and dissenting in part).

165. Id. See supra note 161.

had sexually abused his daughter, allegations that the daughter denied at trial.\textsuperscript{167} When the daughter testified that she had lied to the grand jury because she was angry with her father, the trial judge permitted the prosecutor to offer grand jury statements by the daughter to substantively prove that the abuse had occurred.\textsuperscript{168} The defendant in \textit{Berrio} argued that the Daye case was limited to substantive use of grand jury testimony for the issue of identification only.\textsuperscript{169} After transferring the case from the Massachusetts Appeals Court, the Supreme Judicial Court held that in Daye, "we simply adopted Proposed Mass. R. Evid. 801(d)(1)(A) subject to conditions declared by us. Neither the rule nor Daye is limited to identification evidence."\textsuperscript{170} The court went on to reject the defendant's argument that the Daye conditions had not been satisfied in his case.\textsuperscript{171} Chief Justice Liacos again dissented vigorously on the grounds he raised in his opinion in Daye.\textsuperscript{172}

The one case to date in which the Supreme Judicial Court wholeheartedly, if not unanimously, adopted provisions of the proposed Massachusetts code is \textit{Ruszcyk v. Secretary of Public Safety}.\textsuperscript{173} In \textit{Ruszcyk}, the plaintiff was a municipal police officer in training who was injured while going through a doorway at the Massachusetts State Police Academy.\textsuperscript{174} At trial, the plaintiff offered to prove that the commandant of the academy, a week after the incident, told two municipal officials that a state trooper at the academy had "kicked in the door on the plaintiff."\textsuperscript{175} The trial judge excluded the statement on the ground that the plaintiff failed to offer sufficient evidence that the commandant had been authorized to make statements admitting to liability on behalf of the Commonwealth.\textsuperscript{176}

After transferring the case on its own initiative from the Massachusetts Appeals Court,\textsuperscript{177} the Supreme Judicial Court held that there

\begin{itemize}
\item \textsuperscript{167} \textit{Id.} at 500.
\item \textsuperscript{168} \textit{Id.} at 500-01.
\item \textsuperscript{169} \textit{Id.} at 501.
\item \textsuperscript{170} \textit{Id.}
\item \textsuperscript{171} \textit{Id.}
\item \textsuperscript{172} \textit{Id.} at 501-02 (Liacos, C.J., concurring and dissenting).
\item \textsuperscript{173} 517 N.E.2d 152 (Mass. 1988). Shortly before this Article went to press, the Supreme Judicial Court decided Commonwealth v. Sneed, 597 N.E.2d 1346 (Mass. 1992). In Sneed, the court decided to adopt Proposed Massachusetts Rule 803(18) on the admissibility of learned treatises. \textit{Id.} at 1351. The proposed rule is similar, but not identical, to Federal Rule 803(18). \textit{Id.} at 1350 n.6.
\item \textsuperscript{174} \textit{Ruszcyk}, 517 N.E.2d at 153.
\item \textsuperscript{175} \textit{Id.}
\item \textsuperscript{176} \textit{Id.}
\item \textsuperscript{177} \textit{Id.}
\end{itemize}
was insufficient evidence of actual authority in the commandant under common-law precedents in Massachusetts. However, the majority decided to accept the plaintiff’s suggestion, made also to the trial judge, that the court adopt Proposed Massachusetts Rule 801(d)(2)(D), the so-called “scope of employment” vicarious party admission exception to the hearsay definition. In doing so, the court also refused to read into the proposed Massachusetts rule a requirement that the employee/declarant have personal knowledge of the event described in his or her statement. While such a refusal is consistent with federal interpretations of the parallel federal rule, the court did suggest that personal knowledge, as well as other considerations, should be considered by a state court trial judge in making a Proposed Massachusetts Rule 403 determination of whether the probative value of the statement is substantially outweighed by any prejudicial effect it causes the opponent of the evidence. Thus, the Supreme Judicial Court in Ruszcyk adopted two proposed rules by combining them. Justice O’Connor in his dissent, maintained that even if Proposed Massachusetts Rule 801(d)(1)(C) ought to be adopted, the facts of this case were insufficient to establish that the commandant’s statement was within the scope of the commandant’s employment.

The one case to date in which the court has discussed, but declined to adopt a proposed rule, is Department of Youth Services v. A

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178. Id. at 154.
179. Id.
180. Proposed Massachusetts Rule 801(d)(2)(D) provides as follows: “(d) Statements which are not hearsay. A statement is not hearsay if— . . . (2) Admission by party-opponent. The statement is offered against a party and is . . . (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.” Prop. Mass. R. Evid. 801(d)(2)(D), supra note 2.
182. Id.
183. These other factors include credibility of the witness, the proponent’s need for the particular piece of evidence, and the reliability of the evidence, all of which the trial judge should consider outside the hearing of the jury as provided in Proposed Massachusetts Rule 104(c). Id. at 155.
184. Proposed Massachusetts Rule 403 provides as follows:

EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME—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.

185. Ruszcyk, 517 N.E.2d at 155.
186. Id. at 156-57 (O’Connor, J., dissenting).
Juvenile. In A Juvenile, the Supreme Judicial Court, again after taking the case on direct appellate review, was asked by the Commonwealth to enlarge the bases for admission of expert opinion by adopting Proposed Massachusetts Rule 703. At trial, a psychiatrist had testified against the juvenile defendant, basing his opinion that the juvenile presented "a very significant danger [to] the physical well-being of the community" on a number of internal department reports that he had reviewed, but that were never offered into evidence. Under Massachusetts common law, such an opinion must be based on some combination of the witness' own personal knowledge, admitted facts, or the testimony of other witnesses given or to be given at trial. Under the second sentence of Proposed Massachusetts Rule 703, the psychiatrist's review of the records would be a sufficient basis for his opinion provided such records were "reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." After noting the justification for the parallel federal rule, the court expressed its concern over the "serious potential for abuse," especially the possibility that a litigant would seek an expert who would use inadmissible evidence as the basis for his or her opinion in order to allow the jury to hear that inadmissible evidence. Because of these concerns, the court decided not to accept the principles of Proposed Massachusetts Rule 703. Instead,
the court took "a modest step"198 and struck a compromise between the common law and the proposed rule, stating that if the facts or data upon which the expert bases his or her opinion are admissible into evidence, and are of the sort that experts in that specialty reasonably rely upon in forming their real world opinions, then the expert may state the opinion without the facts or data actually being admitted into evidence.199 The purpose of this compromise was to reduce the unnecessary introduction of admissible evidence that would serve no purpose beyond being the basis for the expert's opinion.200

Unfortunately, the Supreme Judicial Court's tendency to cite to the proposed rules frequently, but explore them rarely, afflicts the Massachusetts Appeals Court as well. While many opinions of the commonwealth's intermediate court of appellate jurisdiction have cited to the proposed Massachusetts rules,201 few are noteworthy. Most of the appellate court's decisions citing the proposed rules did so to illustrate that a common law decision of the Supreme Judicial Court was in accord with a proposed rule.202 To some extent, this tendency is understandable: the Massachusetts Appeals Court, as an intermediate appellate court, is presumably charged with correcting errors based on existing law rather than creating new law. Also, in a number of the cases in which the Supreme Judicial Court discussed the adoption of a proposed Massachusetts rule, that court took the relevant case from the Massachusetts Appeals Court203 before the latter court had an opportunity to express its opinion. However, in some cases the Massachusetts Appeals Court did anticipate the Supreme Judicial Court's later action.204 The Massachusetts Appeals Court also

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198. A Juvenile, 499 N.E.2d at 821.
199. Id.
200. Id. While somewhat cryptic, there is also a passage in A Juvenile that indicates that the court would be inclined to follow most of Proposed Massachusetts Rule 705 on order of proof for the examination of an expert. See id.; Prop. Mass. R. Evid. 705, supra note 2. See also Commonwealth v. Daye, 587 N.E.2d 194 (Mass. 1992).
201. A total of 54 Massachusetts Appeals Court cases citing to one or more of the proposed rules was found by a search of LEXIS, States library, Mass file (Jan. 16, 1992).
203. See supra text accompanying notes 166-200 (discussing Berrio, Ruszcyk, and A Juvenile).
upon occasion has turned to the proposed Massachusetts rules to affirm a trial judge's rejection of evidence expansion,\(^{205}\) to decide an issue involving two conflicting lines of common-law precedent,\(^{206}\) and to contrast a current statute with the same concept under a proposed rule.\(^{207}\)

The proposed Massachusetts rules have fared even worse in the Massachusetts federal courts. Of course, federal trial courts everywhere are governed by the Federal Rules of Evidence in most proceedings.\(^{208}\) While several individual federal rules direct the federal trial judge to look to state evidence law when state substantive law provides the controlling rule of decision on the merits,\(^{209}\) historically few federal cases have cited to the proposed Massachusetts rules as guidance.\(^{210}\) Two of these cases are worthy of discussion. In the first, *Command Transportation, Inc. v. Y.S. Line Corp.*,\(^{211}\) the issue was whether a former employee of a corporation could be considered “a

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\(^{205}\) Simmons v. Yurchak, 551 N.E.2d 539 (Mass. App. Ct.), appeal denied, 554 N.E.2d 851 (Mass. 1990). In *Simmons*, the court affirmed the trial judge's exclusion of evidence beyond expressions of pain by discussing Proposed Massachusetts Rule 803(3) (on statements of present mental or physical condition), and Proposed Massachusetts Rule 403 (on balancing probative value against the danger of misleading the jury), and the absence of a residuary hearsay rule exception in the Proposed Massachusetts Rules of Evidence. *Id.* at 542. *But see*, FED. R. EVID. 803(24).

\(^{206}\) Neitlich v. Peterson, 447 N.E.2d 671 (Mass. App. Ct. 1983). In *Neitlich*, the court used Proposed Massachusetts Rule 510 (on waiver of privilege) as guidance in choosing between a broader and a narrower view of the scope of a waiver of the attorney-client privilege. *Id.* at 673-74.


\(^{208}\) FED. R. EVID. 101; FED. R. EVID. 1101.


representative of the client" within the corporation's attorney-client privilege.\textsuperscript{212} Since the issue arose in a diversity case, Magistrate Alexander determined that the Massachusetts law of attorney-client privilege would apply.\textsuperscript{213} However, she had difficulty finding any guidance under the Supreme Judicial Court's case law.\textsuperscript{214} Proposed Massachusetts Rule 502(a)(2)\textsuperscript{215} contained the restrictive "control-group" test but this choice had been controversial at the advisory committee level and, moreover, was growing "old" as a standard and had not been embraced by the Supreme Judicial Court.\textsuperscript{216} Magistrate Alexander turned to a Massachusetts case\textsuperscript{217} that cited the Supreme Court's decision in \textit{Upjohn Co. v. United States}\textsuperscript{218} with approval, even though \textit{Upjohn} involved the privilege status of a current, rather than former, employee of the corporate client.\textsuperscript{219}

In the second noteworthy federal case citing a proposed Massachusetts rule, \textit{Siguel v. Trustees of Tufts College},\textsuperscript{220} Judge Young was required to apply certain provisions from the Massachusetts Bar Association's standards of professional responsibility.\textsuperscript{221} In trying to determine whether the relevant disciplinary rule\textsuperscript{222} prohibited one party from interviewing former and current employees of a corporate opponent without the presence or prior approval of corporate counsel,\textsuperscript{223} the judge looked at a 1982 decision of the Committee on Professional Ethics of the Massachusetts Bar Association.\textsuperscript{224} However, Judge Young's analysis of that 1982 decision, which would prohibit such pri-

\textsuperscript{212} \textit{Id.} at 95.
\textsuperscript{213} \textit{Id.}
\textsuperscript{214} \textit{Id.}
\textsuperscript{215} Proposed Massachusetts Rule 502(a)(2) provides as follows: "LAWYER-CLIENT PRIVILEGE—(a) Definitions. As used in this rule . . . (2) A 'representative of the client' is one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client." Prop. Mass. R. Evid. 502(a)(2), \textit{supra} note 2.
\textsuperscript{218} 449 U.S. 383 (1981).
\textsuperscript{219} \textit{Command}, 116 F.R.D. at 96-97.
\textsuperscript{221} Local District Court Rule 5(d)(4)(B) of the United States District Court for the District of Massachusetts adopts the provisions of Rule 3:07 of the Rules of the Massachusetts Supreme Judicial Court as the code of professional responsibility for members of the local federal district court bar. D. MASS. CT. R. 5(d)(4)(B).
\textsuperscript{222} Mass. S.J.C. R. 3:07, DR 7-104(A)(1).
\textsuperscript{223} \textit{Siguel}, 52 Fair Empl. Prac. Cas. (BNA) at 698.
\textsuperscript{224} \textit{Id.}
vate interviews, led him to believe that the decision turned on the fact that the ethics committee had believed that Massachusetts law on the scope of employment exception to the hearsay concept was about to be changed to conform with Proposed Massachusetts Rule 801(d)(2)(D), permitting unauthorized employee admissions to be admitted against the corporate employer. Judge Young concluded that "[s]ince events have proved otherwise, there may be some occasion to reconsider" the ethics committee decision.

What is the problem with Judge Young’s analysis? The problem is that while the Supreme Judicial Court declined to adopt the Proposed Massachusetts Rules of Evidence in toto, the court did adopt expressly Proposed Massachusetts Rule 801(d)(2)(D) as part of the commonwealth’s evidence law in the Ruszcyk case in January, 1988, more than two years before the Siguel case was considered.

The majority justices of the Supreme Judicial Court in Weichell and Daye may believe that these cases from the state and federal courts in Massachusetts demonstrate the "value [of the proposed Massachusetts rules] as a comparative standard for the common-law evolution of our evidentiary law." The dissenters in those cases probably disagree. However, when one explores the foregoing in detail, it is apparent that ten years of use of the proposed Massachusetts rules as a comparative standard has not particularly advanced the law of evidence in the commonwealth. Most of the citations to the proposed rules have been makeweight, superfluous allusions to situations in which the proposed codified rule and actual common-law rule would have the same effect. Most of the remaining citations are acknowledgements of contrast between the rules, without helpful discussion, and many judges could have cited to the parallel federal rule as a "comparative standard." Except for Ruszcyk, those situations in which the Supreme Judicial Court actually did consider adopting a proposed Massachusetts rule resulted in either a rejection of the individual rule or a grudging acceptance of the rationale behind the rule, heavily hedged with judicial conditions not found in the wording

227. Id.
229. See Siguel, 52 Fair Empl. Prac. Cas. (BNA) at 697.
231. See supra text accompanying notes 173-86.
232. See supra text accompanying notes 187-200 for a discussion of A Juvenile.
of the proposed rule itself.233 The reticence of the Massachusetts Appeals Court to actually use the proposed rules to improve the commonwealth’s evidence standards and the difficulty of the federal courts ascertaining evolving evidence law of the commonwealth, suggests that the Supreme Judicial Court’s use of the proposed code does not provide much help to those with evidence questions. As the next section of this Article demonstrates, the experience in other jurisdictions since the rejection of the proposed Massachusetts rules ten years ago makes even stronger the case for current codification of Massachusetts evidence law.

III. CODIFICATION IN OTHER JURISDICTIONS

There are numerous law review articles on the codification of evidence law, both at the federal and state levels.234 Two of these articles were written on codifications in Arkansas235 and Maine236 by the original reporter of the proposed Massachusetts rules.237 Given this body of literature, a brief summary of the history of codification might be helpful.238

There were several attempts to codify evidence in the nineteenth century, with Oregon and California accepting a codification but New York rejecting one.239 In the 1920’s, the Commonwealth Fund sug-

233. See supra text accompanying notes 129-65 for a discussion of Daye.


237. See supra text accompanying note 11.

238. For a more detailed treatment of this history, see Saltzburg, supra note 234, at 175-83. For a more cynical treatment of the same, see Graham, supra note 234, at 298-99.

239. Saltzburg, supra note 234, at 177.
gested some modest, code-oriented reforms, but the American Law Institute ("ALI"), though at first interested in a restatement of evidence, decided that the nationwide "law" of evidence was so defective and conflicting that a thorough revision would be more appropriate. The culmination of this effort was the Model Code of Evidence, published by the ALI in 1942. Despite the significant efforts of judges and scholars, including Professor Edmund M. Morgan as Reporter and Dean John Henry Wigmore as Chief Consultant, the Model Code of Evidence was never enacted in any jurisdiction. The code was criticized heavily, often on the ground that it provided too much discretion to the trial judge.

The next major effort at codification enjoyed slightly more success. Using the model code as a basis, in 1950 the National Conference of Commissioners on Uniform State Laws began drafting the code that would be published as the Uniform Rules of Evidence in 1953. However, only the states of California, Kansas, New Jersey and Utah adopted the Uniform Rules, with both California and New Jersey making substantial changes even though the Uniform Rules made an effort to avoid the perceived pitfalls of the predecessor model code.

Though not widely embraced, the Uniform Rules of 1953 did form the basis of the effort that would culminate in the Federal Rules.

240. Id. at 177-78.
241. MODEL CODE OF EVIDENCE viii (Am. Law Inst. 1942), discussed in Patrick, supra note 234, at 671 n.8.
244. See Saltzburg, supra note 234, at 179. For example, Massachusetts criticized the model code on this ground, as did California, which already had a code of evidence. See RICHARD O. LEMPERT & STEPHEN A. SALTZBURG, A MODERN APPROACH TO EVIDENCE 1191 (2d ed. 1982); Report of Massachusetts Bar Association on Proposed Code of Evidence of American Law Institute, 27 MASS. L.Q. 28, Apr. 1942, at 1, 28.
245. Saltzburg, supra note 234, at 180.
247. UNIF. R. EVID. 13 commissioners' prefatory note, 13A U.L.A. 214 (1980); Patrick, supra note 234, at 671 n.17. For greater detail on the state enactments, see Wroth, supra note 234, at 1317 n.6. The Panama Canal Zone and the Virgin Islands also adopted the 1953 version of the Uniform Rules. See Tollison, supra note 234, at 54 n.28.
249. LEMPERT & SALTZBURG, supra note 244, at 1193-94.
Following a preliminary feasibility study on federal court codification, requested in 1961 by the Judicial Conference of the United States,250 a final report favorable to codification resulted in Chief Justice Earl Warren appointing an advisory committee in 1965 to draft actual rules.252 Preliminary drafts of the proposed federal rules were published widely in 1969 and 1971,253 but after the final report was promulgated by the Supreme Court of the United States in November, 1972, there was much criticism in Congress that the final report254 had not been given the same wide circulation as the earlier drafts.255 In what one commentator has called a “separation of powers showdown,”256 the Supreme Court promulgation, which would have been effective on July 1, 1973, was suspended by statute257 until legislative hearings could be held. After hearings on, and significant revisions to, the Supreme Court’s version, Congress enacted “The Federal Rules of Evidence” as a statute, effective July 1, 1975.258

Of the revisions made by Congress, the two most significant were in the areas of presumptions and privileges. Regarding presumptions, the Supreme Court in its 1972 promulgation prescribed the so-called “Morgan view” approach, which means that the effect of a presumption is to shift the burden of persuasion on the presumed fact to the shoulders of the party opposing the presumption.259 Congress, fearful that the “Morgan view” gave too much weight to presumptions,260 instead opted for the so-called “Thayer view,” under which the sole effect of a presumption is to shift the burden of production of the pre-
sumed fact to the shoulders of the party opposing the presumption. Under the federal rule, if the opposing party produces any evidence tending to show the non-existence of the presumed fact, the presumption's "bubble" bursts.\textsuperscript{261} While Congress retained the Supreme Court's "Erie nod" in Federal Rule 302 (allowing states to supply their own rules regarding presumptions in civil cases),\textsuperscript{262} the House of Representatives and Senate deleted Proposed Federal Rule 303 on presumptions in criminal cases.\textsuperscript{263}

The changes wrought by Congress regarding privileges were, if anything, more substantial. The Supreme Court had proposed a detailed code of privileges,\textsuperscript{264} including issues of waiver and comment on the claim of a privilege.\textsuperscript{265} Congress was concerned about forum-shopping between state and federal courts based upon a federal abrogation and extension of state-derived privilege laws, many of which were controversial.\textsuperscript{266} Accordingly, the House of Representatives and the Senate enacted a single rule, Rule 501, which provided for privilege law to be governed by federal court interpretation of common law and for another "Erie nod."\textsuperscript{267}

Despite the wrangling at the federal level, other jurisdictions began to use the Federal Rules of Evidence even before those rules became controlling law in the federal courts. The Proposed Federal Rules of Evidence as promulgated by the Supreme Court in 1972 were approved virtually intact by the National Conference of Commissioners on Uniform State Laws as the "new" Uniform Rules of Evidence in 1974, superseding the 1953 version.\textsuperscript{268} Both New Mexico and Wisconsin adopted codifications based upon the proposed federal rules,

\begin{itemize}
\item \textsuperscript{261} See \textit{Fed. R. Evid.} 301. See also James B. Thayer, \textit{A Preliminary Treatise on Evidence at the Common Law} ch. 8 \textit{passim} (Boston, Little, Brown & Co. 1898).
\item \textsuperscript{262} \textit{Fed. R. Evid.} 302 (providing that a federal court should look to the presumption law of a state where state law provides the rule of decision on the merits). See also Wroth, supra note 234, at 1327 n.75.
\item \textsuperscript{263} See Wroth, supra note 234, at 1328 n.81.
\item \textsuperscript{264} 1972 Proposed Federal Rules, supra note 24, at 356-82 (Rules 501-06).
\item \textsuperscript{265} Id.
\item \textsuperscript{267} \textit{Fed. R. Evid.} 501.
\item \textsuperscript{268} Wroth, supra note 234, at 1319 n.21. \textit{Compare} Unif. R. Evid. (1953) \textit{with} Unif. R. Evid. (1974). Presumptions and privileges are treated consistently in both the 1974 Uniform Rules and the proposed federal rules as drafted by the Supreme Court. However, Congress treated presumptions and privileges differently in the federal rules as enacted.
\end{itemize}
though New Mexico later conformed its rules to the versions enacted by Congress.\footnote{269}

Probably the most striking aspect of codification is the way the Federal Rules of Evidence and the 1974 Uniform Rules counterpart have “caught on” over the last ten years. As of June, 1982, only eighteen states had adopted a version of the federal rules as their state evidence code.\footnote{270} In the ten years since the Supreme Judicial Court of Massachusetts declined codification, that number has virtually doubled to thirty-four,\footnote{271} including Utah, which already had a code based on the 1953 Uniform Rules,\footnote{272} and all the New England states, except Massachusetts and Connecticut.\footnote{273} In addition, a version of the federal rules governs proceedings in federal military courts\footnote{274} and the Commonwealth of Puerto Rico.\footnote{275} There is an effort underway to codify a federal-rules model in Alabama.\footnote{276} New York, which declined codification in the early 1980’s, has revived its consideration of codification, although its current draft is based more on the format than the content of the actual federal rules.\footnote{277} Even New Jersey,

\footnote{269. See Wroth, supra note 234, at 1319 nn.15-16.}

\footnote{270. Internal Memorandum of the National Center for State Courts (June 2, 1982), cited in Healy, supra note 87, at 153 n.13.}


\footnote{272. Compare Utah R. Evid. 101-1103 (effective Sept. 1, 1983) with Utah R. Evid. 1-74.}

\footnote{273. ME. R. EVID. 101-1102; N.H. R. EVID. 100-1103; R.I. R. EVID. 101-1008; VT. R. EVID. 101-1103.}

\footnote{274. MILITARY R. EVID. 101-1103.}

\footnote{275. P.R. R. EVID. 1-84.}


\footnote{277. New York State Law Revision Comm’n, A Code of Evidence for the State of New York (1991) (submitted to the 1991-92 Session of the Legislature by Governor Mario M. Cuomo). In the letter of transmittal from the commission to the Governor, the commission emphasized that, unlike the 1982 proposed code, the 1991 version was less of an attempt to “conform state law to the federal rules” and “much more a New York Code of Evidence.” Letter from Robert M. Pitler, a member of the commission, to Mario M. Cuomo, Governor of the State of New York at XXI (Mar. 21, 1991). Cf. Bernard S.
which already has its own code, is considering a codification based upon federal rule enumeration, but retaining state substantive provisions. Kentucky, which has no evidence code, has developed a tradition of citing to and embracing individual federal rules of evidence. Illinois, which rejected a code in 1979, has also embraced individual federal rules from time to time. Furthermore, while beyond our current concerns, law reform bodies in many other countries are considering revising and codifying their evidence law.

Given the sheer number of federal and state courts now using a version of the federal rules, they have truly become "the majority view," even if no one would argue that they are perfect. However, to the extent that the federal rules have become the norm, there are significant variations from the norm. Three compendiums discuss these variations exhaustively, but some synthesis is possible.

The first major variation is the mode of enactment. Of the thirty-four codifying states, only nine codified their evidence law by statute. Twenty-five of those states, a substantial majority, including


278. See supra discussion accompanying notes 247-49.


286. Wroth, supra note 234, at 1350 n.272.

The second major variation is the extent to which the codifying states have felt free to modify the "better-view" Federal or Uniform Rule model to conform to pre-existing state practice—a perceived "even-better-view." Many federal and/or uniform rules were adopted nearly verbatim by all codifying states. However, several commentators have noted that nearly two-thirds of the Supreme Court's 1972 proposed federal rules have been modified substantively in one or more of the adopting states. Apparently, only one adopting state, Utah, has made fewer than ten substantial changes, and even Utah has made five. At least some states, whether by design or oversight, have not amended their own codes to reflect later amendments to the federal or uniform rules. And, of course, individual state acceptance or rejection in judicial opinions of federal or state advisory committee interpretations can create more of such divergence.

The most significant substantive changes tend to revolve around the perennial "problem children" of presumptions and privileges. With respect to presumptions, the states are all over the board. Beginning with Rule 301, thirteen states, including New Hampshire and

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287. See supra note 273. For the interaction between the legislature and the judiciary in Vermont over the state's proposed codification, see Wroth, supra note 234, at 1350 n.273. See John A. Dooley III, The Regulation of the Practice of Law, Practice and Procedure, and Court Administration in Vermont—Judicial or Legislative Power?, 8 VT. L. REV. 211, 220 n.51 (1983).

288. Wroth, supra note 234, at 1350. Since the publication of Dean Wroth's article, four more states have codified by court rule. See LA. CODE EVID. ANN. 101-1103 (West 1992); MISS. R. EVID. 101-1103; R.I. R. EVID. 100-1008; TENN. R. EVID. 101-1008.


291. Wroth, supra note 234, at 1322; Graham, supra note 234, at 308.

292. Wroth, supra note 234, at 1322 n.43; Graham, supra note 234, at 308.


294. A number of uniform rules were amended by the National Conference in 1986. For a convenient summary, see the prefatory note to the 1986 amendments to the Uniform Rules of Evidence, reprinted in 13A U.L.A. (1986).

295. See Graham, supra note 234, at 308. One example Professor Graham uses here is the variation among the states on the admissibility of subsequent remedial measures under Federal Rule 407 on liability issues in products liability cases, an issue that has vexed the federal circuit courts as well. Id. See Wendy Bugher Greenley, Note, Federal Rule of Evidence 407: New Controversy Besets the Admissibility of Subsequent Remedial Measures, 30 VILL. L. REV. 1611 (1985).

296. See supra text accompanying notes 259-67.
Vermont, have adopted the federal rule, "Thayer view" of presumptions.297 However, twelve states, including Maine, have adopted a proposed federal rule, "Morgan view" of presumptions.298 Four, including Rhode Island, have adopted detailed rules on presumptions, depending on the presumption involved.299 Five states have adopted no codified rules on presumptions.300 One state even adopted a presumption rule that preserves existing presumption law.301 There is comparable confusion over Rules 302 and 303.302

If the codifying states are all over the board regarding presumptions, they are all over the universe regarding privileges. Fourteen states have enacted Federal Rule 501 on privileges, thus leaving privilege law to constitutional, statutory, and common-law recognition and development.303 Eighteen states, including Maine, New Hampshire, and Vermont, have enacted some version of Proposed Federal Rule 501 (also the current Uniform Rule)304 which provides an exclusive "laundry list" of privileges and thus bars evolutionary common-law development of privilege.305 However, many of these latter states, including New Hampshire and Vermont, have expanded or contracted, or deleted and replaced, the privileges on the laundry list,306 resulting in a "crazy quilt" of privilege rules from jurisdiction to jurisdiction. Two other codifying states have adopted no privilege rule whatsoever,307 with Rhode Island tersely expressing an unmistakable desire in Rule 501 of its code to avoid any modification or supersession of existing state privilege law.308

Despite this diversity in the mode of enactment and substantive content of many supposedly "code" provisions, there is remarkably little modern scholarly opposition to codification of evidence law.309

297. See Wroth, supra note 234, at 1327 n.70.
298. Id. at 1327 n.71; 1 JOSEPH & SALTZBURG, supra note 285, § 8.2.
299. See Wroth, supra note 234, at 1327 n.72; R.I. R. EVID. 301-07.
300. See Wroth, supra note 234, at 1327 n.73; LA. CODE EVID. ANN. 301-03 (re­
served) (West 1992); TENN. R. EVID. art. III (reserved).
301. See Wroth, supra note 234, at 1327 n.74; IOWA R. EVID. 301.
302. See Wroth, supra note 234, at 1327-29.
303. 1 JOSEPH & SALTZBURG, supra note 285, § 23.2.
305. 1 JOSEPH & SALTZBURG, supra note 285, § 23.2.
306. See Wroth, supra note 234, at 1334-36.
307. 1 JOSEPH & SALTZBURG, supra note 285, § 23.2.
309. The major piece opposing codification is Graham, supra note 234. Even Professor Graham, however, seems more ambivalent than opposed to codification, his ambivalence growing from his pessimism on whether codification can ever achieve the goals set for it. Accord Younger, supra note 234, at 252-54. See also Richard S. Walinski & Howard Abramoff, The Proposed Ohio Rules of Evidence: The Case Against, 28 CASE W. RES. L.
Scholarly review of codification tends to be favorable, whether viewed prospectively toward codification, or retrospectively with the benefit of ten years of intra-jurisdiction experience under codification. Also, the fact remains that thirty-four states have substantially adopted the Federal Rules of Evidence as their state evidence law, and no state that has codified on a federal rules model has ever "decodified" (at least, not intentionally). The next section of this Article will argue why Massachusetts should reconsider its decision not to codify its evidence law.

IV. WHY MASSACHUSETTS SHOULD CODIFY

A. Uniformity

The first reason Massachusetts should codify its evidence law is to provide uniformity. Admittedly, uniformity is more important in the federal court system (where federal trial judges in different states otherwise might apply different evidence law) than for any given state court system (where presumably every trial judge is applying that state's evidence law). And it may seem odd given the diversity that exists between "codifications" based on the federal rules model to raise uniformity as a factor in codification at all. However, uniformity can be an advantage of codification without literal and total uniform-

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310. Gamble & Sandidge, supra note 276, at 8.
311. See, e.g., Field, supra note 236, at 224.
312. Berger, supra note 234, at 264-69 (10 years of codification in federal court); Schmertz, supra note 234, at 1370-76 (10 years of codification in federal court); Whinery, supra note 234, at 194-96 (10 years of codification in the Oklahoma state courts).
313. The somewhat embarrassing quasi-exception is Arkansas. One of the states that enacted a code by statute, Arkansas discovered 10 years later that its legislature was unlawfully in session at the time the code was passed. Rather than risk chaos in its judicial system, the Arkansas Supreme Court adopted a codification as court rule to fill the gap. See Ricarte v. State, 717 S.W.2d 488 (Ark. 1986).
314. Whinery, supra note 234, at 194.
315. Saltzburg, supra note 234, at 181. Indeed, "for the first 150 years of the 200-year history of federal courts, things were the reverse of what they are today. Before 1938, the federal courts followed state procedural law and federal substantive law, even in diversity cases." Baker, supra note 256, at 325-26. It is thus ironic that a major argument for a given state to codify its evidence law on a federal rules model is to regain the intrastate uniformity that existed prior to the enactment of the Federal Rules of Evidence.
316. This "diversity of codification" deflates the argument that codification on a federal rules model could lead to the nationwide law of evidence being disproportionately influenced by the oligarchical few in charge of the federal rules, the fear being that the states would follow federal evidence law developments in a "sheep-like" manner. See Graham, supra note 234, at 297-98.
ity of language in every state and federal court. Even allowing for local variation, in nearly all the code jurisdictions there is now a consistent format and organizational plan of evidence with identical or nearly identical numbering systems; typical substantive provisions in identical or nearly identical language; and agreement on the evidence topics that are to be included and excluded from the body of the code itself. This “relative” uniformity permits a more thorough analysis of already codified provisions without the wasteful “sorting and comparison of variant rules” across common-law jurisdictions.

The failure of the codes to be exhaustively inclusive is not a death knell to uniformity. As one commentator has observed, “when we speak of the Federal Rules of Evidence and its state counterparts as a ‘code,’ we are not using the term in the same sense . . . as the Bankruptcy Code, or the Internal Revenue Code, or even the Uniform Commercial Code.” The evidence codes do not deal with every situation, and they contain standards rather than absolute rules. The focus tends to be on the most significant areas of admission of proof at trial as well as those most in need of clarification or reform, with the opportunity for judicial interpolation to fill any gaps.

When it declined to adopt the proposed Massachusetts rules, the Supreme Judicial Court recognized uniformity of practice in federal and state courts to be a “valid objective” of codification. While “uniformity” was not included within the code values of fairness, efficiency, and progress, uniformity enhances all three values. Consistency across the states tends to avoid the injustices created by primitive choice-of-law rules in interstate evidence problems. It also eases the transition of lawyers from state to state.

317. Wroth, supra note 234, at 1322.
318. Id. at 1348. But see Younger, supra note 234, at 254 n.17 (“The prudence of uniformity of practice between federal and state courts is hardly self-evident. And if the [Federal] Rules were folly to begin with, their replication among the states would not make them wise.”).
319. Tollison, supra note 234, at 57.
320. Wroth, supra note 234, at 1349.
322. Id.
323. Schmertz, supra note 234, at 1373.
324. For a thoughtful approach to filling such gaps, see id. at 1374-76.
325. SJC Announcement, supra note 1.
326. FED. R. EVID. 102 (“Purpose and Construction”).
327. Graham, supra note 234, at 299-301.
328. Id. at 300 & n.25.
329. See Schmertz, supra note 234, at 1370. There are those who challenge the importance of this factor. See Graham, supra note 234, at 297.
benefits the attorney with clients in several different code states, a situation that occurs frequently in Massachusetts, given that all but one of the neighboring New England states is now a code jurisdiction.

Uniformity between federal and state courts within a state eases the transition of lawyers within the forum, and encourages attorneys to practice in both state and federal venues. While the diversity of provisions across the code states might give rise to some fears of forum-shopping among the courts of different states, forum-shopping on evidence issues between state and federal courts within the same state is unlikely for several reasons. First, most attorneys do not do their “shopping” based on the rules of evidence; rather, they shop based upon considerations of the predispositions of likely judges and the composition of typical jury panels. Second, uniformity of evidence laws between state and federal courts in the same forum would discourage shopping by removing its incentives and at worst would not encourage shopping beyond what is already available.

As with many qualities that are difficult to quantify, however, the ultimate beauty of codifying evidence law on a federal rules model can be appreciated best by metaphor. Think of the common law as Latin, and the federal rules as English. Continued adherence to the common law in evidentiary matters is essentially adherence to a dead language, and the beauty of codification is that everyone would be speaking English, even if the “idioms” of the code from jurisdiction to jurisdiction vary the way English does from Australia to Alabama. In fact, given the diversity within the codes nationwide, Massachusetts can choose its own code idioms within the basic organizational plan.

330. Wroth, supra note 234, at 1322.
331. See supra note 273 and accompanying text.
332. Wroth, supra note 234, at 1322. At least one commentator doubts that many lawyers actually practice in both federal and state courts or that their impact on the rules would be very substantial. Graham, supra note 234, at 296.
333. Saltzburg, supra note 234, at 194 n.79; Tollison, supra note 234, at 62.
334. 1 Joseph & Saltzburg, supra note 285, at v.
335. Patrick, supra note 234, at 670.
336. Tollison, supra note 234, at 57.
337. “Erie nods” in Federal Rules of Evidence 302 (“Presumptions”), 501 (“Privileges”), and 601 (“Competency of Witnesses”) already discourage forum-shopping based on evidence considerations, because the federal courts look to the state view under these rules in diversity and supplemental subject matter jurisdiction cases, the most likely candidates for forum-shopping. See 28 U.S.C. §§ 1332, 1367 (1988). See supra text accompanying notes 262, 267. However, the obvious differences between the federal rules and current Massachusetts practice would still offer possible considerations for the attorney who wished to forum-shop. See generally Hughes et al., supra note 8.
Having conceded that Massachusetts can vary from the federal rules model, a reconsideration of codification for the commonwealth, sadly, must begin with a new proposed code. This is true for several reasons. First, the Supreme Judicial Court was correct in assaying that the 1980 Proposed Massachusetts Rules of Evidence departed significantly and controversially from their federal counterparts.\(^{338}\) A state code more closely patterned after the federal one is more sensible.\(^{339}\) Second, to the extent that Massachusetts would want to depart from the federal model on specific code provisions, the drafters of the proposed code did not have the benefit of comparing and evaluating the codes of three of the four now-codified New England states, because those three jurisdictions codified after the Supreme Judicial Court rejected the proposed Massachusetts rules in 1982.\(^{340}\) Further, two major compendiums of code jurisdictions nationwide would provide even more opportunities for comparison,\(^{341}\) through a "head count" of the codifying states on each evidence topic in the code.\(^{342}\) Third, there have been a number of amendments to, and interpretations of, both the federal\(^{343}\) and uniform rules\(^{344}\) that any advisory committee drafting a new Massachusetts code would want to consider. For instance, any new advisory committee automatically should include one pervasive amendment to the federal rules, the "gender-neutralization" changes.\(^{345}\) Fourth, drafters would want to review a number of post-1980 decisions under Massachusetts common law, especially those dealing with the original proposed Massachusetts

338. SJC Announcement, supra note 1. See also 1 JOSEPH & SALTZBURG, supra note 285, at v ("It can matter, and matter a lot, which version of the Rules a state has adopted.").

339. Gamble & Sandidge, supra note 276, at 8; Tollison, supra note 234, at 62. In addition to the other advantages discussed, if Massachusetts had a code based on the federal rules, and a given Massachusetts rule of evidence were to be part of an appeal to the Supreme Court of the United States, the nation's highest Court would be hard-pressed to overturn on some constitutional ground a state court rule identical to its own federal rule on the issue. See Kestel, supra note 280, at 193.


341. See JOSEPH & SALTZBURG, supra note 285; Wroth, supra note 234.


343. See, e.g., FED. R. EVID. 609(a) ("Impeachment by Evidence of Conviction of Crime"); United States v. Abel, 469 U.S. 45 (1984) (preserving the opportunity to impeach by bias even though no federal rule of evidence expressly permits such mode of impeachment).

344. See supra note 294.

345. See FED. R. EVID. 101-1103.
code. Presumably, any new advisory committee should be constituted with both continuity and diversity in mind. To avoid citational confusion with the earlier effort, a new codification might be designated the “Suggested Massachusetts Rules of Evidence.”

B. Rationality and Modernity

Massachusetts also should codify its evidence law based on a federal rules model because of considerations of rationality and modernity. Even if uniformity with practice in the federal courts alone is unpersuasive, Massachusetts should use the federal code as a model because it remains the most recent and thorough re-evaluation of the law of evidence. The Commonwealth already has modernized its rules of procedure based on the Federal Rules of Civil Procedure, and “rules of evidence are inextricably bound up with rules of procedure.” Accordingly, codifying using the federal evidence model would permit rational interlocking of already cross-referenced rules using similar language to mean similar things. Also, the basic premise underlying the federal evidence code “is that there should be a greater liberality in the admission of evidence.” The premise is grounded on the greater educational and cultural understanding of modern jurors when compared to their eighteenth century counterparts in England. This should be especially true in Massachusetts, which uses the “one-day, one-trial” system for its juries, thereby assuring that virtually everyone, including judges and law professors, will be eli-

346. See generally supra text accompanying notes 98-233.
347. Continuity would be advanced by including at least one member from the original committee. See supra notes 10-13 and accompanying text. Diversity would be advanced by considerations of gender, race, geography (both in the sense of the areas of the state and of size of municipality within the state), type of employment (government and private, academic and judicial), type of litigation practice (civil and criminal), and perhaps other characteristics as well. See also Tollison, supra note 234, at 65-66 (suggestions on the composition of the advisory committee for Mississippi).
349. Hennessey, supra note 98, at 7. See MASS. R. CIV. P.; MASS. R. DOM. REL. P.; DIST./MUN. CTS. R. CIV. P.
350. Tollison, supra note 234, at 53.
351. Field, supra note 235; at 4.
352. Id.
354. When the author of this Article was called for jury service in an attempted murder trial in Suffolk County (Boston), the trial judge asked the jury pool as a whole if anyone could not sit on the jury. I raised my hand, and at a bench conference the trial judge reminded me about the importance of everyone serving as a juror. He then asked for
gible for jury service.

The codification of evidence law would help the Commonwealth jettison irrational practices based upon old precedents.\(^{355}\) Two practices in Massachusetts that fit this category are the rule that a party can impeach his or her own witnesses only by prior inconsistent statement\(^{356}\) and the practice of allowing proponents of an otherwise inadmissible document to offer the document into evidence when it is used to refresh a witness' memory and the opponent demands to see it.\(^{357}\) Also, by codifying rationally, the court could avoid accidental, undesired codification.\(^{358}\)

As indicated earlier, however, a majority of the Supreme Judicial Court was concerned "that promulgation of rules of evidence would tend to restrict the development of common-law principles pertaining to the admission of evidence."\(^{359}\) Opponents of codification often raise this argument using Judge Henry Friendly's classic statement "[w]hen it is not necessary to do anything, it is necessary to do nothing."\(^{360}\) However, the next natural question, which the Supreme Judicial Court did not ask, is: "What is the purpose of common-law development?" Presumably, that purpose is to modernize by reform those evidence rules which have become outdated. However, it is nearly impossible to modernize evidence law through common-law development.\(^{361}\) Case law fails to keep pace with the thousands of practical problems of admissibility that arise each day in trials.\(^{362}\)

The reasons for this failure are fairly simple. First, the common-law system is subject to the vagaries of which cases get appealed. Litigators tend to focus on the result in the case, not pressing or even preserving fine points of evidence law.\(^{363}\) Second, even an ardent litig}

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\(^{355}\) Whinery, supra note 234, at 195.


\(^{358}\) One expert commenting on possible codification in North Carolina noted that North Carolina hearsay law had been affected by the Federal Rules of Evidence even though the state had not yet codified and suggested that an evidence code would be needed in order to prevent unwelcome changes in existing state law. Walter J. Blakey, Moving Towards an Evidence Law of General Principles: Several Suggestions Concerning an Evidence Code for North Carolina, 13 N.C. Cent. L.J. 1, 9-17 (1981).

\(^{359}\) SJC Announcement, supra note 1.


\(^{361}\) Field, supra note 235, at 2; Schmertz, supra note 234, at 1370.

\(^{362}\) See Schmertz, supra note 234, at 1370.

\(^{363}\) Field, supra note 235, at 2.
gator will recognize and abandon harmless error when he or she sees it.\textsuperscript{364} Third, trial judges are unlikely to depart from even old precedents,\textsuperscript{365} thus compounding the first two problems.

By contrast to the haphazard approach of the common law, codification can modernize evidence law immediately, comprehensively, and consistently.\textsuperscript{366} Indeed, one commentator believes that the best argument in favor of codification is its capacity to be a vehicle for the thorough reform of a jurisdiction's law of evidence.\textsuperscript{367} Even though some states that have codified their evidence law have chosen different treatment of an individual rule than the federal code, the codification effort itself forces rethinking of evidence concepts and consequently modernizes them.\textsuperscript{368}

We also should be clear that codification is not the end of the process of analyzing evidence concepts, but rather a new beginning.\textsuperscript{369} Even a "modern" code will not be perfect, and even if perfect, could not stay perfect. As time goes on, courts will have to interpret ambiguities, challenge anachronisms, and perhaps suggest amendments to the code.\textsuperscript{370} The beauty of a code is that such problem areas tend to be highlighted rather quickly and clearly because everyone is studying and arguing the same code phrases.

This is one aspect of codification as to which the Supreme Judicial Court somewhat missed the point, as reflected by two of its statements in the announcement declining to implement the proposed Massachusetts code. On the one hand, "some of the Justices [believed that] the Federal Rules of Evidence have not led to uniform practice in the various federal courts."\textsuperscript{371} This is certainly true, in the sense that federal courts have disagreed on several issues not expressly dealt with in the code, such as whether the exclusion of subsequent remedial

\begin{footnotesize}
\begin{enumerate}
\item Patrick, \textit{supra} note 234, at 673 (noting that the operation of the harmless error rule results in few reversals on points of evidence).
\item Field, \textit{supra} note 235, at 2. The author of that article went on to observe that "[i]t was a standard joke in Massachusetts, where the writer practiced for many years, to give the most credit in reform of evidence law to a judge who several times unintentionally failed to abide by precedent and then was affirmed by the Supreme Judicial Court." \textit{Id.} at 2 n.3.
\item Id. at 2; Schmertz, \textit{supra} note 234, at 1371.
\item Patrick, \textit{supra} note 234, at 670.
\item Saltzburg, \textit{supra} note 234, at 187.
\item Tollison, \textit{supra} note 234, at 66.
\item See, for example, the discussion of possible amendments to the Federal Rules of Evidence on the occasion of their tenth birthday in Berger, \textit{supra} note 234, at 273-76. One opponent of codification is less sanguine about the evolution of law under an evidentiary code system. See Graham, \textit{supra} note 234, at 313-14.
\item SJC Announcement, \textit{supra} note 1.
\end{enumerate}
\end{footnotesize}
measures to prove liability as provided by Rule 407 applies in products liability cases.\textsuperscript{372} However, it is precisely this focus on problem areas that has encouraged and guided several codifying states to include in their Rule 407 an express provision dealing with the products liability question.\textsuperscript{373} Thus, the Supreme Judicial Court's second statement, that "the Federal Rules . . . are, in some instances, less well adapted to the needs of modern trial practice than current Massachusetts law,"\textsuperscript{374} is also misplaced. If Massachusetts disagrees with the federal treatment of a given evidence concept, then the Commonwealth should, and can, change that concept within the Massachusetts code. This rational kind of change can have greater ramifications than mere intrajurisdictional satisfaction. For example, a number of states inserted within their Rule 404(b) a provision that the proponent (usually the prosecutor in a criminal case) of prior bad acts evidence must give pre-trial notice to the opponent of the intention to offer such evidence.\textsuperscript{375} Effective December 1, 1991, a similar notice provision was inserted in the federal rule.\textsuperscript{376} Thus, the states that have codified can act not only for their own good but also as a "laboratory" for extrajurisdictional guidance as well.\textsuperscript{377}

This "laboratory" perspective is an important one. Jurisdictions considering a codification based primarily on their own existing law of evidence (currently, New Jersey and New York)\textsuperscript{378} do not risk merely restating their evidence law instead of reforming it. Those jurisdictions deprive themselves of participating in the nationwide experimentation under federal model codes and therefore risk dooming themselves to evidential eccentricity and eventual irrelevance nationally. By contrast, the states codifying based on a federal rules model enjoy the opportunity to consult the similarly structured jurisprudence of other codifying states and the federal courts as well.\textsuperscript{379} The "fed-

\begin{itemize}
\item \textsuperscript{372} See Berger, supra note 234, at 265-66.
\item \textsuperscript{373} Maine and Rhode Island reversed the federal rule by admitting evidence of subsequent remedial measures in virtually all cases. However, six states that follow the policy of the federal rule have "express" provisions for products liability cases; Alaska, Hawaii, Iowa, and Texas admit such measures, while Nebraska and Tennessee exclude them. See 1 Joseph & Saltzburg, supra note 285, \S 17.2.
\item \textsuperscript{374} SJC Announcement, supra note 1.
\item \textsuperscript{375} 1 Joseph & Saltzburg, supra note 285, \S 14.2 n.6. The states are Florida, Tennessee, and Texas (the last in criminal cases only). The approaches to the "notice" issue of several other states are gathered in Graham, supra note 234, at 309.
\item \textsuperscript{377} 1 Joseph & Saltzburg, supra note 285, at iv-v.
\item \textsuperscript{378} See supra text accompanying notes 277-79.
\item \textsuperscript{379} Tollison, supra note 234, at 54-55. But see Graham, supra note 234, at 313 ("One sees in the state court opinions a slight but gradually increasing tendency to cite the
eral-rules-as-model" is not just the coming thing; as the evidence foundation for thirty-four states, it is the "arrived" thing. Massachusetts, with no homegrown codification and no plans for one, will benefit most by joining the interstate federation of laboratories on a federal-rules model as soon as possible.

C. Accessibility and Competency

Massachusetts should codify for reasons of accessibility and competency as well. The code advantage of accessibility is recognized by skeptics,380 and even opponents,381 of codification. A commentator on one state's ten-year experience with an evidence code believes that accessibility is "perhaps the greatest virtue" of codification.382

The major problem of accessibility in common-law states like Massachusetts is that the "law" of evidence is scattered throughout dozens of volumes of statutes and hundreds of volumes of reporters.383 It is, quite simply, very difficult for attorneys and judges to "find" evidence law in a common-law jurisdiction.384 By comparison, the federal rules, by reducing most of the law of evidence to a single document, has provided a "clearly lit landscape" for participants in litigation.385 The eleven articles of a federal rules code are an integrated system, so that the answer to an evidence question often lies in a relatively easy interplay of several different rules.386 Even if an evidence issue is not covered in the code, at least all participants can discover this and research accordingly.387

Accessibility also enhances lawyer competency. By express Supreme Judicial Court rule, attorneys in Massachusetts are charged
to act competently in cases they handle. Under the format of a federal rules model, the attorney knows where to look for an evidence concept. This is the case even if the actual content of the rule is different from the federal version. Regardless of whether the "better" view is to admit or exclude a given piece of evidence, a code is the best place to make that decision and to make it with clarity.

In addition to easy accessibility pre-trial, the code also provides the litigator with that vital, quick accessibility to an evidentiary rule during a trial or other proceeding. This is the so-called "pocket bible" advantage, praised by some and questioned by others. Obviously, detailed research and motions in limine might produce a "perfect" evidentiary trial. However, the beauty of the pocket bible is that during the heat of a contested hearing on an unanticipated issue of evidence law, many variables can be eliminated and more "correct" trial-level rulings are likely. This should enhance not only the actual competence of lawyers in the courtroom, but also the equally important aspect of apparent competence of lawyers in the one venue in which the general public sees the law presented.

A code of evidence based on the federal rules also enhances lawyer competency by allowing attorneys to understand an evidence concept once it is found. All litigators will be starting their evidence arguments using the same black-letter rules. Furthermore, most att-

391. Tollison, supra note 234, at 56.
392. Saltzburg, supra note 234, at 184.
393. Graham, supra note 234, at 314. One danger of the "pocket bible" approach is that attorneys may tend to rely on the code itself and fail to keep abreast of the case law interpreting it. While this is a danger for codes in any area of the law, the same danger exists for the lawyer practicing in a common-law evidence state who fails to Shepardize a common-law precedent.
394. Saltzburg, supra note 234, at 184.
395. Healy, supra note 87, at 153; Tollison, supra note 234, at 57.
396. See Berger, supra note 234, at 260-61; Tollison, supra note 234, at 57.
Attorneys in the commonwealth entered practice after 1975, the effective
date of the federal rules. Upon publication in the late 1960's, the
preliminary drafts of the proposed federal rules "overnight . . . super­
seded the Model Code and 1953 Uniform Rules as teaching tools." By 1978, law schools were using the federal rules more and more, and by 1984, virtually all evidence casebooks used the federal rules as "a point of departure," a condition which persists today. Accordingly, most attorneys now in practice were "brought up" using the federal rules as the law of evidence, and in not too many more years the same will be true of most judges.

Once found and understood, a code also contributes to competency by allowing the attorney to update the applicable code provision relatively easily. Law review surveys on evidence law from code jurisdictions are more easily scanned and digested than those from common-law states. Even in the absence of such surveys, computerized legal research makes updating a rule with a given designation much easier than linking "buzz words" under an amorphous common-law

397. There were approximately 45,000 attorneys registered in Massachusetts as of March, 1992. Telephone interview, Board of Bar Overseers, Registration Division (Mar. 5, 1992). The board does not maintain statistical records of how many practitioners qualified after certain dates. However, the writer was admitted to the Massachusetts bar in January, 1974, and remembers its total size as being approximately 20,000 members in the mid-1970's. Therefore, most of today's 45,000 Massachusetts attorneys were admitted to the bar after the federal rules became effective on July 1, 1975. Nationwide, more than 50% of 1984's lawyers had been admitted to the bar since 1975. See Berger, supra note 234, at 257.

398. Wroth, supra note 234, at 1318.
399. Saltzbourg, supra note 234, at 185-86.
400. Berger, supra note 234, at 257.

The writer is also informed by his colleagues who teach courses other than Evidence, both in Massachusetts and elsewhere, that they must make use of the Federal Rules of Evidence when evidentiary issues arise in their courses simply because many of them attended law school or practiced law outside of their current state. They can rely on the federal rules being taught in virtually all law schools, including the ones at which they currently teach.

concept.\textsuperscript{403} Also, for those practitioners who are not “computer-literate,” \textit{Shepard’s Evidence Citations} performs the same function, albeit more slowly, for an adopted code,\textsuperscript{404} an advantage even the proposed Massachusetts rules cannot offer.\textsuperscript{405} Further, a code of evidence operative in State A is usually annotated and thus usually can be found both in State A and in State B.\textsuperscript{406} However, often a treatise on evidence from a common-law jurisdiction is not available in the libraries of other states,\textsuperscript{407} and even if an extensive treatise of the common law of State A is available in the libraries of both State A and State B, that treatise may be awkwardly out-of-date.\textsuperscript{408} Indeed, one can argue that when the federal court in \textit{Siguel} \textsuperscript{409} “missed” the Supreme Judicial Court’s decision in \textit{Ruszyk},\textsuperscript{410} it was not because the Massachusetts court adopted a Proposed Massachusetts Rule of Evidence, but rather because that adoption could not easily be found by a federal court given the Massachusetts common-law system of evidence. A concurrent advantage to Massachusetts codifying on a federal-rules model is that the commonwealth’s evidence law would be included in the major compendiums of code states\textsuperscript{411} and thus be available to all, both inside and outside Massachusetts.

D. Certainty and Flexibility

Finally, Massachusetts should codify its evidence law for reasons of certainty and flexibility.\textsuperscript{412} At first it would seem that these two aspects of the admission of evidence are antithetical. After all, more certainty for litigators in the admissibility of evidence would mean less

\begin{footnotesize}
\textsuperscript{403} See, for example, the WESTLAW explanation of computer updating for a given federal rule of evidence in HUGHES, supra note 2, at VIII-IX.

\textsuperscript{404} See, e.g., SHEPARD'S EVIDENCE CITATIONS (1991).

\textsuperscript{405} SHEPARD'S does not “pick up” the Proposed Massachusetts Rules of Evidence, apparently because the proposed rules were never enacted. See, e.g., the citations to “Massachusetts Court Rules” in SHEPARD'S MASSACHUSETTS CITATIONS, STATUTE EDITION 859-92 passim (6th ed. 1986) (no references to the Proposed Massachusetts Rules of Evidence).

\textsuperscript{406} A compendium such as the one by Joseph and Saltzburg could prove to be helpful in this respect. See supra note 285.

\textsuperscript{407} Graham, supra note 234, at 313.

\textsuperscript{408} This is the situation with the traditional “bible” for Massachusetts evidence law, PAUL J. LIACOS, HANDBOOK OF MASSACHUSETTS EVIDENCE (5th ed. 1981 & Supp. 1985). The principal volume is 11 years old, and the most recent supplement is seven years old.

\textsuperscript{409} See supra text accompanying notes 220-29.

\textsuperscript{410} See supra text accompanying notes 173-86.

\textsuperscript{411} For example, Louisiana, Rhode Island, and Tennessee have all recently codified and have been included in the compendium by Joseph and Saltzburg. See supra note 285.

\textsuperscript{412} Whinery, supra note 234, at 196-97.
\end{footnotesize}
flexibility for trial judges in ruling on evidence, while more flexibility for trial judges in ruling on evidence would mean less certainty for litigators in the admissibility of evidence. However, in a code context, certainty and flexibility in fact work together symbiotically.

It is demonstrably clear that codification enhances certainty in evidentiary rulings. As already discussed, a code requires all participants to start from the same black-letter rules, thus encouraging a marshalling of arguments and facts head-to-head and avoiding the frequent, common-law sensation of ships passing in the night. An advocate armed with a black-letter rule is much better positioned to enlighten an inexperienced trial judge. The nightmare of the inconsistent or idiosyncratic trial judge is noted almost universally as a problem in common-law jurisdictions. However, to some extent that nightmare, while real, is not the individual jurist's fault. After all, without a code, and perhaps only decades-old, vague precedents to guide him or her, it is no wonder that a trial judge would idiosyncratically develop a set of his or her “own” rules. These idiosyncracies are relatively easy to "hide" under a common-law system due to the harmless error doctrine and the relatively unsupervised exercise of discretion. However, any such idiosyncracy rapidly dissipates under codification, where there is no question what the “rule” of evidence on most given points actually “is.” Motions in limine will be needed less frequently, but when brought can be more directly focused. This certainty of rule also substantially ameliorates the “equal protection” problem of litigants having the admissibility of their evidence, and therefore the outcome of their case, depend upon which judge they draw. The trial judge who stubbornly insists upon imposing his or her own regime despite codification can be quickly and clearly identified by the express code mandates he or she fails to honor, and thus can be “rechanneled” into code compliance on appeal. It will take some time to adjust to codification, during which time there may be an increase in litigation on evidentiary questions. On the whole, however, the trial courts should be able to avoid time-sapping wrangling

413. Patrick, supra note 234, at 669-70.
414. See supra text accompanying note 396.
415. Schmertz, supra note 234, at 1370; Tollison, supra note 234, at 50.
416. Saltzburg, supra note 234, at 189.
417. Patrick, supra note 234, at 673.
418. Tollison, supra note 234, at 50.
420. Saltzburg, supra note 234, at 187.
over code-covered evidence offerings,\footnote{Id.; Tollison, supra note 234, at 50.} and the appellate system will be burdened less by unnecessary appeals.\footnote{Tollison, supra note 234, at 56.}

Certainty also produces better advice to clients.\footnote{Tollison, supra note 234, at 56.} The more predictable the trial judge's—any trial judge's—eventual ruling can be, the more accurate will be the litigator's assessment of the trial result. Therefore, settlements under a code will tend to be "better"\footnote{Saltzburg, supra note 234, at 187; Tollison, supra note 234, at 55.} (i.e., more reflective of the actual result should the case be tried to judgment), and alternative dispute resolution options will be more likely vehicles for determination without a formal trial.\footnote{Saltzburg, supra note 234, at 188; Tollison, supra note 234, at 55.}

However, certainty under a code system does not put the trial judge in a straitjacket. In much the same way that the code allows more evidence to be heard by the modern, more educated juror, the code also provides the modern trial judge with substantial discretion,\footnote{Saltzburg, supra note 234, at 190.} often more discretion than under parallel common-law systems. The difference is that the trial judge in a code state is usually given more guidelines for his or her discretion\footnote{Patrick, supra note 234, at 673.} and is frequently required to provide reasons for exercising that discretion,\footnote{See the extensive lists of discretionary rules with their guidelines in Field, supra note 236, at 207 n.24 (Maine Rules of Evidence), and in Healy, supra note 87, at 153 n.9 (Proposed Massachusetts Rules of Evidence).} thereby ensuring a more informed set of litigators at the trial level and a sharper, more defined record on appeal.\footnote{See Field, supra note 235, at 5.} While difficult to substantiate statistically, "the general sense seems to be that the [federal r]ules' preference for flexibility . . . worked well over [its first] decade in the federal
There seems to be no reason to believe the carefully selected trial judges in Massachusetts would not also use this flexibility wisely.

The above arguments on uniformity, rationality and modernity, accessibility and competence, and certainty and flexibility make a compelling case for codification. Even if still resistant, however, any opponents of codification must deal with one unavoidable reality of litigation life: even in a common-law jurisdiction, every participant in the trial process does use a "code." The problem is, that we all use different codes. Some use the federal rules, others use the proposed Massachusetts rules. Some turn to a persuasive but not controlling outside treatise, others use a comprehensive but outdated in-state treatise. Still others rely dangerously on terse and often test-oriented bar review materials or evidence class outlines. The bottom line is that all of us need a code, something to turn to for evidentiary guidance, and the importance of all of us using the same code, based on a format shared by thirty-four sister states and the entire federal system, seems obvious.

V. REMAINING ISSUES TOWARD CODIFICATION

A. Promulgation by Judiciary or Legislature

As indicated above, a new advisory committee will have to draft a new code for Massachusetts. Presumably such a committee should be appointed by the branch of state government that will promulgate the new code. The question thus becomes whether the judiciary or the legislature should be that promulgating body.

The Federal Rules of Evidence, though originally suggested by the United States Supreme Court, were eventually enacted into law as a statute by the Congress. The federal rules are also the basis of the Uniform Code of Evidence, promulgated by the National Conference of Commissioners on Uniform State Laws. Since this is the case,

430. Berger, supra note 234, at 270.
431. There have been concerns expressed about ceding expanded discretion in the admission or exclusion of evidence to elected trial judges. See id. at 263. Given the elaborate nomination process (through the Judicial Nominating Committee and the Governor's Office) and confirmation process (through the Governor's Council) in Massachusetts for its appointed trial judges, this should not be a problem. See MASS. CONST. pt. 2, ch. 2, § 3, art. 1.
433. See supra text accompanying notes 338-47.
434. See supra text accompanying notes 253-58.
435. See supra text accompanying notes 268, 294.
Massachusetts could adopt the federal rules in the same way it has adopted other uniform laws.\textsuperscript{436} Nationally, nine states, a significant minority, have codified through legislative enactment.\textsuperscript{437} However, the remaining twenty-five code states have codified by court rule,\textsuperscript{438} including the four codifying New England states.\textsuperscript{439} It is now recognized that the judicial branches of both the federal and state governments possess general rulemaking power over evidence that is concurrent with, if not exclusive of, the legislative branches.\textsuperscript{440} A second question, though, is whether particular rules of evidence intrude upon extrinsic policy issues, thus raising a separation of powers issue under state constitutions.\textsuperscript{441}

In its announcement declining codification, the Supreme Judicial Court made in passing two somewhat inconsistent statements bearing on this issue. On the one hand, there was concern that if the proposed Massachusetts rules were adopted, "there would have to be careful coordination with the Legislature to repeal, revise, or modify many statutes which deal with the admissibility and effect of evidence."\textsuperscript{442} On the other hand, however, the court noted "the continued and historic role of the courts in developing principles of law relating to evidence."\textsuperscript{443} Which branch of the commonwealth's government is the appropriate branch to codify its law of evidence?

The answer is not clear from the express provisions of the state constitution itself. Under the separation of governmental departments, the constitution provides that "the legislative department shall never exercise the . . . judicial powers . . . [and] the judicia[ry] shall never exercise the legislative . . . powers."\textsuperscript{444} However, in the section of the constitution dealing with the judicial power, there is no mention of rulemaking by the court.\textsuperscript{445} Under the legislative power, there is

\textsuperscript{436} Massachusetts has adopted by statute numerous uniform laws suggested by the National Conference, including the Uniform Commercial Code, the Uniform Contribution Among Joint Tortfeasors Act, the Uniform Arbitration Act, and the Uniform Fraudulent Conveyance Act. See MASS. GEN. L. ch. 106, § 1-101 to 9-507 (1990 & Supp. 1991) (adopting the Uniform Commercial Code); ch. 231B, §§ 1-4 (adopting the Uniform Contribution Among Joint Tortfeasors Act); ch. 251, §§ 1-19 (adopting the Uniform Arbitration Act); ch. 109A, §§ 1-13 (adopting the Uniform Fraudulent Conveyance Act).

\textsuperscript{437} See supra text accompanying note 286.

\textsuperscript{438} See supra text accompanying note 288.

\textsuperscript{439} See supra text accompanying note 287.

\textsuperscript{440} Wroth, supra note 234, at 1351.

\textsuperscript{441} Id. at 1351-54.

\textsuperscript{442} SJC Announcement, supra note 1 (emphasis added).

\textsuperscript{443} Id. (emphasis added).

\textsuperscript{444} MASS. CONST. pt. 1, art. 30.

\textsuperscript{445} See id. pt. 2, ch. 3, arts. 1-5.
express authority in the legislature to "erect and constitute . . . courts . . . for the hearing, trying, and determining of all . . . crimes . . . causes and things."446 And the legislature is also given the authority to enact "all manner of wholesome and reasonable . . . laws . . . , not repugnant or contrary to this constitution, . . . for the good and welfare of this commonwealth,"447 including "new laws, as the common good may require."448 The legislature certainly has enacted numerous "new" evidence statutes, mostly in the areas of presumptions,449 privileges,450 and hearsay exceptions,451 but in other areas as well.452

By general statute, the state legislature also has granted rulemaking authority to the Supreme Judicial Court for the superintendence of inferior courts, including the power to "issue such . . . rules as may be necessary or desirable for the furtherance of justice . . . [and] the improvement of administration of such courts."453 Again, by general statute, the legislature has granted rulemaking authority to the Supreme Judicial and Massachusetts Superior Courts to "promulgate uniform codes of rules, consistent with law, for regulating the practice . . . of such courts in cases not expressly provided for by law, for the following purpose[ ]: . . . [c]onducting trials."454

It thus would seem that the court's rulemaking authority is derived only through statutes enacted by the legislature under the latter's constitutional authority. However, the Supreme Judicial Court has held that although the court's inherent powers may be recognized by statute, they exist without statutory authorization and cannot be restricted or abolished by the legislature without violating constitutional provisions governing separation of powers.455 While steering clear of clashes over separation of powers in the evidence area,456 the court

446. Id. pt. 2, ch. 1, § 1, art. 3.
447. Id. pt. 2, ch. 1, § 1, art. 4.
448. Id. pt. 1, art. 22.
449. See, for example, the hundreds of statutory presumptions under "Evidence—Presumptions" in MASS. GEN. L. 1991 GENERAL INDEX, D-I, at 258-59 (1991).
450. See, e.g., MASS. GEN. L. ch. 233, § 20 (1990) (spousal testimonial privilege); id. § 20A (priest/penitent privilege); id. § 20B (patient/psychotherapist privilege); id. § 20J (sexual assault victim/counselor privilege).
451. See, e.g., id. §§ 65-66 (certain statements of deceased persons); id. § 78 (certain business records); id. § 79 (certain hospital records).
452. See, e.g., id. § 20 (incompetency of certain children to testify against their parents); id. § 21 (impeachment of witness by prior criminal conviction); id. § 79A (authentication of certain public records).
453. Id. ch. 211, § 3.
454. Id. ch. 213, § 3.
456. See, e.g., Petition for the Promulgation of Rules Regarding Protection of Confi-
also has held that an express grant of power in the state constitution to one branch of government "necessarily controls over the more general provisions of" the separation of powers article.\footnote{Barnes v. Secretary of Admin., 586 N.E.2d 958, 961 (Mass. 1992).}

Most of the commentators have stated a preference for judicial rather than legislative promulgation of a codified system of evidence.\footnote{See Wroth, supra note 234, at 1354; Tollison, supra note 234, at 65.} This preference is generally based upon the fact that judges have more expertise regarding appropriate admission and exclusion of evidence, more flexibility in drafting procedures, and a more amenable amendment process than their legislative counterparts.\footnote{Wroth, supra note 234, at 1354.} There also have been predictable difficulties in both the legislative enactment and the judicial interpretation of statutory evidence codes.\footnote{See Whinery, supra note 234, at 204-08 (relating Oklahoma's experience).}

Not surprisingly, in a number of states, even in New England,\footnote{See supra note 287.} conflicts have arisen between the legislative and judicial branches regarding rulemaking authority,\footnote{See, e.g., Wroth, supra note 234, at 1349 n.265.} including the adoption of an evidence code.\footnote{See Paul Giannelli, The Proposed Ohio Rules of Evidence: The General Assembly, Evidence, and Rulemaking, 29 Case W. Res. L. Rev. 16,24-27 (1978).} However, there also have been some instances of remarkable cooperation between branches, especially with respect to the effect of inconsistent evidence rules contained in prior law\footnote{See generally JOSEPH & SALTZBURG, supra note 285.} once codification occurs.\footnote{In Maine, for example, the state legislature authorized the state's highest court to prescribe rules of evidence, thus avoiding any doubt about the applicability of prior, more general rule-enabling acts and superseding all laws in conflict with such prescribed rules. Field, supra note 236, at 203 nn.6-7.}

Cooperation also should be possible in Massachusetts.\footnote{For a "model" of judicial/legislative cooperation in the enactment of a code of evidence, see Wroth, supra note 234, at 1354-66.} The areas of evidence law regarding presumptions and privileges are probably the areas in which the legislature would most resent court intrusion, as both areas involve policy issues extrinsic to the trial process. Given the traditionally active involvement of the legislature in each area, the Supreme Judicial Court might defer to that branch in
both areas.\textsuperscript{467}

Regarding presumptions, the original Proposed Massachusetts Rules attempted a detailed approach to presumptions which varied radically from the federal rule and redefined presumption-like concepts from existing Massachusetts law.\textsuperscript{468} A better approach for a new advisory committee might be to follow the federal rule more closely,\textsuperscript{469} but to consult with appropriate legislative committee chairpeople regarding the level of sensitivity legislators have toward preserving existing statutory concepts. The advisory committee also could explore the divergent approaches to presumptions of other codifying states,\textsuperscript{470} since the divergence over the actual content of presumption rules in codifying states has already punctured any substantive "uniformity" in the presumption area nationwide.

Since the approach of the codifying states is similarly divergent,\textsuperscript{471} there is similar freedom for a new advisory committee developing privilege rules. However, Massachusetts privileges, except for attorney-client,\textsuperscript{472} historically have been a matter of legislative rather than judicial creation.\textsuperscript{473} The Supreme Judicial Court has tended to defer to the legislature on matters of privilege\textsuperscript{474} and disqualification (even where it disagrees with the policy decision involved)\textsuperscript{475} and therefore tends to decline the opportunity to create new privileges by

\textsuperscript{467} Wroth, supra note 234, at 1365. Tennessee, which codified the rules of evidence effective January 1, 1990, followed this approach. See Banks, supra note 234, at 295, 335.

\textsuperscript{468} See supra text accompanying notes 23-28.

\textsuperscript{469} See supra text accompanying notes 259-63.

\textsuperscript{470} See supra text accompanying notes 297-302.

\textsuperscript{471} See supra text accompanying notes 303-08.

\textsuperscript{472} See LICOS, supra note 2, at 182-86.

\textsuperscript{473} See, e.g., MASS. GEN. L. ch. 112, § 135 (1990) ("Social Worker-Client Privilege"); id. ch. 233, § 20A ("Priest-Penitent Privilege"); id. § 20B ("Patient-Psychotherapist Privilege").


While codification often results in the restatement of existing privileges, several commentators believe the expansion of privilege rules is particularly appropriate for the legislature, since the expansion of privilege tends to restrict the jury's access to otherwise relevant evidence for a policy reason generally extrinsic to any individual piece of litigation. See Field, supra note 236, at 213; Tollison, supra note 234, at 61.

common-law development. 476 Federal Rule of Evidence 501 encompasses deference to the legislature while retaining for the judiciary the power, but not the mandate, to evolve individual privileges by common-law development. Thus, the actual federal rule approach, 477 followed by fourteen other codifying states, 478 may make sense here. 479

One would hope that the Massachusetts legislature and court could avoid the unseemly "showdown" over separation of powers which marred the federal rules project in the early 1970's. 480 While the Supreme Judicial Court was concerned in its declination of the proposed Massachusetts rules about the "careful coordination" needed with the legislature over pre-existing evidence provisions, a parallel need for careful coordination certainly did not stop the movement to adopt a federal rules based model for the state's civil procedure system. Indeed, that movement resulted in a "coordinated" statute that covered literally hundreds of pre-existing provisions. 481 The same creative and cooperative spirit between branches of government should be observed with the codification of evidence in Massachusetts. 482

B. Public Notice

If codification occurs via the legislative process, the product is, by definition, the will of the people who elected those legislators. However, if codification occurs primarily through judicial rulemaking in a jurisdiction like Massachusetts, which appoints rather than elects its judges, concerns may arise that the process was "counter-majoritarian." 483 The composition of the advisory committee can ameliorate this concern somewhat. 484 In addition, any set of suggested rules should be published both in the lawyers' newspaper 485 and also in the official Massachusetts Reporter, 486 so that the suggested rules

477. See supra text accompanying notes 264-67.
478. See supra text accompanying note 303.
479. But see Patrick, supra note 234, at 690 (noting that "[c]odifying the rules of privilege would make them readily accessible and easily ascertainable . . . [and] would provide an opportunity for reform of certain privilege rules").
480. See supra text accompanying notes 250-58.
482. Tollison, supra note 234, at 63; Healy, supra note 87, at 153.
483. Wroth, supra note 234, at 1354.
484. See supra text accompanying note 347.
485. See supra note 2.
486. This approach was followed by the Federal Rules Decisions reporter for the Proposed Federal Rules of Evidence. See supra text accompanying notes 253-55.
can be read immediately and later researched conveniently and cited effectively. Should the court wish to comment on the new suggested rules, it should ensure that its request for briefs and arguments operates less as an "invitation" and more as a "command performance," so that all segments of the bar are before the court actively and certainly, rather than voting silently and, therefore, ambiguously.487

C. Implementation

The transition to the rules of civil procedure took eight years to complete, beginning with the Massachusetts Superior Court in 1974 and ending with the Massachusetts Land Court in 1982.488 To some extent, this long period was due to the extensive coordination required to transform the entirety of civil litigation, from complaint to execution, to a federal rules model.

However, the implementation of a federal rules evidence code should be easier, since it deals primarily only with trial rather than pre-trial or post-trial stages of a case. While there may have to be a transitional rule similar to the one used for the Massachusetts Superior Court in 1974,489 there should be a single effective date mandated for all courts of the commonwealth, thus requiring all participants in both civil and criminal cases to adapt to the new rules quickly.490 There should be scheduled seminars for judges,491 court clerks, and lawyers who may not be acquainted with the federal rules model to learn the structure and content of the rules.492 To cushion the initial impact of the new code, the effective date should be during the summer months, when judges, lawyers, and clerks may have a better opportunity to become familiar with it.493

487. This concern was noted ten years ago, when the Boston Bar Association's Civil Procedure Committee became the Association's de facto commenting body on the Proposed Massachusetts Rules of Evidence even though that committee had little expertise in those rules that would affect criminal matters. See BBA Brief, supra note 18, at 5.


489. See MASS. R. CIV. P. 1A ("Transitional Rule for Litigation in Progress on July 1, 1974").


491. See Saltzburg, supra note 234, at 186. When a state code is enacted, and even when it is just being discussed, the evidence awareness and educational interest of bench and bar rises. See id. at 186-87 n.53.

492. In the fall of 1982, the author participated as a speaker in an orientation program on the Proposed Massachusetts Rules of Evidence. Many of the attorneys at the program attended because they were not conversant with the federal-rules model. Most of them expressed their satisfaction with the rationality and usability of the rules. Cf. Saltzburg, supra note 234, at 193-94 (noting that opponents of codification viewed the federal rules as more complicated than they have proved to be).

D. Interpretation

The year after the adoption of the federal-model rules of procedure for the Massachusetts Superior Court, the Supreme Judicial Court decided Rollins Environmental Services, Inc. v. Superior Court.494 In Rollins, the court stated: "This court having adopted comprehensive rules of civil procedure in substantially the same form as the earlier Federal Rules of Civil Procedure, the adjudged construction theretofore given to the Federal Rules is to be given to our rules, absent compelling reasons to the contrary or significant differences in content."495

Other states codifying their evidence laws on a federal rules model have Rollins-like decisions on interpreting the new state code.496 If the new Massachusetts code is promulgated by the judiciary rather than passed by the legislature, there seems to be no reason why the Supreme Judicial Court could not accelerate the Rollins-like approach to interpretation by including Rollins-like language in the order of promulgation itself.

E. Supplementation

Commentators decry the absence of a continuing advisory committee on the Federal Rules of Evidence to monitor interpretation of the code and offer suggested supplementation.497 There is a current effort to petition the United States Supreme Court and the Judicial Conference of the United States to create such a continuing committee,498 and several commentators have recommended a state-level committee for codifying states.499 A continuing committee,500 perhaps comprised as suggested above, would make sense for Massachusetts, particularly during the "break-in" period after the codification and legislative coordination become effective, since no statutory "clean-

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495. Id. at 818.
496. See, e.g., Laske v. State, 694 P.2d 536, 538 (Okla. Crim. App. 1985) ("Since the [Oklahoma] Evidence Code was patterned after the Federal Rules of Evidence with the intent that practice in both state and federal courts be uniform, it is useful to look to federal interpretations."). See also Whinery, supra note 234, at 244-46.
497. See, e.g., Berger, supra note 234, at 277.
499. See Tollison, supra note 234, at 65-66; Whinery, supra note 234, at 257-58. An unanswered, and usually unasked, question is how the state-level committees would be funded. See Tollison, supra note 234, at 66 n.90.
500. See supra text accompanying note 347.
up,” however well-coordinated, can be flawless.501

F. Reality

The rapid acceptance of the Federal Rules of Evidence stands in sharp contrast to the fate of earlier codes.502 The reason for this is not that the federal model is inherently a better code, nor that earlier efforts were scuttled unfairly, nor that the attitudes of the practicing bar have changed dramatically. The federal rules were enacted because the federal judiciary received them with “open arms, not a ‘show-me why’ attitude.”503 While codification of evidence law may make sense for Massachusetts, it probably will actually occur only if those involved in the litigation process, both from the bench and the bar, embrace a second codification effort actively and enthusiastically.

VI. CONCLUSION

The effort between 1976 and 1982 to codify evidence law through the Proposed Massachusetts Rules of Evidence was unsuccessful, partly because of the content of the code itself and partly because of the reluctance of a majority of the Supreme Judicial Court to adopt that or any other code. Given the widespread adoption of federal-model codifications during the intervening decade, codification for the commonwealth is now appropriate for reasons of uniformity, rationality and modernity, competency and accessibility, and certainty and flexibility. It is hoped that the current judiciary, legislature, and bar will appreciate these reasons and join together in bringing the benefits of codification to Massachusetts evidence law.

501. Wroth, supra note 234, at 1360.
502. Patrick, supra note 234, at 672.
503. Saltzburg, supra note 234, at 183-84.