

May 1999

The Elusive Identity of the Federal Rules of Evidence

Glen Weissenberger

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Common Law Commons](#), and the [Evidence Commons](#)

Repository Citation

Glen Weissenberger, *The Elusive Identity of the Federal Rules of Evidence*, 40 Wm. & Mary L. Rev. 1613 (1999), <https://scholarship.law.wm.edu/wmlr/vol40/iss5/5>

Copyright c 1999 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmlr>

REPLY

THE ELUSIVE IDENTITY OF THE FEDERAL RULES OF EVIDENCE

GLEN WEISSENBERGER*

I. INTRODUCTION: THE FEARS OF PUBLISHING

When an article is published in a scholarly journal, the author may well have certain reasonably entertained fears. I am no exception. Upon publication of an article, my initial fear usually has been that no one will read it. When I completed my most recent article, *Evidence Myopia: The Failure to See The Federal Rules of Evidence as a Codification of The Common Law*,¹ however, I was confident that this fear would not be realized. I was quite certain that at least one person, my friend and colleague Edward J. Imwinkelried, would read the article. Moreover, I knew that if the past was any indication of the future, Professor Imwinkelried would not only read my article, but would publish a comment in response to it.² I therefore also knew that another personal fear regarding publication certainly would be realized: A highly respected scholar would not only read and scrutinize my article, but would publicly criticize it. Nevertheless, I was quite confident that my very worst fear would never be realized: I would not be proven wrong.

* Judge Joseph P. Kinneary Professor of Law, University of Cincinnati.

1. See Glen Weissenberger, *Evidence Myopia: The Failure to See the Federal Rules of Evidence as a Codification of the Common Law*, 40 WM. & MARY L. REV. 1539 (1999).

2. See Glen Weissenberger, *The Supreme Court and the Interpretation of the Federal Rules of Evidence*, 53 OHIO ST. L.J. 1307 (1992); Edward J. Imwinkelried, *A Brief Defense of the Supreme Court's Approach to the Interpretation of the Federal Rules of Evidence*, 27 IND. L. REV. 267 (1993).

II. OVERVIEW OF THE WEISSENBERGER-IMWINKELRIED DEBATE

Evidence Myopia is an effort to further advance my thesis that the Federal Rules of Evidence ("Federal Rules" or "Rules") should not be interpreted as a typical statute, but should rather be subject to a unique set of hermeneutics that reflects the Rules' identity as a codification of the common law.³ As a perpetual index code, the Federal Rules provide courts with the dynamic authority to expand the law of evidence consistent with the values articulated in Rule 102.⁴ I have argued that treating the Federal Rules as a statute, and subjecting them to the principles of statutory construction, places courts in the position of being inappropriately deferential to principles of legislative supremacy.⁵ Ultimately, treating the Federal Rules as a statute invites courts to abdicate their responsibility to employ the repertoire of techniques and values that are used to expand the common law.⁶

My position, which has been shaped over time in a series of articles,⁷ conflicts directly with that of Professor Imwinkelried who perceives the Federal Rules of Evidence as a statute that should be interpreted according to moderate textualist principles of statutory construction.⁸ The debate between us, which has now resulted in no less than six articles on the subject,⁹ has been subject to such substantiation and elucidation on both sides

3. See Weissenberger, *supra* note 1, at 1545-46.

4. The text of Rule 102 reads as follows: "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." FED. R. EVID. 102; see Glen Weissenberger, *Are the Federal Rules of Evidence a Statute?*, 55 OHIO ST. L.J. 393, 393, 397-98 (1994); Weissenberger, *supra* note 1, at 1565-67.

5. See Weissenberger, *supra* note 1, at 1547-50.

6. See *id.* at 1554.

7. See Weissenberger, *supra* note 4; Weissenberger, *supra* note 1; Weissenberger, *supra* note 2.

8. See Edward J. Imwinkelried, *Whether the Federal Rules of Evidence Should Be Conceived as a Perpetual Index Code: Blindness Is Worse Than Myopia*, 40 WM. & MARY L. REV. 1595, 1596 (1999).

9. See Weissenberger, *supra* note 2; Imwinkelried, *supra* note 2; Weissenberger, *supra* note 4; Weissenberger, *supra* note 1; Imwinkelried, *supra* note 8; Glen Weissenberger, *The Elusive Identity of the Federal Rules of Evidence*, 40 WM. & MARY L. REV. 1613 (1999).

that it would be impossible for anyone to say that either of us is conclusively wrong.¹⁰ It is this understanding that allowed me to realize that I would never be proven wrong upon the publication of *Evidence Myopia*. Anxieties aside, if I am not wrong, am I right? To be honest, there is no right or wrong here.

Beyond our scholarly differences concerning the identity and ethos of the Federal Rules of Evidence, Professor Imwinkelried's approach to the scholarly issue at hand is at its core different than mine. Professor Imwinkelried seems bent on proving that my argument is flawed and wrong-minded,¹¹ and in doing so, he inevitably overstates his case. I, on the other hand, have acknowledged that the treatment of the Federal Rules of Evidence as either a codification of the common law or a statute is a matter of intelligent choice.¹² Accordingly, my scholarly objective has been to illuminate reasons for the enlightened choice of treating the Federal Rules as a perpetual index code. Any objective reader who has studied each of Professor Imwinkelried's and my articles on the subject will recognize readily that there is no definitive, singular authority that deductively compels the conclusion that the Federal Rules are either a statute or a codification of the common law. Rather, the ultimate exercise is to choose from the panoply of authority and accord weight to the elements of each side of the argument. By overplaying his hand, however, Professor Imwinkelried beclouds the resolution of the issue of whether a perpetual index code or a statute is the better choice.

III. MAKING INTELLIGENT CHOICES: RULE 102 OR RULE 402?

In deciding whether the Federal Rules ought to be viewed as a perpetual index code or a statute, there are a number of competing considerations that must be weighed. For example, Professor Imwinkelried chooses to find guidance on the issue in

10. These articles have resulted in a combined total of 149 pages and 831 footnotes.

11. See Imwinkelried, *supra* note 8, at 1607 ("Professor Weissenberger's reliance on Rule 102 is fundamentally flawed because it does not speak to the critical question.").

12. See Weissenberger, *supra* note 4, at 403 (comparing the Federal Rules of Evidence to a Rorschach test).

Rule 402, "Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible." Professor Imwinkelried sees Rule 402 as depriving federal appellate courts of their inherent common-law powers to prescribe exclusionary doctrines beyond those enunciated in the text of the Federal Rules.¹³ Because this common-law power is not expressly preserved on the face of Rule 402, Professor Imwinkelried contends that appellate courts lack their time-honored authority to treat the Federal Rules as a perpetual index code,¹⁴ the interpretation of which would permit the Federal Rules to grow in conscious reference to the antecedent common law. In contrast to Professor Imwinkelried, I focus on Rule 102, "Purpose and Construction," a rule designed to guide the interpretation of the Federal Rules. Rule 102 expressly commands courts to interpret the Rules in a manner that will advance the "growth and development of the law of evidence."¹⁵

Our debate on the relative, competing importance of these two Rules in determining the identity of the Federal Rules of Evidence has been presented in these most recent articles, as well as in our earlier work on the subject, and our most recent contributions to this issue have not changed the essence of the debate. I, for one, would look to the rule that by its very nature seeks to define the purpose and construction of the Federal Rules, not some distinct rule such as Rule 402 that does not attempt to inform the hermeneutical process.¹⁶ The function of Rule 402 is to embody a "structural construct regarding the function of any system which attempts to organize the theory of evidence," not provide interpretational guidance.¹⁷ In the context of this debate, an objective observer has stated:

Understanding that the Federal Rules of Evidence is a codification of law that has been designed, as have other recent codifications of common law, to avoid ossifying the law sheds

13. See Imwinkelried, *supra* note 8, at 1597.

14. See *id.*

15. FED. R. EVID. 102.

16. See Weissenberger, *supra* note 4, at 397-398.

17. *Id.* at 397; see also JAMES B. THAYER, PRELIMINARY TREATISE ON EVIDENCE 264 (Boston, Little Brown 1898), quoted in FED. R. EVID. 402 advisory committee's note (asserting that Rule 402 codifies "a presupposition involved in the very conception of a rational system of evidence").

light on a recent debate between Professors Imwinkelried and Weissenberger as to how the Federal Rules of Evidence ought to be construed. Applying the interpretive principle of *expressio unius est exclusio alterius* to Rule 402, Professor Imwinkelried has argued that the Federal Rules of Evidence have preempted the power of federal courts "to create uncodified exclusionary rules and superimpose or engraft such rules onto the statutory language." Professor Imwinkelried relies heavily on recent dictum in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, where the Supreme Court declared "[w]e interpret the legislatively-enacted Federal Rules of Evidence as we would any statute." Relying predominantly on Rule 102, Professor Weissenberger, by contrast, has argued that the Rules intend federal courts to retain authority to continue "their time-honored role in interpreting and expanding evidentiary doctrines according to such traditional and expressly articulated values as 'truth' and 'justice'."

The key to resolving the above hermeneutical dispute is to place the Federal Rules of Evidence in its appropriate jurisprudential perspective. The Federal Rules of Evidence must be seen for what they are—a codification of the common law. . . .

. . . .

. . . Indeed, not only is there no provision in the Federal Rules of Evidence indicating an intent to foreclose judicially-led development of evidence law, there is a provision *inviting* such judicial interpretation: Rule 102. Professor Weissenberger's understanding of Rule 102 is proper.¹⁸

The choice for an objective reader is quite simple: the reader can either rely on Rule 402, a rule not designed to inform the hermeneutical process, or in the alternative, focus on Rule 102, a rule that contemplates and even mandates the growth of the law of evidence.

18. Mark D. Rosen, *What Has Happened to the Common Law?—Recent American Codifications, and Their Impact on Judicial Practice and the Law's Subsequent Development*, 1994 WIS. L. REV. 1119, 1194-96 (footnotes omitted).

IV. FURTHER INTELLIGENT CHOICES: ATTRIBUTING APPROPRIATE SIGNIFICANCE TO THE INTERVENTION OF CONGRESS IN THE RULEMAKING PROCESS

Other conflicting considerations must be weighed in order to intelligently decide whether the Federal Rules of Evidence are a statute or a codification of the common law. For example, a substantial portion of my article is devoted to placing the Federal Rules in the historical context of the codification movement in the United States.¹⁹ This broad historical perspective provides insight into the identity and ethos of the Federal Rules of Evidence as a codification of the common law.²⁰ Rather than focusing on this broad historical perspective, Professor Imwinkelried emphasizes the briefest of episodes in the history of the Rules' development, i.e. Congress's intervention in the process.²¹ Whatever may be gleaned from the record of Congress's intervention, it is clear that Congress did not intervene in order to ensure that the Federal Rules would be interpreted as a statute. Congress's intervention was prompted by reasons that pertain to a concern that the Federal Rules would affect substantive rights, and therefore exceed the scope of the Rules Enabling Act.²² Congress designed its intervention in the process to facilitate the Rules' adoption "by eliminating an issue that might have served as an obstacle to the[ir] realization,"²³ and had nothing to do with the interpretation of the Rules.

Professor Imwinkelried's belabored preoccupation with congressional intervention in the Rules' development never once cites any evidence in the congressional record that Congress in some way was seeking to eliminate the power of courts to interpret the Federal Rules of Evidence through the repertoire of techniques historically used in the growth of the common law. Not one passage in the congressional record suggests even in the remotest way that Congress wanted to stop federal courts from engaging in their essential function of interpreting and applying

19. See Weissenberger, *supra* note 1, at 1567-76.

20. See *id.*

21. See Imwinkelried, *supra* note 8, at 1599-16.

22. See Weissenberger, *supra* note 1, at 1568-69.

23. *Id.* at 1568.

the text of a body of rules in such a way that the law grows, expands, and becomes illuminated. If Congress wanted federal courts to stop doing what everyone understands to be one of their most fundamental functions, it surely would have made the message loud and clear. In this case, the silence is deafening.

Again, the reader has a choice. The objective arbiter can either view the Federal Rules of Evidence in the broad historical context of the development of codes in the United States, or in the alternative, focus on congressional intervention designed to moot questions about the substantive qualities of the Federal Rules of Evidence—a wholly distinct matter. Congress's intervention, motivated for reasons unrelated to the interpretation of the Federal Rules of Evidence, simply cannot result in applying a hermeneutical scheme that is at odds with the very rule that Congress approved for the purpose and construction of the Rules, Rule 102.²⁴

V. THE CHOICE TO RESPECT THE LANGUAGE OF RULE 102 IN LIGHT OF THE INHERENT POWERS OF FEDERAL COURTS

While Professor Imwinkelried and I differ on the roles of Rules 102 and 402, as well as the historical significance of the intervention of Congress in the development of the Federal Rules of Evidence, we appear to agree that the law pertaining to the inherent judicial powers of federal courts may shed light on the identity of the Federal Rules as a statute or a codification of the common law.²⁵ Professor Imwinkelried invites a further expansion of my argument based upon inherent judicial powers, but the actual Supreme Court jurisprudence on this issue is clear in its brevity. In the context of the Federal Rules of Civil Procedure, the U.S. Supreme Court has held that the codification of civil procedure has not displaced the inherent powers of

24. See *id.* at 1550-52, 1572.

25. See Imwinkelried, *supra* note 8, at 1611 ("Early in his article, Professor Weissenberger suggests that the federal appellate courts have 'inherent judicial powers' to formulate their own evidentiary rules and that Congress's prescription of evidentiary rules may unconstitutionally 'encroach upon the judiciary's fundamental Article III powers.' . . . That argument may have merit." (footnotes omitted)).

federal courts to fashion procedures unaddressed by such a codification because "there is no indication of an intent to displace the inherent power."²⁶ In the context of the Federal Rules of Evidence, Rule 102 expressly encourages, if not commands judicially-led development of evidence law in order to fill the inevitable indeterminacy of the text of the Rules. As stated by the Supreme Court, "the inherent power must continue to exist to fill in the interstices."²⁷

Again, the neutral arbiter has a choice. The reader can believe that the Rules lack lacunae that need to be filled. If this position seems facially incompatible with the obvious skeletal structure of the Rules, the reader might accept Professor Imwinkelried's suggestion that even if the Rules have such inevitable gaps, they cannot be filled by federal courts using their inherent powers. In comparison, I am overwhelmed by the reality that the Federal Rules have huge, purposeful gaps that, by their design, require interstitial judicial interpretation.²⁸ I likewise find nothing in the Rules themselves, the developmental history of codes in the United States, the judicial and legislative history of the Rules, or the entire universe as we know it, that would restrain federal courts from engaging in their time-honored function of employing inherent judicial powers to expand the law of evidence as expressly contemplated by Rule 102. If these central inherent functions of federal courts were to be radically changed, the authority for doing so would be infinitely clearer and more abundant than that scavenged by Professor Imwinkelried from the legislative record and derived from a tortured reading of Rule 402.

VI. CONCLUSION

There is no question that Professor Imwinkelried certainly has prevailed in this exchange on an important level before the debate even began. Professor Imwinkelried's articles on the subject seek to defend, not challenge, the U.S. Supreme Court's

26. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 48 n.13 (1991).

27. *Id.* at 46.

28. See Weissenberger, *supra* note 2, at 1329-30.

position on the interpretation of the Federal Rules of Evidence.²⁹ In comparison to the Supreme Court, which relies merely on its own pronouncements,³⁰ however, Professor Imwinkelried has constructed arguments that tend to rely on discreet sources of authority typically found in the footnotes of law journal articles.³¹ My position, which challenges the Supreme Court on the question of whether the Federal Rules of Evidence should be interpreted as a statute, would require the neutral arbiter of this debate to weigh broad thematic arguments based upon history, the express language of the Rules themselves, and the jurisprudence of the Supreme Court on inherent judicial powers.

The debate, however, probably will never be resolved in a concrete sense, but I predict that over time, the Supreme Court gradually will diminish its pronouncements that the Federal Rules of Evidence are a statute. Likewise, all federal courts will continue to engraft both restrictive and expansive doctrines on the express language of the Federal Rules of Evidence without regard to legislative deference.³² Ultimately, I predict that evidentiary law will be predominantly determined by courts' understanding of the values that have underpinned the common-law

29. See Imwinkelried, *supra* note 8, at 1596.

30. See, e.g., *United States v. Mezzanatto*, 513 U.S. 196 (1995); *Tome v. United States*, 513 U.S. 150 (1995); *Williamson v. United States*, 512 U.S. 594 (1994); *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993); *United States v. Salerno*, 505 U.S. 317 (1992); *United States v. Zolin*, 491 U.S. 554 (1989); *Green v. Bock Laundry Co.*, 490 U.S. 504 (1989); *Huddleston v. United States*, 485 U.S. 681 (1988); *Bourjaily v. United States*, 483 U.S. 171 (1987); *Tanner v. United States*, 483 U.S. 107 (1987); *United States v. Abel*, 469 U.S. 45 (1984); *United States v. Gillock*, 445 U.S. 360 (1980).

31. See, e.g., Imwinkelried, *supra* note 8, at 1603 n.50 (citing Edward W. Cleary, *Preliminary Notes on Reading the Rules of Evidence*, 57 NEB. L. REV. 908, 910 (1978)); *id.* at 1604 n.60 (citing COMMITTEE ON RULES OF PRACTICE & PROCEDURE, U.S. JUDICIAL CONFERENCE, A PRELIMINARY REPORT ON THE ADVISABILITY AND FEASIBILITY OF DEVELOPING UNIFORM RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS 25-26, 28, 51 (1962)).

32. See *United States v. Tome*, 3 F.3d 342, 350 (10th Cir. 1993) (announcing a balancing test for determining whether prior consistent statements should be admissible instead of applying the common-law "pre-motive rule"), *rev'd*, 513 U.S. 150 (1995); *Daubert v. Merrell Dow Pharms., Inc.*, 951 F.2d 1128, 1129-30 (9th Cir. 1991) (applying the common-law "general acceptance" test, first articulated in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), for scientific expert testimony), *vacated*, 509 U.S. 579 (1993).

system of evidence since long before the Federal Rules of Evidence were adopted.

In summary, my position distills down to this: An honest and forthright treatment of the Federal Rules of Evidence as a codification of the common law will best contribute to the enlightened growth of evidence law. The conception that the Federal Rules are a statute merely will confound the interpretation process and retard the growth of the law. As long as courts treat the Federal Rules of Evidence as a statute, and as long as they defer to the legislative branch as the arbiter of evidentiary policy when confronted with the inevitable indeterminacy of the text of the Federal Rules, the interpretational process will be disoriented and counterproductive.³³ As my article has sought to illuminate, the source of wisdom lying behind the Federal Rules of Evidence cannot be found in the legislative branch because, in the main, the Rules did not originate there.³⁴ Rather, the wisdom of the law of evidence is imbedded in the long tradition of the judicially created common law.

33. See Weissenberger, *supra* note 1, at 1554.

34. See *id.* at 1567-70.