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## Evidence—Congressional Preemption of the Federal Rules of Evidence—Pub. L. No. 93-12, 87 Stat. 9 (Mar. 30, 1973)

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EVIDENCE—CONGRESSIONAL PREEMPTION OF THE FEDERAL RULES OF EVIDENCE—Pub. L. No. 93-12, 87 Stat. 9 (Mar. 30, 1973).

The United States Constitution vests the judicial power of the United States in the Supreme Court and such inferior courts as Congress may create.<sup>1</sup> The Constitution is silent, however, as to which body—Congress or the judiciary—has the power to prescribe rules of practice and procedure for the federal courts. The United States Supreme Court concluded in *Sibbach v. Wilson & Co.*<sup>2</sup> that Congress has the power to regulate practice and procedure in the federal courts but has lawfully delegated this function to the Supreme Court under the rules enabling acts.<sup>3</sup> Because these acts limit the Court's authority to matters of procedure, recent discussion of proposed rules of evidence for federal courts has caused serious doubts to be expressed whether such rules would be authorized by the phrase "practice and procedure."

In March 1961, the Judicial Conference of the United States,<sup>4</sup> an advisory body to the Supreme Court, approved the proposal of its Standing Committee on Rules of Practice and Procedure to establish an Advisory Committee on Rules of Evidence, and in 1962 a Special Committee of the Judicial Conference tentatively concluded that: "[1] Rules of evidence applied in the federal courts should be improved; and [2] Rules of evidence, which would be uniform throughout the Federal Court system, are both advisable and feasible."<sup>5</sup> The Special Committee invited the bench and bar to comment on the proposal that federal rules of evidence be promulgated, and in response to enthusiastic comments the Chief Justice of the Supreme Court appointed

1. U.S. CONST. art III, § 1. See note 20 and accompanying text *infra*.

2. 312 U.S. 1 (1941). See notes 25-29 and accompanying text *infra*.

3. 18 U.S.C. §§ 3402 (magistrates and appeals to district courts), 3771 (criminal cases in district courts) (1970); 28 U.S.C. §§ 2072 (district courts), 2075 (bankruptcy proceedings) (1970).

4. The Judicial Conference is authorized under 28 U.S.C. § 331 (1970) to carry on a continuous study of the operation and effect of the rules of practice and procedure prescribed by the Supreme Court of the United States.

5. Committee on Rules of Practice & Procedure of the Judicial Conference of the United States, A Preliminary Report on the Advisability and Feasibility of Developing Uniform Rules of Evidence for the United States District Courts, 30 F.R.D. 73, 77, 114 (1962). Currently, the admissibility of evidence in federal courts is governed by FED. R. CIV. P. 43(a) and FED. R. CRIM. P. 26. In civil cases, evidence is to be admitted if it is admissible under a statute of the United States, a rule of evidence heretofore applied in federal courts of equity, or a rule of evidence applied in the courts of the state in which the United States court is sitting. In criminal cases, the admissibility of evidence is governed "by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." *Id.*

the Advisory Committee on Rules of Evidence and a Reporter for the Committee.<sup>6</sup>

The Advisory Committee held fourteen sessions between June 18, 1965, and December 14, 1968, to work out a preliminary draft of the rules.<sup>7</sup> The preliminary draft was circulated to the legal profession in pamphlet form with a request that all comments be submitted not later than April 1, 1970. The draft was then revised, recirculated,<sup>8</sup> revised again,<sup>9</sup> approved by the Judicial Conference in October, 1971, and forwarded to the Court with the recommendation that the rules be promulgated.<sup>10</sup> This draft was approved by the Court, Justice Douglas dissenting, on November 20, 1972.<sup>11</sup>

Although the Civil Rules Enabling Act<sup>12</sup> provides that rules promulgated by the Supreme Court take effect automatically 90 days after they have been reported to Congress, the Court's order provided that the rules were not to go into effect until July 1, 1973.<sup>13</sup>

However, on January 29, 1973, a bill to secure to the Congress additional time to consider the rules of evidence was introduced in the Senate.<sup>14</sup> Thereafter, hearings on the proposed rules were held for six

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6. Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161, 177-78 (1969).

7. *Hearings on Proposed Rules of Evidence Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 75 (1973) [hereinafter cited as *Hearings*].

8. Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates, 51 F.R.D. 315 (1971).

9. A comparison of a memorandum from Deputy Attorney General Richard Kleindienst to Chief Justice Burger, *Hearings*, note 7 *supra*, at 42-59, with an analysis of the differences between the March 1971 draft and the final draft, *id.* at 121-29, indicates that most, if not all, of the changes involve incorporation of the recommendations of the Justice Department.

10. *Hearings*, note 7 *supra*, at 75-76.

11. Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183 (1973). Justice Douglas expressed a "two-fold concern" over the Rules of Evidence. He questioned whether the rules are within the purview of the Enabling Act, 28 U.S.C. § 2072 (1970), and whether the justices are qualified to appraise the merits of a code of evidence. 56 F.R.D. at 185-86.

12. 28 U.S.C. § 2072 (1970).

13. 56 F.R.D. 184 (1973).

14. S. 583, 93d Cong., 1st Sess. (1973). Senator Ervin's bill provided that the proposed rules "shall have no force or effect prior to the adjournment sine die of the first session of the Ninety-third Congress except to the extent that they may be expressly approved by such Congress prior to such sine die adjournment." *Id.* at § 1.

On the same day that the Senate approved Senator Ervin's proposal, "a bill to provide adequate time for the Congress to consider the rules of evidence" (H.R. 4051, 93d Cong., 1st Sess. (1973)) and "a bill to amend the laws enabling the Court to promulgate rules of procedure to require the approval of Congress" (H.R. 4052, 93d Cong., 1st Sess. (1973)) were introduced in the House and referred to the Committee on the Judiciary. 119 CONG. REC. 22, H873 (daily ed. Feb. 7, 1973).

days before the House Subcommittee on Reform of Federal Criminal Laws. The hearings revealed that:<sup>15</sup>

[T]here were constitutional difficulties with some of the proposed rules insofar as they purported, in certain civil cases, to supplant State laws in the area of privilege; that, because of the arguably substantive nature of some of the proposed rules, there was also a serious question whether the rules were within the authority granted . . . in the enabling acts to promulgate rules of "practice and procedure"; that the method of promulgation of [the] rules by the Advisory and Standing Committees of the Judicial Conference may have been deficient in not affording all interested persons and organizations an opportunity for comment; and that the content and wisdom of a number of specific rules [were] open to extensive debate.

In light of the information gathered at the hearings, there was some concern expressed over whether the Senate proposal, which merely delayed the effective date of the rules, was adequate to insure ample time for consideration of the rules. Thus, in order to provide the necessary time and to assert what it saw to be the primacy of Congress in the promulgation of such rules, an overwhelming majority of the House approved an amendment to the Senate bill, providing that the proposed rules should have no effect unless expressly approved by Congress.<sup>16</sup>

Legislation to adopt the rules as prescribed by the Court was introduced so that the efforts of the Advisory Committee on Rules of Evidence might not be wasted and so that Congress might work its will

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15. 119 CONG. REC. 40, H1723 (daily ed. Mar. 14, 1972). In response to a request by the Special Subcommittee on Reform of Federal Criminal Laws, Charles Halpern and George Frampton, Jr. of the Washington Council of Lawyers prepared a memorandum which classified each proposed rule as controversial or noncontroversial; approximately one-half of the rules were classified as controversial. *Hearings*, note 7 *supra*, at 190.

When the House resolved itself into the Committee of the Whole to discuss Senator Ervin's bill, Representative H. R. Gross (Iowa) expressed special concern over the effect of the rules upon the husband-wife privilege. Mr. Gross, a nonlawyer, proclaimed that he has been married to the same woman for 44 years and asked whether any changes in the privilege might be the result of "the new women's liberation movement." Representative Gross, who had not yet read the rules, expressed his hope that the evidence code would be considered under an open rule (*i.e.*, amendments allowed from the floor) so that he might be able to offer an amendment to the husband-wife privilege. Representative Gross has also expressed concern that nonlawyers will "take a back seat" to the lawyers if the code is considered under an open rule. 119 CONG. REC. 40, H1722-24 (daily ed. Mar. 14, 1973).

16. 119 CONG. REC. 40, H1723, H1730-31 (daily ed. Mar. 14, 1973). The Senate accepted the amendment, 119 CONG. REC. 42, S5009 (daily ed. Mar. 19, 1973), and the

on the proposed rules.<sup>17</sup> Using the rules proposed by the Court as a working model,<sup>18</sup> the Subcommittee on Criminal Justice of the House Judiciary Committee produced a set of rules which passed the House on February 6, 1974.<sup>19</sup>

This history is indicative of the conflict between the Court and Congress over the Court's authority to promulgate rules of evidence. Central to this controversy is the question of whether rules of evidence are substantive or procedural. This note is devoted to a discussion of that issue, ultimately arriving at the conclusion that most of the rules which were prescribed by the Court are procedural in nature and, therefore, within the Court's power to prescribe rules of practice and procedure under the enabling acts.

## I. THE SOURCES OF THE COURT'S POWER TO PRESCRIBE RULES OF EVIDENCE

The Constitution of the United States provides: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."<sup>20</sup> Since the Constitution vests the judicial power in the courts, commentators have argued that only the judicial branch has

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Act, in its final form, was thereafter signed into law. Pub. L. No. 93-12, 87 Stat. 9 (Mar. 30, 1973) provides:

An Act to promote the separation of constitutional powers by suspending the effectiveness of the Rules of Evidence for United States Courts and Magistrates, the Amendments to the Federal Rules of Civil Procedure, and the Amendments to the Federal Rules of Criminal Procedure transmitted to the Congress by the Chief Justice on February 5, 1973, until approved by Act of Congress.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, that notwithstanding any other provisions of law, the Rules of Evidence for United States Courts and Magistrates, the Amendments to the Federal Rules of Civil Procedure, and the Amendments to the Federal Rules of Criminal Procedure, which are embraced by the orders entered by the Supreme Court of the United States on Monday, November 20, 1972, shall have no force or effect except to the extent, and with such amendments, as they may be expressly approved by Act of Congress.

17. 119 CONG. REC. 38, H1638 (daily ed. Mar. 12, 1973).

18. Rules of Evidence Proposed by Subcomm. on Criminal Justice of the House Judiciary Committee, 42 U.S.L.W. (Special Supp. July 17, 1973) (among the major changes proposed by the Subcommittee are the deletion of R. 303, Presumptions in Criminal Cases, all of Article V, Privileges, and R. 803 (24), a broad exception to the hearsay rule). The Subcommittee's draft is reproduced in 119 CONG. REC. 100, H5452-61 (daily ed. Mar. 12, 1973).

19. H.R. 5463, 93d Cong., 2d Sess. (1974).

20. U.S. CONST. art. III, § 1.

the power to prescribe rules for the dispatch of the judiciary's duties.<sup>21</sup> On the other hand, it can be argued that since Congress has the power to establish inferior courts, it necessarily possesses the power to prescribe the rules of practice and procedure for such courts.<sup>22</sup> In fact, if Congress possesses the power to prescribe rules of practice and procedure for the inferior courts, the enabling acts<sup>23</sup> might seem to constitute an unlawful delegation of such power.<sup>24</sup>

The issue has been decisively resolved, however, in *Sibbach v. Wilson & Co.*, wherein the Court concluded that:<sup>25</sup>

Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this [the Supreme Court of the United States] or other federal courts au-

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21. Wigmore, *All Legislative Rules for Judiciary Procedure are Void Constitutionally*, 23 ILL. L. REV. 276 (1928) (emphasis in original):

[T]he legislature (federal or state) exceeds its constitutional power when it attempts to impose upon the judiciary any rules for the dispatch of the judiciary's duties; and that therefore all legislatively declared rules for procedure, civil or criminal, in the courts, are void, except such as are expressly stated in the Constitution.

There is some authority for the proposition that the Court has the inherent power to prescribe rules. In 1792, in response to a request by the Attorney General for information relative to the system of practice by which the attorneys and counsellors before the Supreme Court should regulate themselves, the Court stated that the practice of the King's Bench and Chancery in England provided models for the practice of the Court, in which it would, from time to time, make such "alterations" as circumstances might render necessary. 2 U.S. (2 Dall.) 414 (1792) (the Court's reply to the Attorney General was entitled a "Rule"). Since the King's Bench promulgated rules of court, the Supreme Court, having taken the King's Bench as a model, might be supposed to possess the inherent power to prescribe such rules. See I W. TIDD, *THE PRACTICE OF THE COURTS OF KING'S BENCH AND COMMON PLEAS* xxxv-xlix (3d Am. from 9th London ed. 1840) (fifteen pages of General Rules, Orders and Notices, the oldest of which is dated 1604); E. JENKS, *A SHORT HISTORY OF ENGLISH LAW* 191-92 (5th ed. 1938). If the Court does have the inherent power to prescribe rules of court, then the enabling acts do no more than restate such power. Jenks states that in England:

Parliament began to look with more and more jealousy on any rival in the business of legislation; and, as it was clearly advisable not to withdraw in fact from the judges the necessary function of issuing Rules of Practice, Parliament, in the first half of the nineteenth century began definitely, as in the case of the Crown, to authorize judges to exercise it.

*Id.*

22. Congress possesses the power under the Constitution to "make all Laws which shall be necessary and proper for carrying into Execution" the powers vested in the Congress, the Government of the United States, or any Department or Officer of the Government. U.S. CONST. art. I, § 8.

23. Generally, the enabling acts provide that the Court has the power to promulgate rules of practice and procedure for the federal courts. See statutes cited at note 3 *supra*.

24. Walsh, *Rule-Making Power on the Law Side of Federal Practice*, 6 ORE. L. REV. 1 (1926).

25. 312 U.S. 1, 9-10 (1941); *accord*, *Beers v. Haughton*, 34 U.S. (9 Pet.) 329, 359 (1835); *Bank of the United States v. Halstead*, 23 U.S. (10 Wheat.) 51, 53, 60 (1825); *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825).

thority to make rules not inconsistent with the statutes or the constitution of the United States.

In *Sibbach* the petitioner's contention was that Rules 35 and 37 of the Federal Rules of Civil Procedure affect substantive rights, and therefore their promulgation was not within the Court's power under the Enabling Act.<sup>26</sup> In addressing the petitioner's contention, the Court concluded that the Enabling Act<sup>27</sup> "was purposely restricted in its operation to matters of pleading and court practice and procedure."<sup>28</sup> In so concluding, the Court relied upon the language in the Enabling Act that the Court shall not "abridge, enlarge, nor modify substantive rights."<sup>29</sup>

Thus, the current state of the law is that Congress has the power to regulate the practice and procedure of the federal courts, and that Congress may delegate such power to the Supreme Court. The enabling acts constitute such a delegation of power. However, the Court's authority under the enabling acts is limited to rules, including rules of evidence, which affect "practice and procedure" and does not extend to substantive matters.

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26. 312 U.S. at 3, 9. FED. R. CIV. P. 35 provides: "In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician." FED. R. CIV. P. 37 outlines the consequences of a refusal to comply with an order such as might be made under Rule 35. The Court concluded in *Sibbach* that "the rules under attack are within the authority granted [to the Court under the Enabling Act, 28 U.S.C. § 2072 (1972)]." 312 U.S. at 16.

27. 28 U.S.C. § 2072 (1970):

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

Similar authority with respect to criminal cases is granted in 18 U.S.C. § 3771 (1970).

28. 312 U.S. at 10.

29. *Id.*

## II. RULES OF EVIDENCE—PRACTICE AND PROCEDURE OR SUBSTANTIVE LAW?

In debating the Court's adoption of rules of evidence, Congress has erroneously asserted that the Court possesses no power under the enabling acts to prescribe rules of evidence.<sup>30</sup> The same issue was raised in regard to the Federal Rules of Civil Procedure<sup>31</sup> which do contain a number of provisions which affect the admissibility of evidence.<sup>32</sup> The fact that Congress allowed such rules to go into effect demonstrates its recognition that some areas of evidence are procedural in nature.<sup>33</sup> The conclusion that rules of evidence are included in the term "procedure" finds additional support in a number of court opinions and scholarly articles.<sup>34</sup>

30. See Rules of Evidence Proposed by Subcommittee on Criminal Justice of the House Judiciary Committee, 42 U.S.L.W. (Special Supp. at 5) (July 17, 1973) (The Subcommittee's note to R. 402 states: "Congress should do nothing which would indicate acquiescence in the judgment that the Court has authority to promulgate Rules of Evidence . . ."); 119 CONG. REC. 40, H1727 (daily ed. Mar. 14, 1973) (a comment to the effect that the hearings had settled the question of the Court's authority to prescribe rules of evidence).

31. A difference of opinion as to the extent to which the Civil Rules Enabling Act, 28 U.S.C. § 2072 (1970), authorizes the court to make rules dealing with evidence arose within the Advisory Committee on Rules of Civil Procedure. Preliminary Draft of Rules of Civil Procedure for the District Courts of the United States and the Supreme Court of the District of Columbia xvii (1936); Proposed Rules of Civil Procedure for the District Courts of the United States 108 (1937).

32. The following Federal Rules of Civil Procedure are rules of evidence: 23(b)(2) (nonadmissibility of information concerning an insurance agreement); 27(a)(4) (admissibility of deposition to perpetuate testimony); 32 (use of depositions in court proceedings generally); 33(b) (use of interrogatories at trial); 35(b)(2) (waiver of privilege regarding medical testimony related to mental or physical condition where party requests report of court ordered examination); 43 (general admissibility of evidence); 44 (proof of official record); 44.1 (determination of foreign law).

33. See *Monarch Ins. Co. v. Spach*, 281 F.2d 401, 409 (5th Cir. 1960):  
For the most part . . . rules of evidence relate to what lawyers have long thought of as procedure. This is attested by the presence of Rules 43 and 44 in the Federal Rules. The Rules Enabling Act denied the power of the Supreme Court in such Rules to affect substantive rights. That the Supreme Court, after having this problem brought sharply to mind, thought it appropriate to include them is some considered evidence that with respect to *admissibility* at least, the subject was procedural.

The court in *Monarch* held that a statement of an injured person was admissible under Fed. R. Civ. P. 43 despite a state law which provided that "no written statement by an injured person shall be admissible in evidence . . . in any civil action relating to the subject matter thereof. . . ." 281 F.2d at 404.

34. *Kring v. Missouri*, 107 U.S. (17 Otto) 221, 231-32 (1882); *Kellman v. Stoltz*, 1 F.R.D. 726, 728 (N.D. Iowa 1941); *Ogdon v. Gianakos*, 415 Ill. 591, 114 N.E. 2d 686, 689 (1953); *Hunt v. Rosenbaum Grain Corp.*, 355 Ill. 504, 189 N.E. 907, 911 (1934); *People v. Clark*, 283 Ill. 221, 119 N.E. 329, 331 (1918); *Degnan*, *The Feasibility of Rules of Evidence in Federal Courts*, 24 F.R.D. 341, 345 (1960); *Green*, *To What Extent May Courts Under the Rule-Making Power Prescribe Rules of Evidence?*, 26 A.B.A.J. 482, 484-85 (1940); *Joiner*, *Uniform Rules of Evidence for the Federal*



The distinction between procedure and substance is a perplexing one. In *Sibbach*, the court stated, “[t]he test must be whether a rule really regulates procedure—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.”<sup>35</sup> Rules of evidence are intended as aids in the discovery of truth<sup>36</sup> and are, therefore, designed to regulate the judicial process for enforcing rights and duties recognized by substantive law. Thus, for example, an act which would allow the admission in evidence of a handwriting comparison has been held to be a matter of procedure for the purpose of deciding whether application of the act to crimes committed prior to its passage constituted a violation of the ex post facto clause of the Constitution.<sup>37</sup>

If rules of evidence are generally matters of procedure, it nevertheless can be argued that certain areas of evidence law (e.g., privileged communications) are declarations of a general public policy and are therefore substantive. Rather than facilitating the search for truth, rules of privilege act to exclude evidence which could possibly aid in the determination of the issues involved. Thus, privileges are not granted because of a desire on the part of the court or the legislature to facilitate the enforcement of rights and duties, but in furtherance of an underlying public policy unrelated to procedure.<sup>38</sup> An example of such a nonprocedural rule of evidence is the doctor-patient privilege whereby a physician or surgeon may not, without the consent of his patient, be examined as to any information acquired in attending such patient.<sup>39</sup> The doctor-patient privilege is not designed to facilitate the efficient dispatch of the court’s business; rather, it involves a determination by the legislature that in order to encourage complete patient disclosure of personal information, aiding diagnosis and thus insuring

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*Courts*, 20 F.R.D. 429, 433–35 (1958); Morgan, *Rules of Evidence—Substantive or Procedural?*, 10 VAND. L. REV. 467, 469, 483–84 (1957); Orfield, *Can Rules of Evidence Be Codified?*, 42 N.D. L. REV. 13 (1965); *A Preliminary Report on the Advisability and Feasibility of Developing Rules of Evidence for the United States District Courts*, 30 F.R.D. 73, 101–02 (1962).

35. 312 U.S. at 14.

36. Riedl, *To What Extent May Courts Under the Rule-Making Power Prescribe Rules of Evidence?*, 26 A.B.A.J. 601, 603 (1940).

37. *Thompson v. Missouri*, 171 U.S. 380, 385, 388 (1898).

38. Riedl, note 36 *supra*, at 603.

39. The doctor-patient privilege was omitted from the rules as proposed by the Court. *Rules of Evidence for United States Courts and Magistrates*, 56 F.R.D. 183, 241 (1973) (Advisory Committee’s Note).

proper medical care for everyone, communications between a doctor and his patient must be protected.<sup>40</sup>

### III. THE RULES AS PRESCRIBED BY THE COURT<sup>41</sup>

Except for Article III (Presumptions) and Article V (Privileges), the rules of evidence proposed by the Court are procedural.<sup>42</sup> In fact, the subject matter of several of the rules has been held expressly to be procedural in nature. Under the *Erie* doctrine,<sup>43</sup> a federal court whose jurisdiction is based on diversity of citizenship, is required to apply the law of the state in which it sits except as to matters of procedure. In *Pasternak v. Pan American Petroleum Corp.*,<sup>44</sup> a diversity case, the court impliedly recognized that the admissibility of evidence is a question of procedure when it held that evidence of a felony conviction, which conviction had occurred 5½ years prior to the action in question, was properly admitted despite a contrary state rule declaring such evidence to be admissible only when offered within 5 years of the prior conviction. Similarly, whether one is an adverse witness<sup>45</sup> and whether expert testimony should be admitted<sup>46</sup> have been held to

40. Joiner and Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making*, 55 MICH. L. REV. 623, 650-51 (1957).

41. Rules of Evidence for United States Courts and Magistrates. 56 F.R.D. 183 (1973).

42. Article I (General Provisions; e.g., Purpose and Construction and Rulings on Evidence), Article II (Judicial Notice), Article IX (Authentication and Identification), Article X (Contents of Writings, Recordings and Photographs) and Article XI (Miscellaneous Rules; e.g., Applicability of the Rules) contain housekeeping rules designed to facilitate the orderly dispatch of judicial business and raise no serious questions as to the procedural-substantive dichotomy.

It may be, however, that Rule 105 (Summing Up and Comment by Judge) would be considered substantive in Washington. This rule would permit a judge to comment on the evidence, whereas WASH. CONST. art. IV, § 16, provides: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Inherent in this constitutional provision is a strong concern over the potential impact which a judge's comments on the evidence may have upon the jury's decision.

43. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

44. 417 F.2d 1292, 1294-95 (10th Cir. 1969). Impeachment, competency and other rules concerning witnesses are contained in Article VI of the Rules, note 41 *supra*.

45. *Hanover Ins. Co. v. Berry*, 416 F.2d 279, 283 (5th Cir. 1969): "[The] question of whether one is an adverse witness is a question of procedure rather than substance and thus is governed by federal and not state rules."

46. *Haddigan v. Harkins*, 441 F.2d 844, 851 (3d Cir. 1971). In *Haddigan*, the court held that in deciding whether expert testimony on the economic value of services rendered by a wife and mother should be admissible in a wrongful death action, a federal district court need not look to the law of the forum state but may look to federal authorities which favor admissibility. The federal rule with respect to hypothetical questions has been held to apply in a diversity case despite a contrary state rule. *Twin City Plaza, Inc. v. Central Surety and Ins. Corp.*, 409 F.2d 1195, 1200 (8th Cir. 1969). *Haddigan*

be questions of procedure. Finally, in *Dallas County v. Commercial Union Assurance Co.*,<sup>47</sup> the court held that the question of the admissibility of a newspaper article which the court had characterized as hearsay is a question of procedure.

In contrast, rules of privilege (Article V) are substantive<sup>48</sup> and therefore outside the Court's power to prescribe rules of "practice and procedure." In *Massachusetts Mutual Life Insurance Co. v. Brei*, the court concluded:<sup>49</sup>

The patient-physician privilege is more than a rule of procedure since it goes to relationships established and maintained outside the area of litigation, and "affect[s] people's conduct at the stage of primary private activity and should therefore be classified as substantive or quasi-substantive."

Besides the "primary private activity" rationale, the result in *Brei* is also supported by the fact that privileges are based on underlying public policies which have nothing to do with the efficient conduct of litigation.<sup>50</sup> In fact, by excluding relevant evidence, rules of privilege tend to hinder the search for truth.<sup>51</sup>

Article III of the proposed rules (Presumptions) is also outside the Court's authority to promulgate rules of "practice and procedure." *Cities Service Oil Co. v. Dunlap*<sup>52</sup> involved the question of whether a

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and *Twin City Plaza* indicate that the subject matter of Article VII (Opinions and Expert Testimony) is procedural.

47. 286 F.2d 388, 393 (5th Cir. 1961). *Dallas County* constitutes authority for the proposition that Article VIII (hearsay), involves questions of procedure rather than substance.

48. See notes 38-40 and accompanying text *supra*.

49. 311 F.2d 463, 466 (2d Cir. 1962) (footnotes omitted). In an action for declaratory judgment, the insurer sought to avoid liability under a policy on the ground that the decedent-insured had committed suicide. The trial court excluded from evidence certain testimony of the decedent's physician on the grounds that it was privileged information. The trial court's action was upheld on appeal.

Other cases in which courts have concluded that privileges are substantive include: *Republic Gear Co. v. Borg-Warner Corp.*, 381 F.2d 551, 555-56 n.2 (2d Cir. 1967) (dictum re attorney-client privilege); *Krizak v. W.C. Brooks & Sons*, 320 F.2d 37, 42-43 (4th Cir. 1963) (Virginia statute providing that a report of an automobile accident may not be used in evidence in any trial arising out of the accident); *Baird v. Korerer*, 279 F.2d 623, 632 (9th Cir. 1960) (attorney-client); *State Mutual Life Assurance Co. v. Wittenberg*, 239 F.2d 87, 91-92 (8th Cir. 1956) (doctor-patient); and *Palmer v. Fisher*, 228 F.2d 603, 608 (7th Cir. 1955) (certified public accountant's privilege). Because federal jurisdiction in each of these cases was based upon diversity of citizenship, the question was presented whether the privileges were procedural or substantive for the purpose of applying the doctrine of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

50. 311 F.2d at 466.

51. See text accompanying notes 38-40 *supra*.

52. 308 U.S. 208 (1939).

federal court must apply a state rule "prescribing how and by whom the facts should be shown where one party to a contest concerning ownership of land claims the legal title as bona fide purchaser."<sup>53</sup> The trial court had held that the burden of proving bona fide purchaser status was a question of procedure and refused to apply a state rule which placed the burden on the party who challenged the legal title. The Supreme Court reversed and held that the issue was substantive:<sup>54</sup>

We cannot accept the view that the question presented was only one of practice in courts of equity. Rather we think it relates to a substantial right upon which the holder of recorded legal title to Texas land may confidently rely. Petitioner was entitled to the protection afforded by the local rule. In the absence of evidence showing it was not a bona fide purchaser its position was superior to a claimant asserting an equitable interest only. This was a valuable assurance in favor of its title.

The "reliance" theory in *Dunlap* is very similar to the "primary private activity" language in *Brei*; the court in *Brei* could have concluded just as easily that the doctor and patient had a substantial right to rely on the state rule which protected their communications with one another. Both opinions also stress an underlying public policy. In *Brei*, the policy of encouraging free and open communications between a doctor and his patient was emphasized, and in *Dunlap*, the policy of protecting one who has recorded his title to property was relied upon. Finally, presumptions, like privileges, may tend, in certain circumstances, to impede the search for truth. For example, a presumption may result in placing the burden of proof upon the litigant who is not "in possession" of the relevant evidence.

In addition to privileges and presumptions, some of the rules in Ar-

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53. *Id.* at 209.

54. *Id.* at 212. In *Dick v. New York Life Ins. Co.*, 359 U.S. 437 (1959), a diversity case involving a dispute over whether an insured died as a result of suicide or accident, the Court stated:

In a case like this one, North Dakota presumes that death was accidental and places on the insurer the burden of proving that death resulted from suicide. . . . Under the *Erie* rule, presumptions (and their effects) and burden of proof are "substantive" and hence respondent was required to shoulder the burden during the instant trial. . . . *Id.* at 446 (footnotes and citations omitted).

The Advisory Committee on Rules of Evidence took the stance that application of state law is not called for where the presumption to be applied is "tactical." Not only did the Committee fail to define "tactical," it did not cite any authority for the proposition that the state law need not be applied in such a situation. 56 F.R.D. 183, 211 (1973).

ticle IV (Relevancy and Its Limits) are arguably substantive. Generally this is not true, since the exclusion of irrelevant evidence is directly related to the desire to enhance the efficiency with which a trial court hears and decides a case. That the rules of relevancy, as prescribed by the Court, were designed to facilitate the orderly dispatch of judicial business is illustrated by Rule 403:<sup>55</sup>

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.

However, of the rules in Article IV, Rules 407 (Subsequent Remedial Measures), 408 (Compromise and Offers to Compromise), 409 (Payment of Medical and Similar Expenses), 410 (Offer to Plead Guilty; *Nolo Contendere*; Withdrawn Plea of Guilty) and 411 (Liability Insurance) are arguably substantive. The exclusion of evidence of subsequent remedial measures, offers to compromise, payment of the plaintiff's medical expenses, plea bargaining and the defendant's liability insurance can be based upon the irrelevance of such evidence to the question of liability or guilt. However, as the Advisory Committee on Rules of Evidence recognized, each of these rules is founded on a second "policy" reason. The exclusion of evidence of subsequent remedial measures encourages people to take—or at least does not discourage people from taking—steps in furtherance of added safety.<sup>56</sup> The exclusion of evidence of compromise and offers to compromise rests upon "the public policy favoring the compromise and settlement of disputes."<sup>57</sup> "[E]vidence of payment of medical, hospital, or similar expenses of an injured party by the opposing party, is not admissible, the reason often given being that such payment or offer is usually made from humane impulses and not from an admission of liability, and that to hold otherwise would tend to discourage assistance to the injured person."<sup>58</sup> "Exclusion of offers to plead guilty or *nolo* has as its purpose the promotion of disposition of criminal cases by compro-

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55. 56 F.R.D. at 218–19 (1973).

56. *Id.* at 225–26 (Advisory Committee's Note).

57. *Id.* at 227 (Advisory Committee's Note).

58. *Id.* at 228 (Advisory Committee's Note).

mise.”<sup>59</sup> Finally, the exclusion of evidence of insurance coverage is based on a concern that knowledge of such coverage might induce juries to decide cases on improper grounds.<sup>60</sup>

Despite these considerations, Rules 407 through 411 should be viewed as rules of practice and procedure. Even in the absence of the above mentioned “policy” considerations, the evidence excluded under these rules would still be inadmissible on the basis of irrelevancy to the question of liability or guilt. In fact, the policy reasons upon which the rules are based (*e.g.*, encouragement of compromise) are directly related to the adequate, simple, prompt and inexpensive administration of justice. Finally, unlike the protection of privileged communications which is aimed at primary private activity unrelated to a pending suit, the exclusion of evidence under these rules is aimed at activity connected with anticipated litigation.

#### IV. CONCLUSION

With the exception of privileges and presumptions, rules of evidence are procedural, and their promulgation is, therefore within the authority of the United States Supreme Court under the enabling acts. Congressional preemption of the Rules of Evidence, rather than based upon any sound conclusions in regard to the Court’s power to prescribe such rules, may have been the result of the furor raised during the hearings over Article V (Privileges). The rules as prescribed by the Court do not recognize a general physician-patient privilege nor do they recognize a journalist’s privilege. Naturally, the failure of the rules to recognize these privileges caused a good deal of concern within the medical and journalistic professions. Besieged by memoranda from representatives of these interest groups, Congress overreacted by making broad generalizations in regard to the Court’s power.<sup>61</sup>

59. *Id.* at 229 (Advisory Committee’s Note). In *Rain v. Pavkov*, 357 F.2d 506, 509 (3d Cir. 1966), the admissibility in evidence of a guilty plea to a charge of reckless driving was held to be a matter of procedure:

It is the general rule that a plea of guilty to a charge of reckless driving is an admission against interest, and evidence thereof is admissible in an action for personal injuries based upon the same facts and circumstances from which the charge arose . . . . While the statutory rule of Pennsylvania [the forum state], upon which the court below relied, is clearly to the contrary, it is not controlling in an action in the federal courts.

60. 56 F.R.D. at 230 (Advisory Committee’s Note).

61. See *Hearings*, note 7 *supra*, at 192–94, 342–52, 449–81, 583, 584, 586–89.

Still, whatever its motivation, Congress has done nothing which it lacked the power to do.<sup>62</sup> However, with the exception of its treatment of privileges and presumptions, the same is true of the Court. It is suggested that rather than preempting the rules in their entirety, Congress could have either deleted those sections which it deemed to be substantive and allowed the remainder of the rules to go into effect, or returned the rules to the Court with the suggestion that they be amended in light of the information gathered at the hearings. Such a course of action would have preserved the integrity of the Court in the area of promulgation of rules while restricting the power of the Court to the boundaries established by the enabling acts (*i.e.*, practice and procedure).

If and when Congress produces a code of evidence, it is anticipated that many states will adopt the federal code for the sake of uniformity between the state and federal courts. Thus the states which choose to adopt such rules will have to face the question of which governmental body possesses the power to promulgate rules of evidence. Congressional preemption of the Federal Rules of Evidence should not be taken as the last word on the question of which branch is properly in the business of prescribing rules of evidence; rather, each state should analyze the powers which are vested in its courts and the powers which are vested in its legislature vis-à-vis each area of evidence law which is to be affected.<sup>63</sup>

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62. See text accompanying notes 25–29 *supra*.

63. The pertinent Washington provision is WASH. REV. CODE § 2.04.190 (1963) (emphasis added):

The supreme court shall have the power to prescribe, from time to time, the forms of writs and all other process, the mode and manner of framing and filing proceedings and pleadings; of giving notice and serving writs and process of all kinds; of *taking and obtaining evidence*; of drawing up, entering and enrolling orders and judgments; and generally to regulate and prescribe by rule the forms for and the kind and character of the entire pleading, practice, and procedure to be used in all suits, actions, appeals and proceedings of whatever nature by the supreme court, superior courts and justices of the peace of the state. In prescribing such rules the supreme court shall have regard to the simplification of the system of pleading, practice and procedure in said courts to promote the speedy determination of litigation on the merits.

It is unclear whether the phrase “of taking and obtaining evidence” refers to depositions only or whether it refers to the entire area of evidence law.