The Federal Rules of Evidence and Florida Evidence Law Compared

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I. INTRODUCTION

The newly effective Federal Rules of Evidence must rank among the most thoroughly analyzed legal developments of our generation. In 1961 Chief Justice Warren appointed the Special Committee on Evidence to determine the advisability and feasibility of developing uniform federal evidence rules. Pursuant to the committee's findings, an advisory committee of distinguished practitioners and scholars was formed in 1965. Over a period of years that committee produced two drafts and a final set of proposed rules. The Supreme Court accepted the Proposed Rules in 1972, but Congress withheld immediate approval, and in late 1974 passed a substantially modified version of the Rules.

During the years of debate and revision it was anticipated that the Federal Rules would command such respect as to inspire state


2. The composition of this committee, along with brief biographical sketches of its members, is given in Spangenberg, supra note 1, at 1068-69.


4. Act of March 30, 1973, Pub. L. No. 93-12, 87 Stat. 9, provided that the rules as promulgated by the Supreme Court "shall have no force or effect except to the extent and with such amendments, as they may be expressly approved by Act of Congress."


The House made substantial changes in 36 of the 77 rules approved by the Court. The House made minor changes (including changes in terminology) in 14 rules. The Senate made 37 substantial changes in the House version. Those differences were resolved by a conference committee. 4 U.S. CODE CONG. & AD. NEWS 7108 (1974).
lawmakers to follow them. The Federal Rules embrace almost the entire field of evidence law. Present Florida law, by contrast, is physically and jurisprudentially fragmented. There are lacunae in which no litigation has ever taken place. The resulting lack of simplicity, integration, and easy accessibility is a flaw well appreciated by members of the trial bar and bench who must recall these rules instantaneously, often at peril of losing a case or committing reversible error. Moreover, the current Florida approach fosters diverse rulings at the trial level and thereby hampers predictability.

This note is concerned primarily with the substantive differences between current federal and Florida evidence law. This comparison, while hardly exhaustive, emphasizes discrepancies that recur frequently or that can affect outcome. The most noticeable discrepancy between current federal and Florida law is codification. Proposals for codification of Florida evidence law have stalled twice in the legislature. With a few exceptions, the 1975 proposed Florida code resembles the Federal Rules, adopting some of them verbatim. In the hope that Florida lawmakers will resolve their differences over the proposed

7. See notes 70, 101, 115 and accompanying text infra.
8. The Florida Law Revision Council drafted a proposed code of evidence, with extensive sponsor's notes, that was submitted to the legislature in the 1974 session. See Fla. H.R. 3670 (1974); Fla. S. 1089 (1974). These bills were filed too late, however, to receive extensive consideration. Their history and highlights are recounted in Ehrhardt, A Look at Florida's Proposed Code of Evidence, 2 Fla. St. U.L. Rev. 681 (1974). After circulation among the profession and modification by the Council, the proposals were reintroduced in the 1975 session as Fla. H.R. 471 (1975). The code is modeled after the Federal Rules of Evidence, although it retains much current statutory and case law and draws some provisions from codes of other states. STAFF OF FLA. H.R. COMM. ON THE JUDICIARY, 1975 Sess., STAFF SUMMARY ON CODE OF EVIDENCE FOR FLORIDA 2 (Comm. Print 1975). Although this measure, slightly amended, reached the calendar in the House of Representatives and passed the Senate Judiciary-Civil Committee, it stalled in the Senate Judiciary-Criminal Committee. Appearing before that committee on May 23, 1975, Assistant Attorney General Raymond Marky suggested that the Florida Supreme Court has the power to adopt the code under FLA. CONST. art. V, § 2(a) (rules for practice and procedure) and that some legislatively adopted evidence rules could be unconstitutional. Interview with Raymond Marky, Assistant Attorney General of Florida, in Tallahassee, Florida, May 30, 1975. Charles V. Ehrhardt, Reporter to the Law Revision Council for the proposed evidence code, feels there are no constitutional obstacles to legislative enactment of the code. He also suggests that the Florida Supreme Court could adopt the code as rules of court. Ehrhardt believes it to be of overriding importance, however, that one body, legislative or judicial, consider the entire set of rules. Interview with Charles W. Ehrhardt, Reporter to the Florida Law Revision Council, in Tallahassee, Florida, June 19, 1975. The bill will automatically return to the calendar in the House and the Judiciary-Criminal Committee in the Senate at the beginning of the 1976 session.
code in the next session, this note indicates in passing those elements of Florida law that would be affected by the 1975 proposed code.

The materials on presumption, privilege, and competency are presented together because the Federal Rules treat these issues identically; that is, the Rules adopt state law in civil actions where state law supplies the rule with respect to an element of a claim or defense. These are particularly sensitive areas for forum shopping, since the burden of proof and admissibility of whole blocks of evidence are at issue. The hybrid approach adopted in the Federal Rules reduces, but does not eliminate, forum shopping and choice of law problems.

Federal and Florida law differ broadly in the areas of judicial initiative, impeachment, and hearsay, which are considered next. Lesser conflicts are found in remaining fields, which are considered as a potpourri. The area of weight and sufficiency of evidence, although not covered in the Federal Rules, is presented as an interesting adjunct. Finally, some thought is given to possible underlying jurisprudential differences between the two bodies of law.

II. PRESUMPTIONS, PRIVILEGES, AND COMPETENCY

There was extensive debate on how presumptions, privileges and competency should be treated in the Federal Rules. Privileges in particular were hotly contested; advocates of a uniform federal approach opposed those who favored conformity with state law. At issue were both the wisdom of recognizing specific privileges and the federal power thereby to thwart established state policies in diversity cases. Congress rejected proposed rules that would have recognized

9. See Fed. R. Evid. 302 (presumptions), 501 (privileges), 601 (competency). Compare the approach of the Restatement (Second) of Conflict of Laws: the local law of the forum determines what witnesses are competent and the admissibility of evidence generally. Privileges, however, are handled by balancing the local law of the forum against that of the forum having the most significant relationship with the communication; where conflict exists, the evidence is admitted in the absence of an overriding policy consideration of one of the forums. Restatement (Second) of Conflict of Laws §§ 137-39 (1971).

10. See notes 15-20 and accompanying text infra.


12. Privileges represent a manifestation of state policy that some consider substantive under the doctrine of Erie R.R. v. Tompkins, 304 U.S. 64 (1938), which held
enumerated privileges in all federal actions; it enacted present Rule 501, which allows federal statutes, rules, and common law to govern, except in civil actions in which state law supplies the rule with respect to an element of a claim or defense. As previously noted, state law is to be applied similarly in the areas of presumptions and competency.

The result in all three areas is unsatisfactory, for it remains unclear when state law should be applied. The distinction is not based on jurisdiction, for even in a federal question case state law may supply the rule of decision, as where a federal statute incorporates state law by reference, or where conflict of laws principles require application of another forum's law. The Rules are likewise unhelpful where pendant jurisdiction is invoked, or where defenses, counterclaims, cross-claims and third party claims with differing jurisdictional bases are joined. Severance is not always a just solution. Finally, as a matter of constitutional law that federal courts must apply state substantive law in diversity of citizenship cases. One argument for the position that privileges are substantive is that private individuals rely on state privilege law in making pre-litigation decisions. Compare Prop. Fed. R. Evid. 501, Advisory Committee Note, 56 F.R.D. 230-34 (1972), with House Report 8-9 and Senate Report 11-13. Compare Dunham, supra note 11, and Reutlinger, Policy, Privacy, and Prerogatives: A Critical Examination of the Proposed Federal Rules of Evidence as They Affect Marital Privilege, 61 Cal. L. Rev. 1353 (1973), with Ladd, supra note 1, and Note, Federal Rules of Privilege in Diversity Cases: A Time for Congressional Action, 8 Suffolk U.L. Rev. 1217 (1974).

13. This discussion of privileges is offered as an illustration only; similar compromises were enacted concerning presumptions and competency. See Fed. R. Evid. 302, 601.

14. See text accompanying note 9 supra.


16. See, e.g., Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1970), making the United States liable for acts of its employees under circumstances where a private person would be liable to the claimant "in accordance with the law of the place where the act or omission occurred"; 18 U.S.C. § 13 (1970), adopting nonconflicting state criminal law in areas subject to the special maritime and territorial jurisdiction of the United States.

17. See, e.g., Cr. Ct. R. 61(b) (capacity to sue or be sued in Court of Claims is determined by the law of the state of domicile).

18. Under UMW v. Gibbs, 383 U.S. 715, 725 (1966), pendant jurisdiction may be exercised whenever the state and federal claims "derive from a common nucleus of operative fact" such that a plaintiff "would ordinarily be expected to try them all in one judicial proceeding." Considerations of judicial economy, convenience, and fairness to litigants are guides to the trial court in accepting or denying pendant jurisdiction. Id. at 726. When the Gibbs conditions are met, severance would work a hardship on one or both litigants and on the court system as a whole.

Similar problems arise under the Federal Rules of Civil Procedure. Some claims, such as compulsory counterclaims under Rule 13(a), must be litigated or lost; severance is not possible in such cases. Where litigation becomes more complex, and additional parties and claims are joined, the court may consolidate or sever based on considerations of prejudice, convenience, and delay. See Fed. R. Civ. P. 19(b), 20(b), 21. Foreseeable
troversy may arise as to whether contested matter is an "element of a claim or defense," or something less, a mere "item of proof." How federal courts will resolve this problem is a matter of conjecture; hence the discrepancies between federal and Florida law in the following areas are critical.

A. Presumptions

Under Federal Rule 301 courts must apply the "bursting bubble" theory of presumptions in all civil cases not otherwise provided for by statute or rule. That theory imposes the burden of going forward with the evidence on the party against whom the presumption is directed. It does not shift the burden of proof. Florida law is generally in accord, but there are occasional cases in which the presumption shifts the burden of proof. Examples include legitimacy of birth, sanity in civil actions, and the good faith and propriety of acts of public officials. In varying degrees the Florida courts have appeared to require proof to overcome these presumptions; to that extent Florida law conflicts with the Federal Rule.

Evidentiary problems could enter into the court's determination, but should not govern it. Further, the severance-consolidation question must be resolved by the court with the aid of the parties, in the absence of witnesses who, when called to testify, may wish to invoke a state or federal privilege.


20. Logical alternatives include: (1) when in doubt, use the rule supplied by federal law; (2) when in doubt, use the rule supplied by state law; (3) use federal law unless it conflicts with a strong state policy; (4) use state law unless it conflicts with a strong federal policy; (5) use the law of the forum which supplies the rule as to the "main substantive issue" of the case; (6) apply federal law to "insignificant" matters, state law to "dispositive" matters; (7) decide each case along lines of fundamental fairness to the parties. These suggestions have been listed in more or less declining order of uniformity and simplicity. Any standard of fundamental fairness demands some consideration of these criteria. There is some discussion of these matters in Rothstein, The Proposed Amendments to the Federal Rules of Evidence, 62 Geo. L.J. 125, 138-39 (1973), and Weinstein, supra note 11, at 376.

21. Leonetti v. Boone, 74 So. 2d 551 (Fla. 1954). Fla. H.R. 471 § 1 (1975) (§§ 90.302- .304) would retain both types of presumptions. Those that shift the burden of proof are those otherwise provided by statute and those which implement public policy. Presumptions of a mere procedural or ordering nature would shift only the burden of producing evidence.

22. Eldridge v. Eldridge, 16 So. 2d 163 (Fla. 1944).

23. Schaefer v. Voyle, 102 So. 7 (Fla. 1924). Once a person is adjudicated insane, there arises a presumption that shifts the burden of proof to one alleging sanity. Wells v. State, 98 So. 2d 795 (Fla. 1957). Where mental condition fluctuates, the presumption of sanity obtains. Alexander v. Estate of Callahan, 132 So. 2d 42 (Fla. 3d Dist. Ct. App. 1961).

B. Privileges

The Proposed Federal Rules sought to replace the existing chameleon-like federal privilege law\textsuperscript{25} with eight privileges that were to apply uniformly in all federal cases.\textsuperscript{26} Congress rejected this approach. Federal Rule 501 refers federal courts to statutes and case law, except where state law supplies the rule with respect to an element of a claim or defense. Currently recognized federal privileges based on statutes and case law include attorney-client communications,\textsuperscript{27} governmental reports,\textsuperscript{28} husband-wife communications,\textsuperscript{29} communications to clergy,\textsuperscript{30}

\begin{itemize}
  \item Federal evidence law prior to the Rules was governed by statutes and case law, especially \textit{Erie R.R. v. Tompkins}, 304 U.S. 64 (1938), and \textit{Fed. R. Civ. P. 43(a)}. See \textit{Weinstein, supra} note 11, at 353-56. In adopting the Proposed Rules of Evidence, the Supreme Court amended \textit{Fed. R. Civ. P. 43(a)} to incorporate the new Rules. 56 F.R.D. 355, 356 (1972).
  \item Rule 43(a) formerly read in pertinent part (emphasis added):
  \begin{quote}
    All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. \textit{In any case, the statute or rule which favors the reception of evidence governs . . . .}
  \end{quote}
  Rule 43(a) provided a comfortable, if nonuniform, approach to evidence admissibility. Obviously decisions under this rule varied among federal trial courts. New Rule 43(a) merely connects the Rules of Evidence with the Rules of Civil Procedure.
  \item The federal interspousal privilege is broad. Sometimes it has been treated as a competency issue. \textit{See United States v. Armstrong}, 263 F.2d 275 (D.C. Cir. 1958). Like federal law, Florida law privileges communications to clergy. \textit{Fla. Stat.} § 90.505 (1973). This privilege would be retained in Fla. H.R. 471 § 1 (1975) (§ 90.241).
\end{itemize}
trade secrets, state secrets, and informants' identities. Political votes may be privileged; the issue does not seem to have been litigated. No generally recognized privileges exist for newsmen or accountants; state privileges for communications to physicians and psychotherapists have been honored only when *Erie R.R. v. Tompkins* is applicable.

How does Florida law differ? Statutes privilege communications to psychiatrists, psychologists, and accountants. Accident reports and blood alcohol tests are also statutorily privileged; this privilege

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34. *Branzburg v. Hayes*, 408 U.S. 665 (1972). At least five Justices, however, found a limited privilege when, for example, the disclosure was not sought in good faith. See id. at 709-10 (Powell, J., concurring).


36. There is no federally created physician-patient privilege. The privilege may, however, be recognized in diversity cases by applying the law of a forum that recognizes the privilege. *Cf. Barnes v. United States*, 374 F.2d 126 (5th Cir. 1967), cert. denied, 389 U.S. 917 (1967).


38. 304 U.S. 64 (1938). *See note 12 supra.*


42. Fla. Stat. § 316.066(4) (1973). This statute applies to required blood alcohol tests as well as verbal communications. Cannon v. Giddens, 210 So. 2d 714 (Fla. 1968), *But see Timmons v. State*, 214 So. 2d 11 (Fla. 1st Dist. Ct. App. 1968), cert. denied, 222 So. 2d 752 (Fla. 1969) (consensual blood alcohol test results admissible if obtained by officer not investigating accident). This privilege is not mentioned in the proposed code, Fla. H.R. 471 (1975), but might be retained as part of the state traffic law, Fla. Stat. §§ 316.001-292 (1973). The accident report privilege is strictly construed and
has been recognized in one federal case.\textsuperscript{43} The Florida interspousal privilege is narrowly drawn, covering only confidential communications between married persons.\textsuperscript{44} The trade secret and state secret privileges are only tenuously established in this state’s courts.\textsuperscript{45} In view of federal courts’ general rejection of the privileges for accountants, accident reports, and blood alcohol tests, these matters are likely to create troublesome conflicts.

C. Competency

Federal Rule 601 declares every person to be a competent witness, except as elsewhere provided in the Rules or where state law supplies the rule of decision with respect to an element of a claim or defense. Other pertinent Federal Rules require only that the witness have personal knowledge of the subject matter, take an oath or affirmation, and not be the presiding judge or a jury member.\textsuperscript{46}

Florida law is more traditional. The state bars testimony by infants and mental defectives who have insufficient intelligence or sense of obligation to tell the truth.\textsuperscript{47} Where competency is at issue, appellate courts rarely find error in trial courts’ exercise of discretion. The most troublesome difference in the competency area is Florida’s Deadman’s Statute.\textsuperscript{48} With certain exceptions, it bars the testimony of

\begin{itemize}
\item \textsuperscript{43} Kuklis v. Hancock, 428 F.2d 608 (5th Cir. 1970).
\item \textsuperscript{44} Florida Interspousal Privilege encompasses confidential communications. Brown v. May, 76 So. 2d 652 (Fla. 1954).
\item \textsuperscript{45} The Florida Interspousal privilege encompasses confidential communications. Brown v. May, 76 So. 2d 652 (Fla. 1954).
\item \textsuperscript{46} Bell v. State, 93 So. 2d 575 (Fla. 1957), and Harrold v. Schluep, 264 So. 2d 431 (Fla. 4th Dist. Ct. App. 1972).
\item \textsuperscript{47} With regard to infants, see Bell v. State, 93 So. 2d 575 (Fla. 1957), and Harrold v. Schluep, 264 So. 2d 431 (Fla. 4th Dist. Ct. App. 1972).
\item \textsuperscript{48} FLA. STAT. § 90.05 (1973). The proposed Florida code limits the statute to “oral
a party or interested person as to communications or transactions with a decedent or insane person in a claim against that person's personal representative, heir, survivor, or beneficiary. The Deadman's Statute can affect outcomes dramatically, and, although federal courts have occasionally applied it, the statute may encourage forum shopping in the future.

Florida courts have not ruled on the competency of judges and jurors to act as witnesses in cases they are trying, although a statute provides that any juror who is a prospective witness may be challenged for cause. Fundamental fairness would seem to require a finding of incompetency.

Federal Rule 606(b) limits the competence of jurors to impeach their own verdict to instances where the jury has been exposed to extraneous prejudicial information or improper outside influence. This limitation effectively precludes impeachment of "quotient verdicts," in which jurors have bound themselves to determine a verdict by average. Congress apparently sought to reduce juror harassment and exploitation after trial. Florida law is generally in accord with the extrinsic influence limitation, but allows quotient verdicts to be impeached.

D. Summary

In summary, Congress decided that, in the majority of cases where a choice of forum is available, differences between state and federal law should be minimized. Therefore, only when the phrase "civil actions and proceedings with respect to an element of a claim or defense as to which State law supplies the rule of decision" cannot readily be defined are there likely to be choice of law problems. Considerations of comity and the constitutional requirements of Erie prevailed in the House of Representatives revision, and ultimately in the Rules
This course sacrificed some uniformity, for application of these Rules will now differ from state to state, from case to case, and possibly within a case. Propriety of venue, personal jurisdiction, and joinder may now be more hotly contested. The burden on federal judges to select the applicable rule will be substantial. Finally, the opportunity to fashion an exemplary set of federal rules, at least in the privilege area, is lost for the time being.

III. JUDICIAL INITIATIVE

Federal trial courts have far more power than their Florida counterparts to take the initiative in presenting and determining facts. Presumably this initiative is used to streamline the trial process, fill interstices in testimony, clarify issues, and do substantial justice. If abused, it could jeopardize the trial's adversary nature, and the pages of Federal Reporter would billow with appeals. Federal judges' established power to summarize and comment on the evidence has not created noticeable problems. Florida judges have no such power. The Rules give federal courts particular clout in the areas of judicial notice and the appointment of expert witnesses. These three powers can make the court a formidable participant in the trial process.

Judicial notice in Florida and federal forums differs in several respects. In federal civil cases judicial notice, once exercised, is conclusive; the jury must accept the court's finding. In federal criminal cases, Congress has required an instruction that the jury is not bound

54. See House Report 8-9; Conference Report 7-8.
55. This discrepancy between federal and Florida courts may reflect heightened confidence in the federal judiciary. One survey revealed that greater confidence in the independence and judicial temperament of the federal bench was the fourth most common of 14 factors cited by attorneys who had chosen the federal forum. The first three factors were geographical concerns, better pretrial discovery, and higher verdicts. Summers, Analysis of Factors That Influence Choice of Forum in Diversity Cases, 47 Iowa L. Rev. 933, 937 (1962).
57. Raulerson v. State, 102 So. 2d 281 ( Fla. 1958). The proposed Florida code does not give trial judges the power to summarize and comment on the evidence. See Fla. H.R. 471 § 1 (1975) ( § 90.106).
60. Fed. R. Evid. 201(g). Subsection (e) allows the opposing party to be heard prior to the taking of notice, or afterwards in the absence of prior notification, but these arguments do not reach the jury. Perhaps the opportunity to rebut before the jury is insignificant, since any judicially noticed fact must be "not subject to reasonable dispute." Fed. R. Evid. 201(h).
to accept judicially noticed facts as conclusive.\textsuperscript{61} The Federal Rule, however, has no provision allowing the party disputing a noticed fact in a criminal proceeding the opportunity to rebut before the jury.\textsuperscript{62} In Florida cases, civil and criminal, the opponent may offer rebuttal even after judicial notice, and the jury may reject the court's finding.\textsuperscript{63}

Federal Rule 201(b) encompasses what is "generally known within the territorial jurisdiction," and facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." The plain language of the rule suggests that all authoritative sources—such as almanacs, atlases, treatises, business records—may be consulted and facts therein irrebuttably noticed even if those facts are not "generally known." Florida cases generally limit judicial notice to what is "commonly known."\textsuperscript{64} State courts are additionally handicapped by appellate courts' reluctance to sanction judicial notice in some areas, and a lack of litigation in others. Among the troublesome areas are municipal ordinances, which cannot be noticed in state courts not charged with enforcing them,\textsuperscript{65} county records required by law,\textsuperscript{66} and rules and regulations of state agencies.\textsuperscript{67}

Federal courts may appoint their own expert witnesses, and may reveal to the jury that they are court appointed.\textsuperscript{68} Such witnesses may then be cross-examined by either party.\textsuperscript{69} The extent to which Florida

\textsuperscript{61} FED. R. EVID. 201(g). \textit{See also} HOUSE REPORT 6-7, citing the sixth amendment as the basis for treating criminal cases differently.

\textsuperscript{62} Nonetheless, the sixth amendment's jury trial guarantee arguably requires that a criminal defendant be given the opportunity to rebut judicially noticed facts before the jury. \textit{Cf.} HOUSE REPORT 6-7; PROP. FED. R. EVID. 201(g), Advisory Committee Note, 46 F.R.D. 161, 208 (1969).

\textsuperscript{63} Makos v. Prince, 64 So. 2d 670 (Fla. 1953). The proposed Florida code requires facts judicially noticed to be accepted by the jury. It does not differentiate civil and criminal cases. Fla. H.R. 471 § 1 (1975) (§ 90.206).

\textsuperscript{64} Amos v. Moseley, 77 So. 619 (Fla. 1917), established this phrase, which has been honored ever since by cases defining notice in terms of what is "known." \textit{See} Wyatt v. State, 270 So. 2d 47 (Fla. 4th Dist. Ct. App. 1972). \textit{Cf.} Roberts v. Wofford Beach Hotel, 67 So. 2d 670, 672 (Fla. 1953), restricting judicial notice of scientific facts to "matters of universal notoriety and general understanding." Perhaps the only exception to the "commonly known" rule occurs when Florida courts take notice of census data. Yoo Kun Wha v. Kelly, 154 So. 2d 161 (Fla. 1963). The proposed code allows notice of facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fla. H.R. 471 § 1 (1975) (§ 90.202(12)).

\textsuperscript{65} Holmes v. State, 273 So. 2d 753 (Fla. 1972). Fla. H.R. 471 § 1 (1975) (§ 90.202(10)) would permit ordinances to be noticed if available in printed or certified copies.

\textsuperscript{66} Livingston v. State, 145 So. 761 (Fla. 1933) (specifically rejecting judicial notice).

\textsuperscript{67} Freimuth v. State, 272 So. 2d 473 (Fla. 1972), allows notice of the Federal Register, but there seem to be no cases allowing notice of the \textit{Florida Administrative Code}. Fla. H.R. 471 § 1 (1975) (§ 90.202(3), (9)) would allow notice of both.

\textsuperscript{68} FED. R. EVID. 706(a), (c).

\textsuperscript{69} FED. R. EVID. 706(a).
courts enjoy these powers is unclear. The Advisory Committee note to Proposed Federal Rule 706 suggests that although the power to appoint expert witnesses may rarely be used, it could have a subtle restraining effect on the parties' own use of experts.

Federal courts' latitude in the areas of judicial notice, appointment of expert witnesses, and summation of evidence is paralleled in other areas. For instance, federal case law has long recognized curative admissibility as an appropriate tool with which to redress undue prejudice created by improper evidence previously admitted, and the Federal Rules provide an open-ended exception to the hearsay rule. Neither curative admissibility nor an open-ended hearsay exception is recognized in Florida.

IV. IMPEACHMENT

Cross-examination in both federal and Florida courts is limited to the scope of the preceding direct examination, except where the court in its discretion permits greater latitude, and to impeachment. Although Congress rejected a proposed rule which would have expanded the scope of cross-examination to any relevant subject, it retained broad impeachment provisions. Federal and Florida law differ as to who may impeach, by what kinds of evidence, under what conditions, and with what effect. Possibly the more open federal law reflects not only a greater skepticism about testimony and witnesses, but a greater faith in the jury's sophistication and resistance to prejudice.

In Florida a party may only impeach his own witness after showing that he is surprised and adversely affected by the witness' testi-

70. Florida courts may appoint experts in eminent domain proceedings, but cross-examination by the parties is not allowed, nor is revealing that the witness is court-appointed. Rochelle v. State Road Dept., 196 So. 2d 477 (Fla. 2d Dist. Ct. App. 1967). It is unclear whether Rochelle applies to civil actions generally. Court-appointed experts are common in criminal proceedings, however, and cross-examination by either party is allowed. See Brown v. State, 108 So. 842 (Fla. 1926). The proposed Florida code does not mention the court's power to appoint experts, but does allow a court to call witnesses on its own motion. The code further provides that such witnesses may be cross-examined by any party. Fla. H.R. 471 § 1 (1975) (§ 90.615).

72. See cases cited in 1 J. Wigmore, Evidence § 15, at 307 n.3 (3d ed. 1940), at 77 n.3 (Supp. 1975).
74. See, e.g., Statewright v. State, 278 So. 2d 652 (Fla. 4th Dist. Ct. App. 1973), rev'd on other grounds, 300 So. 2d 674 (Fla. 1974); Fed. R. Evid. 611(b).
mony. If those conditions are met, the calling party may impeach by prior inconsistent statement, but not by character evidence; he is held to vouch for his witness' good character. The Federal Rules allow impeachment by any party without preconditions, and by any method generally permissible. The Rules thus allow much greater use of prior statements. No showing of adversity or surprise is required; the prior inconsistent statement may even be used when the witness is unable to recall the event in question. This ability to make greater use of prior statements is of great moment, especially when they may be used substantively as well as to impeach.

Before using a prior statement to impeach, counsel is required by Florida law to show the statement to the witness. Federal Rule 613 requires only that the statement be shown to opposing counsel on demand. The Florida procedure lessens the questioning attorney's advantage over the witness and possibly makes impeachment more difficult.

The Federal Rules are also more relaxed on the subject of character impeachment. It may be accomplished by showing either a trait of untruthfulness or prior conviction of a crime; other character evidence is considered irrelevant. Attacking character for truthfulness may be accomplished by inquiring into reputation, opinion, or, on cross-examination, specific instances of conduct involving truthfulness or untruthfulness. Florida law allows character impeachment by reputation evidence only. It is more receptive to impeachment by criminal conviction, however; the state courts admit evidence of any conviction.

76. See Fla. Stat. § 90.09 (1973). The surprise requirement is not mentioned in the statute, but was noted in Hernandez v. State, 22 So. 2d 781 (Fla. 1945). The proposed code would eliminate the surprise requirement. Fla. H.R. 471 § 1 (1975) (§ 90.608 (2)).

77. Hernandez v. State, 22 So. 2d 781 (Fla. 1945); Fla. Stat. § 90.09 (1973). This rule would not be changed by the proposed code. See Fla. H.R. 471 § 1 (1975) (§ 90.608(2)).


79. Florida law excludes prior inconsistent statements as substantive evidence of a fact not otherwise shown. Tomlinson v. Peninsular Naval Stores Co., 55 So. 548 (Fla. 1911). Wallace v. Rashkow, 270 So. 2d 743 (Fla. 3d Dist. Ct. App. 1972), is the only case allowing substantive use of a prior inconsistent statement to corroborate independent evidence. This case is discussed in Ehrhardt, supra note 8, at 685-87. Compare Fed. R. Evid. 801(d)(1), allowing substantive use of the prior statement if it was given under oath in a trial, hearing, or deposition. Prop. Fed. R. Evid. 801(d)(1), 56 F.R.D. 183, 293 (1972), would have allowed substantive use of any prior inconsistent statement, regardless of the setting, House Report 13, as would Fla. H.R. 471 § 1 (1975) (§ 90.801(4)(a)).


82. Fed. R. Evid. 608.

83. Taylor v. State, 190 So. 691 (Fla. 1939); Fla. Stat. § 90.08 (1973).
felony or misdemeanor, and allow remoteness to be brought out only on redirect. Federal law is much more strict: the crime must be a felony or involve dishonesty or false statement; the conviction (or release from confinement) must be less than 10 years old unless the court finds admission to be in the interests of justice and notice is given the adverse party; pardoned crimes are not admissible; and evidence of juvenile adjudications is frowned upon.

Under the Federal Rules, evidence of habit and routine practice may be used to prove conformity therewith on a particular occasion. Since the habit involved may concern some trait other than truthfulness, this method of proof may prove useful in areas other than impeachment. For example, a party's habitual negligent practice can be introduced to show negligence on a particular occasion; such evidence could be decisive. The Federal Rules are also more lenient about the introduction of evidence of character traits, other than for untruthfulness, of the victim of a sex crime.

V. HEARSAY

One commentator, in discussing Florida's approach to hearsay, felt the rule to be "I know hearsay when I see it and this is hearsay." This condemnation is probably overstated, but ad hoc rulemaking

84. FLA. STAT. § 90.08 (1973). The procedure for impeaching by prior conviction, including rebuttal use of mitigating circumstances, is outlined in McArthur v. Cook, 99 So. 2d 565 (Fla. 1957). The proposed code adopts the more restrictive federal approach. Fla. H.R. 471 § 1 (1975) (§ 90.610).

85. FED. R. EVID. 609(a)-(d). Congress evidently did not intend much use to be made of stale convictions. See SENATE REPORT 15. Use of a juvenile adjudication for impeachment does not seem to have been litigated in Florida, perhaps because of the juvenile records privilege, FLA. STAT. § 39.12(4) (1973).

86. FED. R. EVID. 406. This Rule is particularly liberal, requiring no personal knowledge or corroboration. Most states do not allow use of habit evidence. 29 AM. JUR. 2d Evidence § 303 (1967). Florida law generally agrees with the majority. See General Motors Acceptance Corp. v. American Liberty Ins. Co., 238 So. 2d 450 (Fla. 1st Dist. Ct. App. 1970). But cf. State v. Wadsworth, 210 So. 2d 4 (Fla. 1968), allowing the trial court discretion to admit evidence of propensity to intemperance as corroborating evidence of intoxication at the time of the crime. The Wadsworth case was decided by a panel of seven justices, two of whom were sitting by leave from lower courts, and two more of whom dissented from the holding. Wadsworth has never been expressly followed. The proposed Florida code allows use of routine practice of an organization, but not habit. Fla. H.R. 471 § 1 (1975) (§ 90.406).

87. Compare FED. R. EVID. 404(a)(2), allowing the accused to offer character evidence of a pertinent trait of the victim, with FLA. STAT. § 794.022(2) (Supp. 1974), barring testimony about prior sex acts with persons other than the accused unless previously shown to constitute a behavior pattern that is relevant to the issue of consent.

88. Urich, 1970-1971 Survey of Florida Law, Evidence, 26 U. MIAMI L. REV. 147, 176 (1971). Urich points out that there are inconsistencies among the districts, and that compartmentalization of exceptions may not always be possible. Id. at 177.
seems to have left more gaps, confusion, and other evils in hearsay than in other areas of evidence. Presumably Florida trial courts resolve the less commonly contested hearsay questions by referring to the general common law, and may reach results in accord with federal law without being fastidious about terminology. This section will concentrate on the substantive differences between federal and Florida hearsay rules.

Federal Rule 801(d) defines certain statements as "not hearsay," thereby making them admissible as substantive evidence. Subsection (1) includes within this category a testifying witness' prior inconsistent statements given under oath in a proceeding or deposition, and his prior consistent statements offered to rebut a charge of recent fabrication or improper motive. Florida law permits use of prior inconsistent statements to impeach, but not to prove the truth of facts not otherwise supported. Subsection (2) of the Federal Rule includes admissions by a party-opponent as "not hearsay" when offered against the declaring party. Florida law is in accord, although it does not always specify whether such admissions are an exception to the hearsay rule or are "not hearsay," and sometimes confuses party admissions with non-party declarations.

Two minor discrepancies deserve mention here. First, Federal Rule 801(a) defines as a statement, and thereby subjects to the hearsay rule, conduct "intended . . . as an assertion." Arguably silence may never be "intended . . . as an assertion." Both Florida and federal courts have treated silence, when circumstances warrant a statement, as a statement.

89. Tomlinson v. Peninsular Naval Stores Co., 55 So. 548 (Fla. 1911). See also Wallace v. Rashkow, 270 So. 2d 743 (Fla. 3d Dist. Ct. App. 1972). The proposed Florida code is even broader than the Federal Rule, admitting as "not hearsay" any prior inconsistent statement if the declarant testifies. Fla. H.R. 471 § 1 (1975) (§ 90.801(4)).


91. In the accepted terminology, the word "admissions" refers to statements by parties or those with whom they are in privity, while "declarations" refers to statements by nonparties. See Fed. R. Evid. 801, 804; C. McCormick, Evidence § 276 (2d ed. 1972). Florida courts have not always used accepted terminology, however. See Seaboard Coast Line R.R. v. Nieuwendaal, 253 So. 2d 451 (Fla. 2d Dist. Ct. App. 1971), cert. denied, 262 So. 2d 682 (Fla. 1972). Florida cases once appeared to decide admissibility questions on the basis of whether a party admission was self-serving or disserving. See 13 Fla. Jur. Evidence § 218 (1957); S. Gardner, Florida Evidence Rules 178-79, at 268-71 (1967). It now appears that motive or result at the time of the statement is irrelevant, provided the statement is offered against its maker. DeLong v. Williams, 232 So. 2d 246 (Fla. 4th Dist. Ct. App. 1970); Wilkinson v. Grover, 181 So. 2d 591 (Fla. 3d Dist. Ct. App. 1965). This approach is in accord with Fed. R. Evid. 801(d)(2). The proposed Florida code treats admissions and declarations against interest as separate exceptions to the hearsay rule. Fla. H.R. 471 § 1 (1975) (§§ 90.803(18), .804(2)(c)).
as an admission that may be entered in evidence. The wording of the Federal Rule may take silence out of the hearsay rule completely. Secondly, the leading Florida case held opinion survey results to be hearsay based on hearsay, and hence inadmissible to support a motion for a change of venue. Of course, survey results would not be hearsay if offered to prove matters other than the truth of matters asserted by the parties polled. If hearsay, the results might still be admissible under Federal Rule 803(6) (records of any regularly conducted activity); (8) (public records); (17) (market reports); or (24) (other exceptions). Survey results might also be admissible under Federal Rule 703, if the witness testifies as an expert and the supporting facts are of a type reasonably relied on by his colleagues in the field.

"Res gestae" is a term so carelessly used that a generation of legal scholars has urged its abolition. Florida courts have sometimes joined in this criticism. Nevertheless, the phrase is commonplace in state decisions, which have given it multifarious meanings.

92. See Smith v. Allen, 297 F.2d 235 (4th Cir. 1961); Sullivan v. McMillan, 8 So. 450 (Fla. 1890).
93. In any case, silence will only be admissible if it is relevant and not unduly prejudicial. See Fed. R. Evid. 401-03. Moreover, an accused's exercise of his right to remain silent may not be used against him in a criminal proceeding. U.S. Conr. amend. V.; United States v. Ghiz, 491 F.2d 599 (4th Cir. 1974); United States v. Mullings, 364 F.2d 173 (2d Cir. 1966); but see United States v. Harris, 388 F.2d 373 (7th Cir. 1967).
94. Irvin v. State, 66 So. 2d 288 (Fla. 1953), cert. denied, 346 U.S. 927 (1954). The court also suggested that survey results might be incompetent. Id. at 292.
96. See Williams v. State, 188 So. 2d 320, 323 (2d Dist. Ct. App. 1966), quoting J. Wigmore, supra note 95. This case was modified by the Supreme Court of Florida, however, in an opinion by Justice Roberts that used the term "res gestae" without any indication of disapproval. State v. Williams, 198 So. 2d 21, 23 (Fla. 1967). The Supreme Court of Florida had previously recognized problems caused by use of the term. See Green v. State, 113 So. 121, 123 (Fla. 1927).
97. Florida courts have been imaginative in defining "res gestae." See, e.g., Gillette v. State, 6 So. 2d 377 (Fla. 1942) (evidence of sodomy); State Board of Funeral Directors & Embalmers v. Cooksey, 3 So. 2d 502 (Fla. 1941) (conduct of funeral director in changing casket and clothing of deceased); Thornton v. State, 196 So. 842 (Fla. 1940) (fact of being an escaping convict); Powell v. State, 175 So. 213 (Fla. 1937) (circumstances surrounding death of a co-victim); Browne v. State, 109 So. 811 (Fla. 1926) (clothes worn by the deceased). All of the above refer to nonassertive conduct or to circumstances, and not to "statements" subject to the hearsay rule; they might conceivably have been admissible without any reference to "res gestae." This may account for the fact that none of these cases has ever been overruled, questioned, distinguished, or explained. Florida courts continue to use "res gestae" in reference to acts as well as statements. See, e.g., Smith v. State, 311 So. 2d 775 (Fla. 3d Dist. Ct. App. 1975).
precise hearsay exceptions: present sense impressions; excited utterances; and then-existing mental, emotional, or physical conditions.  

Federal Rule 803(4) admits statements made for purposes of medical diagnosis and treatment, including statements regarding causation insofar as relevant to diagnosis or treatment. Logically this would include statements to paramedics and nurses. Florida law is more restrictive. Unless they are "res gestae," prior statements as to causation are inadmissible if offered on behalf of the party making the statement. Florida law excludes testimony of examining physicians (as opposed to treating physicians) that is based even partly on the patient's own relation of his case history.

Arguably, the absence of an entry in records of a regularly conducted activity can never be hearsay, since it is only circumstantial evidence that an event which normally would be recorded did not occur. Stated otherwise, absence of an entry cannot evidence the truth of the matter asserted because there is no assertion. Federal Rule 803(7) has settled the question, however, by making such absence an exception to the hearsay rule. Florida courts do not seem to have considered the matter.

Federal Rule 803(8)(c) renders admissible in civil cases factual findings of public investigations, and in criminal cases findings against the government, unless sources or circumstances indicate a lack of trustworthiness. Florida law allows use of required accident reports for impeachment purposes, but not as substantive evidence. This

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98. Fed. R. Evid. 803(1)-(3). The proposed Florida code adopts the same approach. Fla. H.R. 471 § 1 (1975) (§ 90.803(1)-(3)).


100. Marshall v. Papineau, 132 So. 2d 786 (Fla. 1st Dist. Ct. App. 1961). See also Bondy v. West, 219 So. 2d 117 (Fla. 2d Dist. Ct. App. 1969) (examining doctor may testify if the testimony is based solely on his own observations). The rule was relaxed in a recent case, Marine Exploration Co. v. McCoy, 308 So. 2d 43 (Fla. 5d Dist. Ct. App. 1975). Fla. H.R. 471 § 1 (1975) (§ 90.803(4)) retains the distinction between examining and treating physicians; that section requires the declarant to be seeking diagnosis or treatment.


102. State v. Johnson, 284 So. 2d 198 (Fla. 1973), allows use of a police report for impeachment when the report is critical, deals with a vital point, is reasonably exculpatory, and has been reviewed in camera for improper matter.

difference is potentially outcome determinative in interstate traffic accident litigation.

Federal Rule 803(16) allows "ancient" documents to be admitted once 20 years old. Florida adheres to the common law 30-year rule, with certain statutory exceptions for judgments and decrees of record, and for deeds and powers of attorney, all of which are "ancient" after 20 years.

Prior convictions of crimes punishable by death or imprisonment in excess of one year may be admitted in civil proceedings under Federal Rule 803(22). The Rule reaches all such convictions not based on a plea of nolo contendere. Florida law on this subject is inconsistent and illogical. A conviction based on a guilty plea is allowed as an admission, but convictions are not otherwise admissible in civil proceedings as substantive evidence. The wisdom of the Florida approach is questionable in light of the need for plea bargaining. Furthermore, a conviction over 20 years old may be admissible as an ancient judgment under section 92.07, Florida Statutes.

Statements in a learned treatise are admissible under Federal Rule 803(18) if a witness' testimony or admission establishes the treatise as an authority, if other expert testimony so establishes, or if judicial notice is taken of the treatise's reliability. Thus it is fairly easy to admit treatise materials as substantive evidence. In Florida, statements in learned treatises cannot be used as substantive evidence, and may be used for impeachment only when the treatise is recognized as authoritative by the witness whose testimony is to be impeached.

When the declarant is unavailable, Federal Rule 804 provides an additional set of exceptions. Under subsection (a), a witness is unavailable if he is exempted from testifying on grounds of privilege, refuses to testify, claims lack of memory, cannot be present or testify due to sickness or death, or is beyond process and unwilling to appear. If these criteria are met, five types of statements may be admitted: former testimony, statements under belief of impending death, statements under belief of federal treatment of government reports, see Prop. Fed. R. Evid. 502, 509, 803(8), Advisory Committee Notes, 56 F.R.D. 183, 235, 252-54, 311-13 (1972).


107. Eggart v. State, 25 So. 144 (Fla. 1898); City of St. Petersburg v. Ferguson, 193 So. 2d 648 (Fla. 2d Dist. Ct. App. 1966). The proposed Florida code contains no provisions on learned treatises.

108. The court may, however, choose not to believe the witness. House Report 15, citing United States v. Insana, 423 F.2d 1165 (2d Cir.), cert. denied, 400 U.S. 841 (1970). This qualification gives tremendous latitude to the trial court.
ments against interest, statements of personal or family history, and other (unspecified) statements. Florida's criteria for unavailability are nonuniform. For former testimony\(^{109}\) the courts have recognized death,\(^{110}\) whereabouts unknown,\(^{111}\) insanity and infirmity,\(^{112}\) and diminished memory.\(^{113}\) Florida allows statements under belief of impending death only where the declarant has died.\(^{114}\) Unavailability requirements are not clear for statements against interest.\(^{115}\)

Florida restricts the use of declarant-unavailable hearsay in additional respects. Federal Rule 804(b)(2) allows statements under belief of impending death in homicide prosecutions and civil cases; Florida allows them only in homicide cases.\(^{116}\) Federal Rule 804(b)(3) allows use of declarations against penal interest; in criminal cases, however, where such declarations are offered to exculpate the accused, they are admissible only if their trustworthiness is indicated by corroborating circumstances. Florida's declarant-unavailable exception includes declarations against proprietary or pecuniary, but not penal, interests.\(^{117}\)

\(^{109}\) In civil cases, use of former testimony is governed by Fla. Stat. § 92.22 (1973). That section states the unavailability requirement much more broadly than the Federal Rules; § 92.22(4) requires "[t]hat a substantial reason [be] shown why the original witness or document is not produced."

Use of the former testimony exception in criminal cases was approved in Richardson v. State, 247 So. 2d 296 (Fla. 1971), citing Blackwell v. State, 86 So. 244 (Fla. 1920).


\(^{111}\) See Putnal v. State, 47 So. 864 (Fla. 1908).

\(^{112}\) See Habig v. Bastian, 158 So. 508 (Fla. 1935).

\(^{113}\) See Anderson v. Gaither, 162 So. 877 (Fla. 1935). See also Fla. Stat. § 92.22(4) (1973). Fla. H.R. 471 § 1 (1975) (§ 90.804) would adopt the federal criteria and apply them uniformly to all declarant-unavailable hearsay exceptions.

\(^{114}\) See Johnson v. State, 58 So. 540 (Fla. 1912); Coatney v. State, 55 So. 285 (Fla. 1911).

\(^{115}\) This question is not often litigated in Florida. S. Gard, FLORIDA EVIDENCE Rule 161, at 238 (1967). One case that purports to rule on the subject makes no mention of a showing of unavailability, and the holding of admissibility might well have been made under a party-agent admission rationale. See Wise v. Western Union Tel. Co., 177 So. 2d 765 (Fla. 1st Dist. Ct. App. 1965). Francis v. State, 508 So. 2d 174, 176 (Fla. 1st Dist. Ct. App. 1975), implies that although death of the declarant is the sole "traditional" criterion of unavailability, the court is willing to recognize illness, insanity, absence from the jurisdiction, incompetency through interest, and exercise of the constitutional privilege against self-incrimination. Fla. H.R. 471 § 1 (1975) (§ 90.804) would solidify and define this exception.

\(^{116}\) See Johnson v. State, 58 So. 540 (Fla. 1912); Coatney v. State, 55 So. 285 (Fla. 1911). This was also the common law rule. C. McCormick, EVIDENCE § 283 (2d ed. 1972). Fla. H.R. 471 § 1 (1975) (§ 90.804(2)(b)) would admit dying declarations in both civil and criminal cases.

\(^{117}\) Francis v. State, 508 So. 2d 174 (Fla. 1st Dist. Ct. App. 1975). In criminal cases this approach may infringe constitutional rights. See Chambers v. Mississippi, 410 U.S. 284 (1973), where the exclusion of a declaration against penal interest was held
Finally, the Rules leave federal courts a means by which they may do substantial justice in the event hearsay testimony is offered which does not fall within an enumerated exception. Under Rules 803(24) and 804(b)(5), a court may admit such evidence if it is offered to prove a material fact, it is more probative than any reasonably available alternative evidence, its admission will serve the interests of justice, and the opponent has an opportunity to prepare to meet it. Florida trial courts have no such discretion. The state supreme court, however, may occasionally ratify a trial decision admitting evidence without an established hearsay exception.\[118\]

VI. MISCELLANEOUS DIFFERENCES

There are several other areas of evidence law where discrepancies between federal and Florida rules are significant. This section is not exhaustive of these areas, but enough discussion will be presented to highlight differences in basic approach.

A. Offers to Compromise

Federal Rule 408 excludes evidence of offers and attempts to compromise a claim, and of conduct and statements included therein, to prove liability, invalidity, or amount of a claim. Florida has distinguished evidence of conditional or hypothetical offers, which is inadmissible, from unconditional admissions of facts supporting a claim, which may be admitted although part of a settlement offer.\[119\] It is uncertain whether state courts would adhere to this rule if the question were presented today.\[120\]

B. Liability Insurance

Evidence of insurance vel non is inadmissible to prove liability under Federal Rule 411, although it may be admitted to prove agency, ownership, control, or witness bias. Current Florida law allows in-

\[118\] See Tampa Elec. Co. v. Getrost, 10 So. 2d 83 (Fla. 1942). The proposed Florida code has no open-ended provisions comparable to those of the Federal Rules.

\[119\] Mutual Benefit Health & Accident Ass'n v. Bunting, 183 So. 321 (Fla. 1938).

\[120\] Cf. Jordan v. City of Coral Gables, 191 So. 2d 38 (Fla. 1966) (holding evidence of settlement between defendant and third party inadmissible). The proposed Florida code excludes "any relevant conduct or statements" in the negotiation process. Fla. H.R. 471 § 1 (1975) (§ 90.408).
urance companies to be joined as real parties in interest,\textsuperscript{121} and a severance may not be granted absent a justiciable issue related to insurance.\textsuperscript{122} Therefore the presence of the insurance interest cannot be hidden in many instances, although presumably evidence of insurance cannot be used to demonstrate or suggest liability.\textsuperscript{123}

\section*{C. Refreshing Recollection}

If a witness uses a writing to refresh his memory prior to testifying, Federal Rule 612 allows opposing counsel, if the court so permits in the interests of justice, to inspect the writing and cross-examine the witness on it. Florida cases allow trial courts the same discretion negatively phrased; that is, no error is committed by not allowing inspection by the adverse party.\textsuperscript{124}

\section*{D. The Rule of Sequestration}

Federal Rule 615 allows the court to exclude witnesses during presentation of others' testimony. An exception is recognized for parties, agents of corporate parties, and persons essential to the presentation of a party's case. This last category applies to criminal cases; it allows the federal prosecutor to have an investigative agent present for consultation throughout the trial, to counter the advantage the defense supposedly enjoys in consulting the accused.\textsuperscript{125} The Rule's wording suggests that the exclusion of such agents from the effect of "the rule" is mandatory: where the prosecutor demonstrates need, sequestration is not authorized. In Florida, permitting a witness to remain in court is discretionary.\textsuperscript{126}

\begin{enumerate}
\item Shingleton v. Bussey, 223 So. 2d 713 (Fla. 1969).
\item Stecher v. Pomeroy, 253 So. 2d 421 (Fla. 1971).
\item Mention of insurance in a context that may suggest liability might be prejudicial, depending on the statement itself and the circumstances. See Allred v. Chitten-den Pool Supply, Inc., 298 So. 2d 361 (Fla. 1974); Pierce v. Smith, 301 So. 2d 805 (Fla. 2d Dist. Ct. App. 1974). Likewise, some federal cases hold that in some contexts mention of "insurance" at trial may be grounds for mistrial. See Corbett v. Borandi, 375 F.2d 265 (3d Cir. 1967); Ingalls Shipbuilding Corp. v. Trehern, 155 F.2d 202 (5th Cir. 1946). Presumably Florida courts would be more tolerant in direct action cases, since the company counsel has an opportunity to rebut or object to unfair remarks.
\item Senate Report 26.
\item West v. State, 6 So. 2d 7 (Fla. 1942). In that case the witness was allowed to remain even though his presence was not shown to be essential to the prosecution. Therefore, the Federal Rule may in some cases disadvantage defendants less than the Florida approach. The proposed Florida code is silent on the point.
\end{enumerate}
E. Basis for Expert Opinion Testimony

Federal Rule 703 allows an expert to state his opinion even when the underlying facts or data are not admissible in evidence. Florida law allows the expert to testify only on the basis of his personal examination and observations, on the basis of others' testimony if the expert has been present in court and heard it all, or in response to a hypothetical question. Facts submitted in a hypothetical question must be supported by evidence already in the record or by reasonable inference therefrom. Thus experts may not rely on facts propounded by counsel prior to testimony, or on the out-of-court statements and opinions of others, even if reasonably relied upon by experts in that area generally. This restriction may encourage the use of awkward, time-consuming hypotheticals, and is at variance with the actual diagnostic practice of experts.

F. Best Evidence

Federal Rule 1003 relaxes the best evidence rule. It allows admission of duplicates, including carbon copies, photocopies, and chemically produced copies, to the same extent as an original unless a genuine question is raised as to authenticity, or unless it would be unfair to admit a duplicate (as with a negotiable instrument). Florida law allows admission of duplicates only where the original is unavailable, or where a statute specifically authorizes admission of duplicates. Further, the state appears to impose a hierarchy of secondary evidence; the availability of any level of secondary evidence renders inadmissible the levels below it. The hierarchy extends from

129. See Ehrhardt, supra note 8, at 707-10. The proposed Florida code settles this issue by not requiring the basis for expert testimony to be admissible if of a kind reasonably relied upon by experts in the subject to support the opinion expressed. Fla. H.R. 471 § 1 (1975) (§ 90.704). Section 90.705 includes an additional safeguard for the party against whom the expert opinion is offered: the opportunity to voir dire the witness as to the facts underlying his opinion prior to testimony as to the opinion itself. Federal Rule 705 allows disclosure only on cross-examination, or where the court so requires.
131. See Florida Cent. & Pac. R.R. v. Seymour, 33 So. 424 (Fla. 1902); cf. Fla. STAT. §§ 15.16 (Department of State records); 18.20(4) (State Treasury records); 28.30(4) (circuit court records); 229.781(1) (Department of Education records); 321.23(3) (1973) (Department of Highway Safety records); Fla. STAT. § 92.12 (Supp. 1974) (certified copies of instruments and records). Generally, the contents of any public record inconvenient to remove may be proved by a duly authenticated copy.
carbon copies to photocopies,\textsuperscript{132} to copies of copies.\textsuperscript{133} The Federal Rule makes no such distinctions.

\textbf{G. Weight and Sufficiency}

A difficult final question is whether, in a federal action decided under state substantive law, issues of weight and sufficiency of evidence are resolved by reference to federal or state law. The Federal Rules are silent on this point. A plurality of circuits, including the Fifth, looks to federal law on weight and sufficiency.\textsuperscript{134} Despite the conflict among circuits, the Supreme Court has yet to rule on the issue.\textsuperscript{135} Where each forum looks to its own law for guidance on so vital a question, the incentive to forum shop is increased.

\textbf{VII. CONCLUSION}

This discussion of the conflicts between federal and Florida evidence law suggests certain underlying jurisprudential differences. The following observations are speculative insofar as they rest only on the differences between the two forums and not on the many similarities.

First, Florida law is more prohibitive than the Federal Rules in admitting evidence generally. Restrictions in the areas of competency (especially the Deadman's Statute), impeachment, and hearsay are examples. But the Florida rules are not always more restrictive; Florida is more lenient in permitting impeachment by prior conviction, for example. Perhaps the Federal Rules contemplate a more sophisticated jury, or at least one capable of appreciating for itself that some forms of testimony are suspect. By exposing the factfinder to a greater volume of relevant information, the Federal Rules promote "truth-finding" as a trial goal at the expense of such other values as simplicity and communicational privilege.\textsuperscript{136}

\textsuperscript{132} Wicker v. Board of Public Instruction, 31 So. 2d 635 (Fla. 1947). Fla. H.R. 471 § 1 (1975) (§§ 90.1001(4), .1004) makes none of these distinctions.

\textsuperscript{133} Morris Kirschman & Co. v. Garrett, 308 So. 2d 575 (Fla. 1st Dist. Ct. App. 1975); Continental Aviation Corp. v. Southern Bell Tel. & Tel. Co., 173 So. 2d 750 (Fla. 3d Dist. Ct. App. 1965).

\textsuperscript{134} See ABC-Paramount Records, Inc. v. Topps Record Distrib. Co., 374 F.2d 455 (5th Cir. 1967); Annot., 10 A.L.R. Fed. 451 (1972). The Fourth, Seventh, Ninth and Tenth Circuits have also held that federal law controls as to weight and sufficiency in diversity cases. The Sixth and Eighth Circuits have held state law controls. The Second and Third Circuits have had mixed results. Annot., supra.

\textsuperscript{135} In Dick v. New York Life Ins. Co., 359 U.S. 437 (1959), the issue was passed over because both parties assumed state law governed.

\textsuperscript{136} As a sort of obbligato, the Rules impose a greater burden of investigation and persuasion on the opponent of the evidence. Rothstein, \textit{Some Themes in the Proposed Federal Rules of Evidence}, 33 Fed. B.J. 21 (1974). This approach, Rothstein suggests,
Secondly, Florida law seems to discourage judicial initiative. While federal law does not require participation by the bench, the Rules allow it and there is no inhibitive standard for review other than "abuse of discretion." It may not be possible to reconstruct from a transcript the subtle effects of judicial initiative. Therefore, individual litigants may feel less certain and secure in presenting their cases, and appellate courts may feel the system less uniform. Again, the Federal Rules apparently presume the jury is capable of withstanding minor judicial infelicities that do not amount to abuse of discretion. The federal judge at a pretrial conference under the Federal Rules of Civil Procedure is allowed a similarly activist role in simplifying and ordering the trial process.

Finally, neither forum places a premium on the simplicity of its evidence law. In Florida this difficulty stems partly from an ad hoc approach to rulemaking that renders the law difficult to locate. That approach also leaves gaps in which it is uncertain what principles will apply. The Federal Rules are simpler in that general principles are easier to recognize, and ancient aberrations like the Deadman's Statute are left out. Yet the Federal Rules are not simplistic; they are a scholarly product that has, in places, been mischievously compromised. At least one commentator considers the lack of simplicity a major defect.

The advantages of codified rules, and of the Federal Rules in particular, should be obvious by this time. While evidence codifications cannot reduce the number of trials, they can, by virtue of easy access and comprehensiveness, streamline the trial process and thereby alleviate crowded dockets somewhat. Evidence codification should also reduce the number of appeals on evidentiary points. Furthermore, if lawyers spend less time niggling over existing common law rules outside the jury's hearing, then the jury's (and perhaps the parties' and witnesses') confidence in the trial process will increase. When codification is combined with an approach to factfinding that allows more relevant information to reach the jury, the overall benefit is substantial.

Evaluated from the perspective of the Federal Rules, many aspects of Florida evidence law seem illogical and antiquated. Moreover, the

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hurts the accused in criminal proceedings, where exclusion usually favors the defense. Consider the effect of Federal Rules 201 (judicial notice), 405 (methods of proving character), 601 (general rule of competency), 706 (court appointed experts), and the liberal rules of Articles VIII (hearsay) and IX (authentication of documents). "Street wisdom" suggests that these provisions will be of little comfort to the defense.

137. See, e.g., notes 11-20 and accompanying text supra.
138. See Weinberg, supra note 6, at 607.
number of significant variances between state and federal evidence law creates considerable practical problems for Florida attorneys. Florida evidence law needs revision and codification. A few unsettled questions notwithstanding, the Federal Rules should prove a major success. Florida would do well to follow the federal example.

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