Preface

One by-product of our English heritage is that until the latter quarter of the twentieth century the admissibility of evidence in American courts was, by and large, determined by the "common law method." An evidential holding was made in one case, was reported, and was then cited as precedent in a subsequent case. The more commonly cited holdings became known as "rules."

In the early days of this country, courts regularly cited cases from the King's Bench and Queen's Bench in England as precedent. Eventually, as the number of reported American decisions grew, citations to English cases became less frequent. American courts increasingly cited their own prior opinions as authority on points of evidence.

In the latter half of the twentieth century, American courts, led by the United States Supreme Court under Chief Justice Earl Warren, held that some evidential rulings are mandated by federal and state constitutional provisions. These are mostly rulings that restrict the admission of evidence against defendants in criminal cases.

Legislatures, from time to time, have enacted particular rules of evidence, which the courts generally enforce. In Pennsylvania, the Dead Man's Act (42 Pa.C.S. § 5930), the Uniform Business Records as Evidence Act (42 Pa.C.S. § 6108), and the Rape Shield Act (18 Pa.C.S. § 3104), are prominent examples.

Written rules, or codes, of evidence, though long advocated academically, did not become part of the judicial landscape in the United States until well into the twentieth century.

In 1942 the American Law Institute promulgated the Model Code of Evidence. It got generally good reviews, but nobody adopted it. In 1953 the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Rules of Evidence. This was, in essence, an improved version of the Model Code of Evidence. It met the same reception as the Model Code, at first.

On January 1, 1964, Kansas broke the ice and became the first state to adopt written rules of evidence. California followed the next year. Then came New Jersey.

In the meantime, the United States Supreme Court became interested. In 1961 Chief Justice Warren appointed an advisory committee to study the feasibility and advisability of drafting rules of evidence for use in the federal courts. It recommended that such rules be drafted. Therefore, in 1965, the Supreme Court appointed an advisory committee to draft them. It did so. The rules were approved and promulgated by the Supreme Court in November, 1972, to take effect on July 1, 1973. Congress promptly intervened, threw out the rules on privileges, made some modifications to the other rules, and enacted them into law. The Federal Rules of Evidence took effect on July 1, 1975.

The adoption of the Federal Rules of Evidence had a bandwagon effect on the states, which, one by one, began adopting written rules of evidence patterned after them. Approximately three-quarters of these rules have been adopted by states' highest courts. The rest have been adopted by states' legislatures. The legislative enactments are usually referred to as "codes."

On October 1, 1998, Pennsylvania became the forty-third state to adopt written rules of evidence. Connecticut has since become the forty-fourth state to do so. Illinois has become the forty-fifth.

The Supreme Court of Pennsylvania promulgated the Pennsylvania Rules of Evidence pursuant to Article V, Section 10(c), of the Pennsylvania Constitution, which empowers it "to prescribe general rules governing practice, procedure and the conduct of all courts" in the Commonwealth.

Article V, Section 10(c), though, contains several express limitations on the Supreme Court's rule making power. One of them is that rules adopted by it must "neither abridge, enlarge nor modify the substantive rights of any litigant."

At first blush, it appears that many of the Pennsylvania Rules of Evidence do abridge, enlarge, or modify the substantive rights of litigants. However, the Supreme Court has held that it may adopt rules under Article V, Section 10(c), even though its rules have "a collateral effect on a substantive right." In *Laudenberger v. Port Authority of Allegheny County*, 436 A.2d 147, 155 (Pa. 1981), app. dismissed sub nom. *Buchheit v. Laudenberger*, 456 U.S. 940 (1982), the Pennsylvania Supreme Court, upholding the constitutionality of Pa.R.C.P. 238 (delay damages), said:

> [T]he fact that a rule does involve the substantive rights of litigants should not mean that the rule is an inappropriate topic for Supreme Court rule-making. Most rules of procedure will eventually reverberate to the substantive rights and duties of those involved. We therefore must agree with our brethren in New Jersey that:
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> > "an absolute prohibition against rules which merely affect substantive rights or liabilities, however slight such effect may be, would seriously cripple the authority and concomitant responsibility which have been given to the Court by the Constitution."
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> *State v. Leonardis*, 73 N.J. 360, 375 A.2d 607, 614 (1977). See also *Fehrenbach v. Fehrenbach*, 42 Wis.2d 410, 167 N.W.2d 218 (1969). We certainly do not intend to, and will not, promulgate rules in contravention of the constitutional prohibition against abridging, enlarging or modifying substantive rights. However, to interpret this provision too narrowly affects an equally offensive circumscription of our constitutional duties. As we have stated previously, the legislature is forbidden to act in the field of procedure; we are bound to do so by the terms of our authority. This Court should not be prevented from exercising its duty to resolve procedural questions merely because of a collateral effect on a substantive right.

Article V, Section 10(c), of the Pennsylvania Constitution also provides, most importantly: "All laws shall be suspended to the extent that they are inconsistent with rules prescribed under these provisions."

The Pennsylvania Rules of Evidence do not expressly suspend any statutory rules of evidence. Indeed, the rules take pains to accommodate various evidential enactments of the legislature. In particular, Article V of the rules does not adopt any rules of privilege. However, where any inconsistency is found between the Pennsylvania Rules of Evidence and a statute, the rules trump the statute.

Of course, the Pennsylvania Rules of Evidence overrule any prior inconsistent case law.

The Pennsylvania Rules of Evidence follow the format of the Federal Rules of Evidence, as do the rules in 43 other states. (Kansas and California still follow the format of the Uniform Rules of Evidence that were promulgated by the National Conference of Commissioners on Uniform State Laws in 1953.)

Substantively, however, the Pennsylvania Rules of Evidence are not a tight fit with the Federal Rules of Evidence. When a federal rule conflicted with prior Pennsylvania case law, or a Pennsylvania statute, the Pennsylvania Rules of Evidence usually, but not always, rejected the federal formulation in favor of the status quo. In short, the Pennsylvania Rules of Evidence, by and large, are old evidential wine in a new bottle.

On March 18, 2013, the Pennsylvania Rules of Evidence were "restyled," ostensibly to clarify them and make them more readable. This was a copycat reaction to the restyling of the Federal Rules of Evidence that took effect on December 1, 2011.

This book sets forth the current text of each Pennsylvania Rule of Evidence, provides an analysis of the rule, cites leading cases and pertinent statutes, and summarizes, for purposes of comparison, its federal counterpart. The Committee Comment—2013 that directly follows each rule is that of the Pennsylvania Supreme Court's Committee on Evidence.

The Pennsylvania Rules of Evidence do not define or attempt to codify presumptions. To find Pennsylvania law on presumptions, the practitioner must consult case law and an occasional statute. Presumptions are covered in chapter 3 in this book.

The Pennsylvania Rules of Evidence do not codify testimonial privileges, either. To find Pennsylvania law on testimonial privileges, the practitioner must consult case law and a few statutes. Testimonial privileges are covered in chapter 5 in this book.

The Pennsylvania Rules of Evidence do not purport to codify evidential rulings that are based on federal or state constitutional provisions. Here, again, the practitioner must consult case law. References to the most important of these cases are made under appropriate topics in this book.

The Pennsylvania Rules of Evidence leave intact a substantial number of evidential statutes, including Pennsylvania's notorious Dead Man's Act, 42 Pa.C.S. § 5930 (see Author's Analysis in chapter 6, section 6.01, in this book).

In short, when the Pennsylvania Rules of Evidence cover an evidential issue, and they cover most of them, the rules are paramount. When the rules don't cover an evidential issue, case law, and occasionally a statute, must be consulted, the same as before the rules were adopted.

This book is a quick and practical guide to the Pennsylvania law of evidence. The first 10 chapters explain the Pennsylvania Rules of Evidence, and compare them to their federal counterparts. Chapters 3, 5, and 11 explain important components of Pennsylvania evidence that are not encompassed by the written rules, including presumptions, testimonial privileges, the collateral source rule, the corpus delicti rule, the parol evidence rule, res ipsa loquitur, and the seat belt rule.

The Federal Rules of Evidence apply in cases in the federal courts. Those rules are set forth in this book following their Pennsylvania counterparts, along with explanations of any significant differences between them and the Pennsylvania Rules of Evidence, plus a synopsis of leading cases interpreting and applying them from, in particular, the United States Supreme Court and the United States Court of Appeals for the Third Circuit.

The Federal Rules of Evidence became effective in 1975 and have been amended, piecemeal, from time to time since then. On December 1, 2011, a rewording (called a "restyling") of the federal rules took effect. This restyling was intended to make the rules more user-friendly, i.e., more readable. This book quotes and analyzes the current text of the Federal Rules of Evidence.