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## Symposium: Comparing New York and Federal Evidence Law - A Brief Look at New York's Efforts to Codify Its Law of Evidence

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## **Symposium: Comparing New York and Federal Evidence Law**

### **A Brief Look at New York's Efforts to Codify Its Law of Evidence**

*Hon. George C. Pratt:*

From there we will move onto Professor Barbara Salken, Pace University. Professor Salken is going to talk about the need to codify the rules of evidence in the state, perhaps, somewhat akin to the Federal Rules of Evidence.

*Professor Barbara C. Salken\*:*

#### Introduction

Good Morning. Thank you, Judge Pratt. I am going to speak to you today about New York's long and somewhat tortuous efforts to codify its law of evidence.<sup>1</sup> Most of us think of New York as one of the nation's most progressive states. After all, it was one of the first jurisdictions to legalize abortion,<sup>2</sup> has been in the forefront of environmental regulation,<sup>3</sup> and ironi-

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\* Professor of Law, Pace University. B.A., Skidmore College, 1969; J.D., Brooklyn Law School, 1975.

1. This speech was based on a previously published article, Barbara C. Salken, *To Codify or Not to Codify: That is the Question: A Study of New York's Efforts to Enact an Evidence Code*, 58 BROOK. L. REV. 641 (1992).

2. See generally N.Y. PENAL LAW § 125.05(3) (McKinney 1970). This rule states: "An abortifacient act is justifiable when committed upon a female with her consent by a duly licensed physician acting (a) under a reasonable belief that such is necessary to preserve her life or (b) within twenty-four weeks from the commencement of her pregnancy." *Id.*

3. See 1911 N.Y. LAWS 647 (prohibiting sludge and other pollutants to be placed in the vicinity of oyster beds and providing both criminal penalties and liability for damage).

cally, has been the historic leader in American codification movements.<sup>4</sup> Yet, New York is one of only seven states that has not codified its law of evidence.<sup>5</sup> It is not as if New York has ignored the debate. There have been efforts to codify its law of evidence for almost 150 years.<sup>6</sup> Six complete codes have been offered to the New York legislature, each meeting the same unsuccessful fate.<sup>7</sup> As in many of our sister states, the modern efforts to codify have been sparked by the decision to codify the Federal Rules of Evidence.

During the 1950's and 60's, the rules of evidence in federal courts came under attack for two principal reasons. First, federal procedural rules made it difficult to identify whose evidence law (state or federal) applied in a particular case.<sup>8</sup> Secondly, the entire body of evidence law had been criticized for many years by academic commentators for being archaic and confusing.<sup>9</sup> It took the Supreme Court and Congress over ten years to finally enact the Federal Rules of Evidence.<sup>10</sup> Both the widespread interest in the possibility of uniform evidence law and general satisfaction with the final product led to substantial interest among the states in codifying their own law. Thirty-four of the forty-three states have been codified their evidence law have done so based on the Federal Rules of Evidence.<sup>11</sup>

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4. See Salken, *supra* note 1, at 649-52 nn. 46-73 and accompanying text.

5. See Salken, *supra* note 1, at 642 (stating that New York, Connecticut, Illinois, Indiana, Maryland, Massachusetts and Virginia are the only states without evidence codes).

6. See Salken, *supra* note 1, at 652-62 nn. 74-150 and accompanying text.

7. See Salken, *supra* note 1, at 653, 659-62 nn. 80-85, 125-50 and accompanying text.

8. See Salken, *supra* note 1, at 656 nn. 104-06 and accompanying text.

9. See Salken, *supra* note 1, at 656-57 nn. 107-10 and accompanying text.

10. See Salken, *supra* note 1, at 657-58 nn. 111-19 and accompanying text.

11. The thirty-four states that have codified their law of evidence on the model of the Federal Rules of Evidence are: ALASKA STAT., R. EVID. §§ 101-1103 (1992); ARIZ. REV. STAT. ANN., R. EVID. §§ 101-1103 (1992); ARK. CODE ANN., R. EVID. §§ 101-1102 (Michie 1992); COLO. REV. STAT., R. EVID. §§ 101-1103 (1984 & Supp. 1990); DEL. CODE ANN., R. EVID. §§ 101-1103 (1991); FLA. STAT. ANN. §§ 90.101-.958 (West 1979 & Supp. 1992); HAW. REV. STAT., R. EVID. §§101-1102 (1985 & Supp. 1991); IDAHO CODE R. EVID., §§ 101-1103 (1992); IOWA CODE, R. EVID., §§101-1103 (1984 & Supp. 1992); LA. CODE EVID. ANN. (West Sp. Pamph. 1992); ME. REV. STAT. ANN., R. EVID. (West 1991); MICH. COMP. LAWS, R. EVID. §§ 101-1103 (1992); MINN. STAT. ANN., R. EVID. 50 §§101-1101 (West 1980 & Supp. 1992); MISS. CODE ANN. §§13-1-1 to -153 (1972 & Supp. 1991); MONT. CODE ANN. §§ 26-10-101 to -1008 (1991); NEB. REV. STAT. §§ 27-101 to -1103 (1988 & Supp. 1992); NEV.

## I. New York's Attempt at Codification

Like the rest of the country, New York considered joining the Federal Rules of Evidence bandwagon. In 1976, a team of consultants was formed to research and draft a code, and an advisory panel was created to screen the product before submission to the legislature.<sup>12</sup> New York's first modern efforts were not designed to mimic the federal rules. Rather, the federal rules were to be the organizational model with California's Evidence Code and New York's common law as substantive guide posts.<sup>13</sup> It turned out, however, that the draft code was much more like the Federal Rules of Evidence than anyone had anticipated.<sup>14</sup> The final bill was sent to committee, where it died the slow death of a study bill. A very similar bill was submitted a few years later and found a similar fate.<sup>15</sup> The latest effort took a different track and came much closer to passing.

In 1980, the Law Revision Commission formed a working group, headed by Professor Robert Pitler of Brooklyn Law School, which genuinely tried to codify New York's common

REV. STAT. §§ 47.020-52.395 (1991); N.H. R. EVID. §§ 100-1103 (1992); N.M. STAT. ANN., R. EVID. §§ 11-101 to -102 (Michie 1986); N.C. GEN. STAT. § 8C-1, Rules 101 to 11-2 (1988); N.D. CENT. CODE, R. EVID. §§101-1103 (1990-91); OHIO REV. CODE ANN., R. EVID. §§ 101-1103 (Anderson 1992); OKLA. STAT. ANN. tit. 12, §§ 2101-3103 (West 1980 & Supp. 1992); OR. REV. STAT. §§ 40-010 to -585 (1991); R.I. GEN. LAWS, R. EVID. (1991-92); S.D. CODIFIED LAWS ANN. §§ 19-9-1 to 19-18-8 (1987 & Supp. 1992); TENN. CODE ANN., R. EVID. §§ 101-1102 (1990-91); TEX. CODE ANN., TEX. CIV. R. EVID., and TEX. CRIM. CODE EVID. (1990-91); UTAH CODE ANN., R. EVID. (1992); VT. STAT. ANN., R. EVID. §§ 101-1103 (1983 & Supp. 1991); WASH. REV. CODE ANN. §§ 5.04-5.64 (West 1963 & Supp. 1992); W. VA. CODE, R. EVID. §§ 101-1102 (1992); WIS. STAT. ANN. §§ 901.01-911.02 (West 1975 & Supp. 1991); WYO. STAT., R. EVID. §§ 101-1103 (1979).

Four other states have codes that pre-date the Federal Rules: ALA. CODE §§ 12-21-1 to -285 (1986 & Supp. 1992); CAL. EVID. CODE §§ 1-1605 (West 1966 & Supp. 1992); KAN. STAT. ANN. §§ 60-401 to -470 (1985 & Supp. 1991); N.J. STAT. ANN. §§ 2A:84A-1 to -49 (West 1976 & Supp. 1992).

The remaining five states have modern codes that are not based on the federal model: GA. CODE ANN. §§ 24-1-1 to -154 (Michie 1982 & Supp. 1992); KY. REV. STAT. ANN. §§ 422-01-990 (Michie/Bobbs-Merrill 1992); MO. REV. STAT. §§ 490.010-170 (1986 & Supp. 1992); PA. STAT. ANN. tit. 42, § 6101 (1982 & Supp. 1992); S.C. CODE ANN. §§ 19-1-10 to -70 (Law. Co-op, 1985 & Supp. 1991).

12. STATE OF NEW YORK, REPORT OF THE LAW REVISION COMMISSION FOR 1977, at 10 (1977).

13. *Id.* at 13.

14. See Joseph M. McLaughlin, *Trends, Developments, New York Trial Practice: Code of Evidence*, 183 N.Y. L.J. 1 (May 9, 1980).

15. See Salken, *supra* note 1, at 660-61 nn. 138-45 and accompanying text.

law.<sup>16</sup> At one point, the group even tried to create its own numbering system. In the end, however, the universal language that the federal numbering system has become made creating a system unique to New York counter-productive. The substantive rules of the proposal, however, are very true to New York's common law.

Codifying New York's common law of evidence was no easy task. New York's law is dispersed throughout both judicial decisions and statutes. In fact, some individual rules are found in both decisional and statutory law.<sup>17</sup> Additionally, even though New York has a significant amount of its law already in statutes, these provisions are widely scattered over 9000 frequently unrelated statutory provisions.<sup>18</sup> The latest draft succeeds in creating a code that reflects New York's common law, proposing changes only in those areas where there is a genuine need for reform. In some instances, the code accepts a provision from the federal rules, and sometimes the reform is entirely new, benefiting from lessons learned under the Federal Rules of Evidence. But by and large, the latest proposal is an accurate codification of New York's common law. I find it a fabulous resource for comparing New York law to the Federal Rules of Evidence, and I keep a copy of it on reserve in my school's library for my students to use.

Unfortunately, this latest draft has done no better in the legislature than its predecessors, notwithstanding the support of Governor Mario Cuomo and a reduction in the traditional opposition experienced by codification efforts that more clearly followed the Federal Rules of Evidence. This last proposal has joined its ancestors for a long rest in the Codes Committee, with no expectation that it will ever see the light of day.

## II. Support for Codification Lacks the Necessary Support

Why can't New York pass an evidence code? As with so many of the recurring issues before the legislature, the outcome depends primarily on the political benefits or defects associated

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16. See NEW YORK STATE LAW REVISION COMMISSION, A CODE OF EVIDENCE FOR THE STATE OF NEW YORK XIX (Mar. 21, 1991).

17. See Salken, *supra* note 1, at 664 nn. 158-61 and accompanying text.

18. See Eugene R. Canudo and Harold Korn, *Proposal for Codification of the New York Law of Evidence*, 45 N.Y. St. B. J. 527-28 (1973).

with passage of a code and very little on whether codification would be good for New York. Before we look at the merits of codification, let us briefly see between whom the dispute exists.

The crux of the problem may be that there is simply no political constituency for codifying the law of evidence. Except for lawyers, who cares whether the law of evidence is codified or not? Certainly not the general public. There may be particular trials that include unpopular rulings that briefly raise support for some specific legislation,<sup>19</sup> but this a far cry from any interest in legislating the whole of the common law of evidence and rounding up the myriad statutory provisions to create an organized, logical, and modern body of law to take into the courtrooms. In fact, of the thirty-four state codes based on the Federal Rules of Evidence, only ten of the bills were legislatively proposed.<sup>20</sup> The remainder were rules promulgated by the states' high courts and either became automatically effective or shortly became law if the legislature did not promptly act to delay or reject the promulgation.<sup>21</sup>

In New York, it is the legislature, with all its political baggage, that must accept or reject an evidence code. It was of particular interest to me in trying to figure out why we could not pass a code to learn that the same people opposed codification regardless of whether their individual objections were addressed by the drafters. There was opposition even after the successful effort to draft a code that did no more than enact the current law. I learned that codification is most stridently opposed by the defense bar. The criminal defense bar was certainly the most vociferous of the objectors,<sup>22</sup> but it was not alone. I found civil lawyers who principally represented defend-

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19. An example of this occurred in New Jersey in the case of Arthur Seale, who was convicted of murdering Exxon Executive Sidney Reso. This case is discussed in Salken, *supra* note 1, at 698 nn. 343-45 and accompanying text.

20. See Salken, *supra* note 1, at 699 n. 348 and accompanying text.

21. See, e.g., ARIZ. REV. STAT. ANN., R. EVID. (1994); COLO. REV. STAT., R. EVID. (1984 & Supp. 1993); MINN. STAT. ANN., R. EVID. (1980 & Supp. 1994).

22. See, e.g., *Proposed Code of Evidence for the State of New York; Joint Public Hearing on New York State Law Revision Commission, Senate Standing Committee on the Judiciary, Assembly Standing Committee on the Judiciary, Senate Standing Committee on Codes, and Assembly Standing Committee on Codes* 36 (July 24, 1990) (testimony of Gerald Lefcourt, on behalf of the New York State Association of Criminal Defense Lawyers); *Id.* at 290-96 (testimony of Archibald Murray, on behalf of the Legal Aid Society); *Id.* at 287-310 (testimony of Eric Seiff,

ants<sup>23</sup> equally opposed to codification efforts, while trial associations, bar associations, law professors, and the District Attorneys, with some reservations,<sup>24</sup> favored codification.<sup>25</sup> Since all the modern trends and all the modern codifications let in more evidence than is admissible under common law, it is not surprising that the proponents of codification in New York are lawyers who usually have the burden of proof, and the opponents are lawyers who must defend against their opposition's offer of proof.<sup>26</sup>

Personalities also count. As trial lawyers, the defense bar has more confidence that it will be able to sway the trial judge with lawyering skills, unencumbered by a specific rule at issue. Defense lawyers prefer the more comfortable stance of arguing fairness and prejudice, which so frequently persuades a trial judge. This personality or background issue may also contribute to the opposition experienced when the various bills get to the legislature. Many of the legislators are former defense attorneys and, for many years, the guardian of the all-important door from the Assembly Codes Committee has been a long-time opponent of codification, going back to his early training with the Legal Aid Society.<sup>27</sup>

### III. Would New York Benefit From Codification?

Well, let us move to the merits of the claim. Should we codify the law of evidence or should we remain with our traditional common law development? Historically, there have been three arguments in favor of codification of any law: codification makes the law more accessible; codification permits more uniform application of the law; and codification will permit system-

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on behalf of the New York Criminal Bar Association); *Id.* at 130-34 (testimony of Peter McShane, on behalf of the New York State Defenders' Association).

23. See James M. Furey, *Position Paper on the Proposed Code of Evidence by the Tort Reparations Committee of the New York State Bar Association* (1982); see also letter from David Siegel, Distinguished Professor of Law, Albany Law School, to Edward J. Hart, Chair of the New York State Tort Reparations Committee (Feb. 11, 1984) (on file with the author).

24. See Salken, *supra* note 1, at 663 n. 154 and accompanying text.

25. See Salken, *supra* note 1, at 662-63 nn. 151-56 and accompanying text.

26. See Salken, *supra* note 1, at 692-93 nn. 312-18 and accompanying text.

27. James Yates, formerly Legislative Counsel to the Speaker of the Assembly and prior to that counsel to the House Codes Committee.

atic reform. The same arguments have led the debate in New York. To me, the strongest of these arguments is the first. I think the law of evidence is hard to find. The law of evidence should be in every lawyer's pocket or purse whenever he or she is in court. The judge needs a copy directly on the bench. The three-way immediate conversations that follow the cry of an objection should start from the same place. It may be that extended dialogue or even a recess for research will be needed in a particular case, but evidentiary rulings are, by and large, handed down from the bench in the heat of a trial, and we need to move that initial discussion to language that has meaning to all of the participants.

Opponents argue that codification is not necessary because the law is easy to find and everyone already knows what it is. Opponents to codification argue that we already have two nice single volume treatises, *Richardson on Evidence*<sup>28</sup> or *Fisch on Evidence*,<sup>29</sup> that can and should be brought into every courtroom. My experience tells me that *Richardson* and *Fisch* are just not doing the job. Evidence is hard to learn and hard to work with. It will continue to be difficult even with a code. After all, the Federal Rules of Evidence did not turn us all into evidence scholars. However, I think the absence of a code makes it more difficult than it has to be.

In 1992-93, I spent a sabbatical year in the Manhattan District Attorney's office participating in some, and watching other, cases during trial. I was fortunate enough to share case loads with very excellent lawyers and was opposed by experienced and knowledgeable defense teams. However, I was appalled at the level of *knowledge* of evidence law I observed. Almost any out-of-court statement was *characterized* as hearsay regardless of the reason it was being offered. No one had a clue as to the proper foundation for offering a business record or whether there was a difference between a business record and a public document. The performances in the New York Supreme Court were far superior to those I encountered when I invited Westchester judges to sit for final trials in my trial practice classes. I had a judge that once ruled that a witness' testimony was not

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28. JEROME PRINCE, *RICHARDSON ON EVIDENCE* (10th ed. 1973).

29. EDITH L. FISCH, *FISCH ON NEW YORK EVIDENCE* (2d ed. 1977).



hearsay because the out-of-court declarant was sitting in the courtroom. I have had judges who would not let a witness publish a document to the jury when that very witness had just laid the foundation for the document's successful admission, because the judge felt that "the document speaks for itself." I have had judges who would not even let witnesses answer questions about a document that had been admitted in evidence because "the document speaks for itself."

Will a code help any of this? I think so. For about thirty years everyone has been learning evidence law by the federal rules numbers—this is a Rule 403 problem, or it is an exception to the rule prohibiting hearsay under Rule 803(4). We teach the Federal Rules of Evidence and students learn the Federal Rules of Evidence. For those who enter New York practice, the Federal Rules of Evidence become the backdrop against which they make their New York evidence arguments. Many of the rules are actually the same, but a New York judge does not want to hear Rule 803(4). He or she wants to hear what the New York Court of Appeals has said on that subject, and that is not easy to find since neither *Richardson* nor *Fisch* follow the format of the Federal Rules of Evidence. Since every recently educated lawyer was trained using the format of the Federal Rules of Evidence, the journey to find the New York equivalent can be tortuous and sometimes unsuccessful. Codification of New York's evidence law, particularly following the numbering system used in the Federal Rules of Evidence, will save hours of court time and much human effort.<sup>30</sup> I also think it is more likely to produce a result consistent with the current status of the law in New York.

I am sure Judge Pratt can tell you plenty of war stories about poor or incorrect evidence arguments made in federal court. However, I bet he does not have as many stories about judges developing local rules that completely ignore the Federal Rules of Evidence. One of the remaining arguments in favor of

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30. We learned this morning that Professor Richard Farrell of Brooklyn Law School, is currently completing a revision on *Richardson on Evidence*. Included in his work is a reorganizing of the treatise so that it will follow the format of the Federal Rules of Evidence. This is a wonderful step forward. If the new *Richardson's* can finally bring the law into the courtroom, my principal enthusiasm for codification will be accomplished. See JEROME PRINCE ET AL., *RICHARDSON ON EVIDENCE* (11th ed. forthcoming).

codification is that it permits unified application of the law in all trial courts and appellate divisions. Many local trial court judges have their own court rules that seem logical and convenient for running a court room but cannot be found in any case or statute. I think it is easier for the New York local judges because they do not have a nice little book that collects all the law in one place. Additionally, it is the rare instance that an appellate court will even know about these private rules. Evidence law, after all, is almost entirely a trial court call; it rarely gets mentioned in appellate cases, and even more rarely is it the subject of appellate reversal. Thus, trial court evidence rules can be unique in circumstances in which other rules would not survive. I think the introduction of a little book containing the law of evidence will reduce the incentive for developing new "private rules" and may even give everyone the sense that the floor has been swept clean, so that the law in the little book will be the new starting point, erasing "private rules" that currently exist.

The last argument in favor of codification has been that it can permit a systematic reform effort to modernize and clarify existing law. Although the most recent proposal made significant progress in clearing up what the law currently is, political restraints limited the amount of reform that could be proposed. Any hope that might have existed for the passage of this proposal in the legislature's current climate depended upon a reliable and faithful reproduction of the law as it stands. So for New York, reform may not be a strong argument in favor of codification.

This political quagmire also adds support to one of the opposition's strongest arguments, that codification will freeze the development of the law. Although I do not think the law will be entirely frozen at the point of codification, one must admit that the role of the courts will certainly be changed. Once the law of evidence is codified, the courts will no longer be able to develop new concepts and let the law grow in the slow incremental fashion case-by-case adjudication requires. Instead of seeking justice in the individual case, the courts will be limited to interpreting the intent of the legislature when it drafted the code. This does not mean that the law of evidence will come to a standstill and will be unable to move and grow as new problems

develop. Courts will always be called on to interpret the law and significant changes will be made in this way.<sup>31</sup>

Courts are not the only way to get meaningful change. Recent reform of evidence law has been much more likely from the legislature than from the courts. In fact, New York's Court of Appeals has been far away from the cutting edge of evidence law. New York's law of evidence is one of the more archaic collections of evidence rules in existence. For instance, New York is one of the few jurisdictions that continue the ancient voucher rule, which limits the ability of a lawyer to challenge a witness the lawyer has called to the stand.<sup>32</sup>

Like all appellate courts, the New York Court of Appeals cannot always change a rule even when it wants to. Courts must follow precedent and can only consider a question when it is actually posed in a real case. The legislature, on the other hand, is free to jump in whenever an issue presents itself. Assuming that the legislature would consider codification at all, there is no reason to think that it would not accept amendments if they become appropriate.

Ironically, this brings us to the last substantial objection raised by the opponents of codification. The opposition, led by the defense bar, is afraid that the evidence code will become a frequent subject of amendment and will result in politicizing the law in ways that will certainly hurt the criminal defendant.

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31. See Salken, *supra* note 1, at 684-89 nn. 267-300 and accompanying text.

32. See FLA. STAT. ANN. § 90.608(2) (West 1979 & Supp. 1994); MASS. GEN. LAWS ANN. ch. 233 § 23 (West 1986 & Supp. 1994); N.J. R. EVID. 20 (Gann 1991 & Supp. 1993); OHIO REV. CODE ANN. § 607 (Page's 1991 & Supp. 1993); VA. CODE ANN. §§ 8.01-43 (Michie 1992 & Supp. 1994); see also *Castillow v. Browning - Ferris Indus., Inc.*, 591 So.2d 43 (Ala. 1991) (stating that a hostile witness is an exception to Alabama's general rule that an attorney cannot impeach his own witness); *State v. Smith*, 82 A.2d 816 (Conn. 1951) (holding that since the State was surprised by witness's actions, they were allowed to impeach him); *Poole v. State*, 428 A.2d 434 (Md. 1981) (stating that only surprise, hostility, or deceit are exceptions to the voucher rule); *Hall v. State*, 165 So. 2d 345 (Miss. 1964) (explaining that witnesses may be impeached or cross-examined if they are hostile); *Commonwealth v. Brady*, 507 A.2d 66 (Pa. 1986) (discussing notion that surprise is not necessary in allowing a party to impeach their own witness as that rule is flexible in areas of truth and justice); *State v. Gomes*, 604 A.2d 1249 (R.I. 1992) (holding that interest of justice allowed prosecution to impeach own witness even though they were not completely surprised); *State v. Anderson*, 406 S.E.2d 152 (S.C. 1991) (stating that the decision to use the voucher rule is within the discretion of the trial court).

Defense lawyers fear that every time a big trial results in an acquittal, and some evidence provision can be identified as the culprit, the legislature will run in and make new law, responding to the injustice perceived in the newsworthy case without considering whether the reform has truly long-lasting benefits and considers policy and reliability questions.

To understand whether this fear is justified, I studied the amendments in the ten states where codes had been adopted by the legislature and the amendments to the Federal Rules of Evidence in the almost thirty years of their existence. My research simply does not support the fears of the objectors. Big trials may make bad law, but the fact of codification is simply not the stimulus. The legislature knows how to pass an evidence law whether the rest of the law is codified or not. There is no evidence that codified jurisdictions amend their law any more frequently than common law jurisdictions. Common law jurisdictions are perfectly free to pass particular rules that the legislature feels public pressure demands, whether the jurisdiction has a code or not.<sup>33</sup> New York's common law system did not stop the legislature from enacting a pro-victim statute after model Marla Hanson was slashed and subjected to intrusive cross-examination.<sup>34</sup> Now, I am not making a statement as to whether any of these changes are good or bad. It just seems to me that this kind of tinkering with the law is inevitable and has nothing to do with the codification movement.

### Conclusion

Should the law of evidence be codified in New York? I think it should, but I do not come away from this problem with a strong sense that codification is a critical imperative. I just think it will be better. I think it will be clearer and more available. The easier the law is to find, the more likely we will all be speaking the same language, struggling with the same concepts and eventually reaching the same conclusions. I do not think not having an evidence code is a calamity. I think it would be better, as do most of my academic colleagues. We think it will

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33. See Salken, *supra* note 1, at 696-703 nn. 334-69 and accompanying text.

34. N.Y. CRIM. PROC. LAW § 60.43 (McKinney 1992 & Supp. 1994). See Kevin Sack, *New York Limits Use of Sex History in Trials*, N.Y. TIMES, July 31, 1990, at B3.

let us move New York evidence law into the classroom and permit the students who become trial lawyers to take it with them when they enter the courtroom. Maybe Professor Farrell's new *Richardson's* will do the same thing. I must admit that I now think the probability of ever getting the legislature to pass one of these drafts is very slim. So I wish you good luck, Dick, and look forward to using *Richardson's* instead of a code for the foreseeable future. Thank you all for listening to these ramblings. I hope you learned something. I certainly enjoyed speaking with you.

*Hon. George C. Pratt:*

Thank you. Professor Salken. I was kind of disappointed at your last statement. You may be accurate as a predictor. There is another group that really has an interest in an evidence code and that is the judges. It is extremely helpful to judges to have the rules in a single place readily found. It forces lawyers to categorize their objections.

One comment that Professor Salken made was that there are very few appellate decisions that turn on evidence questions. This startled me when I got on the appellate court as a trial lawyer. An awful lot of my time was spent worrying about evidence problems, many of which never actually arose in the courtroom, but you have to be prepared for them. You never know when your adversary is going to object to something you want to get in.

On the trial bench, the dominant feature of evidence problems was the suddenness with which they arose and the urgency for the need for a decision.

The first trial I ever had as a district judge, we got things going, picked a jury, opening statements and so forth, and I kind of sat back and relaxed a little bit.

The attorney starts questioning the witness and suddenly I hear an objection. I had not heard the question, of course. And your instincts, of course are immediately defensive. What grounds? Hearsay.

I still haven't the foggiest notion what is going on. So I turned to the other attorney and asked, "What's your response to that?"

He said, "Well, I think it qualifies under the business records exception."

I go back to the objector, "Why didn't it qualify?" Well, he's offering this, and so forth. And they state their positions.

Suddenly, dead silence in the courtroom. Every eye in the courtroom is on me. I am supposed to say overruled or sustained. And it came as really a shock to me. The whole thing had taken maybe thirty or forty seconds. And how long can you sit? You can't very well say, "We'll take a recess. I'll ask my law clerk to pull down *Weinstein on Evidence*, and so forth."

Things have to move along, and so you make a decision. They are important decisions to the parties. They almost are never outcome determinative decisions.

I can only recall two or three cases that I have sat on as an appellate judge in the last ten years, where we have reversed because evidence was admitted or excluded. We frequently talk about evidence problems, but it is not the reason things get reversed.

Now, this problem with the pressure and the trial judge is what gives rise to what Professor Salken described as the development of local rules. Trial judges need quick identifiers, rules of thumb that let them respond instinctively to various objections. The codified rules of the federal rules are very useful in that regard.