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'The rules that are not rules' mark milestone

By: Robert J. Brink ◉ April 5, 2018



The Supreme Judicial Court recently announced the completion of the 10th annual edition of its "Massachusetts Guide to Evidence," which the Flaschner Judicial Institute, as the publisher of the official print edition, distributes to every judge in the state.

Commenting on the release of the inaugural guide a decade ago, the editors of the Massachusetts Practice Series volume on evidence spoke in superlatives, stating that "[t]his is the most important development in Massachusetts evidence law in over a

quarter century," representing "a sea change" in the authoritative organization of a body of law integral to every case adjudicated in the trial courts of the commonwealth. The welcome improvement was a long time coming but one perfectly adapted to the legal research needs of the bench and bar.

Following the promulgation of the Federal Rules of Evidence in 1975, Massachusetts soon thereafter joined scores of states in undertaking to draft similar codes of evidence — the great majority of which were adopted. The arguments for codification were compellingly consistent with other recent developments to modernize court procedure.

In 1974, for instance, the SJC adopted for the first time comprehensive new rules of civil and appellate procedure. An ambitious project on criminal rules was also underway. As one proponent put it, a complementary evidence code "would permit rational interlocking of already cross-referenced rules using similar language to mean similar things."

Thus, in 1976, upon the urging of the commissioners on Uniform State Laws and the Boston and Massachusetts bar associations, the SJC appointed an advisory committee to consider whether Massachusetts evidentiary law should be codified. After years of arduous work, the committee submitted its much-anticipated Proposed Rules of Massachusetts Evidence.

In 1982 — to the disappointment of many — a divided SJC surprisingly declined to adopt them. In its announcement, the court cited practical complexities involving the legislative process, noting "there would have to be careful coordinating with the Legislature to repeal, revise, or modify many statutes which deal with the admissibility and effect of evidence."

Also, there were "significant and arguably valid criticisms" of some proposed rules. More importantly, the court was concerned that promulgation of a formal code of evidence rules "would tend to restrict the development of common law principles pertaining to the admissibility of evidence."

At the same time, the court acknowledged that the proposed rules "have substantial value as a comparative standard in the continued and historic role of the courts in developing principles of law relating to evidence."

As might be expected, the SJC's rejection of the proposed rules did not quell the calls for a codification. The court's invitation to parties to cite the proposed rules, "wherever appropriate," may have even compounded the confused state of evidence law.

As the subtitle of a 1999 article in Lawyers Weekly ridiculing the notion of accessible "rules" of evidence lampooned: "In Massachusetts, Lawyers Must Scramble For Authority Because The Rules Are *'There Are No Rules.'*" (Emphasis added.)

The diehards continued the drumbeat for a code for decades. To them, rationalizing the common law of evidence into a single consolidated text of controlling authority was necessary to end the confusion of deciphering the "rules"

of evidence strewn in a maze of statutes and case reporters, a process that continued to befuddle both bench and bar.

To prove that point, one commentary observed that the federal courts had even been known to miss the correct Massachusetts rules because they were hidden in plain sight.



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It seemed to many that the only sensible solution was for the court to reconsider its earlier rejection and finally adopt a straightforward code modeled on the same organizational structure as the Federal Rules of Evidence (the proposed rules had followed that format).

"The bottom line is that all of us need a code," a 60-page law review article implored in 1993, "something to turn to for evidentiary guidance, and the importance of all of us using the same code, based on a format shared by [then] thirty-four sister states and the entire federal system, seems obvious."

The MBA, BBA and Massachusetts Academy of Trial Attorneys inevitably came to the same consensus, later joining in a resolution urging the court to address the bar's concerns.

At long last, the tide finally turned in 2006 with the SJC's creation of its Advisory Committee on Massachusetts Evidence Law with a mandate to prepare a "guide" —notably not a "code"— assembling "the current law [of evidence] in one easily usable document, along the lines of the Federal Rules of Evidence."

As Chief Justice Margaret H. Marshall envisioned, such a guide "will make our rules of evidence more accessible to bench, bar, and the public. It will improve the understanding, teaching, and presentation of Massachusetts evidence. It will advance the delivery of justice."

Beginning with the 2008 first edition, it has succeeded on all points.

The guide provides bench and bar with an accessible and authoritative statement of evidence law in a single volume organized on the same familiar scheme as its federal counterpart. It has no equivalent in the United States, in the sense that it contains both an authoritative statement of the Massachusetts law of evidence (the book of "rules that are not rules," as Chief Justice Ralph D. Gants once called it), and detailed explanatory notes that include annotated summaries of decisional and statutory law.

As its name confirms, it is not a "code" as such, but it is no less useful for that reason. It does not suggest modifications, adopt rules, or opine on the wisdom of future developments, but concentrates on the law of evidence as it is with the release of each new annual edition.

A prediction by the editors of the Massachusetts Practice Series volume on evidence that the Guide to Evidence will "soon be the most oft-cited evidentiary reference through the trial courts of the Commonwealth" appears to be accurate. Although that's a difficult proposition to prove definitively, there's abundant anecdotal evidence that both judges and seasoned trial lawyers swear by it.

The SJC deserves credit for creatively addressing the bar's concerns with an accessible and authoritative "guide" that prioritizes and chronicles the continuing development of common law principles of evidence over the constraints inherent in an inflexible "code."

And the court's Executive Committee on Massachusetts Evidence Law —currently led by Appeals Court Judge Peter W. Agnes Jr. (editor-in-chief) and Appeals Court Clerk Joseph F. Stanton (reporter) and comprising lawyers and judges too numerous to mention — deserves the applause of both bench and bar. The guide may not be primary law, but because of their collective labors, it is the closest thing to a "code" that Massachusetts lawyers and judges can get.

True to its title, the guide is the quickest and most reliable “map” to the correct evidentiary rule on an issue, whether, as noted in the SJC’s announcement, using the Flaschner Judicial Institute’s official print edition or the electronic version available without charge on the court’s website at <https://www.mass.gov/guides/massachusetts-guide-to-evidence>.

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