

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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**TO: Honorable Anthony J. Scirica, Chair
Standing Committee on Rules of Practice
and Procedure**

**FROM: Honorable Milton I. Shadur, Chair
Advisory Committee on Evidence Rules**

DATE: December 1, 2000

RE: Report of the Advisory Committee on Evidence Rules

I. Introduction

The Advisory Committee on Evidence Rules did not hold a Fall 2000 meeting. The Advisory Committee is working on a number of long-term projects, but none of them required immediate consideration by the Committee. This memorandum reports on the status of those long-term projects.

II. Action Items

No Action Items

III. Information Items

A. Consideration of Evidence Rules

At its April 2001 meeting the Committee will consider the possibility of proposing amendments to two Evidence Rules—Rules 608(b) and 804(b)(3).

1. Rule 608(b) — Evidence Rule 608(b) prohibits the admission of extrinsic evidence when used to impeach a witness' "credibility". Read literally, this would mean that extrinsic evidence could never be offered to prove any aspect of a witness' credibility. But the Supreme Court made clear in *United States v. Abel* that the term "credibility" really means "character for truthfulness." Impeachment on non-character grounds, such as for bias, is not covered by the extrinsic evidence limitation of Rule 608(b). *Abel* basically distinguishes a character attack (as to

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which extrinsic evidence is absolutely inadmissible) from all other forms of impeachment (as to which extrinsic evidence can be admitted subject to Rule 403).

After an extensive review of the case law, the Committee determined that a fair number of reported cases misapply current Rule 608(b) by invoking it to preclude extrinsic evidence offered for non-character forms of impeachment. Litigants also appear to be misinterpreting the Rule at the trial level, and many litigants apparently do not proffer extrinsic evidence for non-character impeachment because they believe that the Rule on its face prohibits it.

After discussion and deliberation at its April 2000 meeting, the Evidence Rules Committee directed the Reporter to prepare a draft amendment that would: 1) substitute the term “character for truthfulness” for the word “credibility” in Rule 608(b); 2) add language to the Rule to provide that where extrinsic evidence is prohibited, it cannot be referred to directly or indirectly (in order to prevent an abusive practice by which a party impeaching a witness’ character will try to smuggle in extrinsic evidence by referring to consequences suffered by the witness for his alleged misconduct); and 3) include language in the Committee Note specifying that the admissibility of extrinsic evidence offered to impeach the witness on grounds of contradiction, prior inconsistent statement, bias or lack of capacity is governed by Rules 402 and 403, not by Rule 608(b).

The proposed amendment to Evidence Rule 608(b) will be considered at the April 2001 meeting of the Evidence Rules Committee, with a view to proposing to the Standing Committee its release for public comment in 2001.

2. Rule 804(b)(3) — Evidence Rule 804(b)(3) provides a hearsay exception for declarations against penal interest. The Rule as written states that in criminal cases an accused must provide corroborating circumstances clearly indicating the trustworthiness of the statement before it can be admitted as a declaration against penal interest in the accused’s favor. This corroborating-circumstances requirement does not, by the terms of the Rule, apply to government-proffered declarations against penal interest. Nor does the corroborating-circumstances requirement apply on its face to civil cases. The Evidence Rules Committee has considered whether Rule 804(b)(3) should be amended to extend the corroborating-circumstances requirement to government-proffered hearsay and to civil cases. The Committee noted that the current one-way corroboration requirement has never been justified; that it resulted from an oversight during the legislative process; and that it has been criticized and rejected by many courts. The Committee has unanimously agreed that a unitary approach to the admissibility of declarations against penal interest would result in both fairness and efficiency in the administration of the Rule.

The Committee also determined that there is some dispute in the courts over the meaning of “corroborating circumstances.” The Rule leaves the term undefined, and the term is not used anywhere else in the Evidence Rules. The Committee therefore unanimously agreed that it would

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be useful to provide some guidance on the meaning of “corroborating circumstances” in a Committee Note.

After substantial discussion at the April 2000 meeting, the Reporter was directed to draft a proposed amendment and Committee Note to Rule 804(b)(3). That proposed amendment would: 1) apply the corroborating-circumstances requirement to all proffered declarations against penal interest, and 2) include in the Committee Note a non-exclusive list of factors that courts should take into account in determining whether the corroborating-circumstances requirement is met. The proposed amendment will be considered at the April 2001 meeting of the Evidence Rules Committee, with a view to proposing to the Standing Committee its release for public comment in 2001.

3. Rule 902 — The Committee has reviewed a Justice Department proposal to amend Rule 902 to provide for self-authentication of public documents by way of certification (to provide an alternative to the requirement of a seal). The Committee has made a preliminary determination that the costs of an amendment would not be justified unless the Justice Department can show that the requirement of a seal imposes a substantial problem in practice. Any hardship imposed by a sealing requirement is minimized by the current Rule 902(2), which provides for self-authentication of unsealed documents if an official affixes a seal to a certification that the document is genuine. The Rule 902(2) certification sealing requirement does not mandate a government seal; a certification would be sufficient if it bore a notary seal or the like. Therefore the Committee did not find a substantial need to proceed with an amendment to Rule 902 at this time. The Committee agreed to reconsider the proposed amendment if a survey conducted by the Department of Justice indicates that DOJ attorneys are having substantial problems in authenticating public records due to the sealing requirements of Rule 902.

B. Committee Report on Case Law Divergence From Rules or Notes

I am pleased to report that the Reporter’s article on Case Law Divergence from the Federal Rules of Evidence has been published by the Federal Judicial Center and is being widely distributed to judges and lawyers. The article was prepared by the Reporter at the direction of the Evidence Rules Committee, and was reviewed by the Committee before it was submitted for publication. The article highlights for lawyers and judges the existence of case law under the Evidence Rules that diverges materially from the text of a particular Rule, or from the accompanying Committee Note, or both. The article will be published in West’s Federal Rules Decisions, and West has also included the article as a special appendix to all of its statutory publications of the Federal Rules of Evidence.

C. Privileges

The Evidence Rules Committee continues to work on a long-term project to prepare provisions that would state, in rule form, the federal common law of privileges. This project will not necessarily result in proposed amendments, however. The Subcommittee on Privileges is working on draft rules for consideration by the Committee at the April, 2001 meeting. Those rules would codify: 1) the lawyer-client privilege; 2) rules on waiver; and 3) a catch-all provision similar to current Rule 501, that would permit further development of privileges. The Committee is aware that the Civil Rules Committee is also working on the subject of privilege waiver, and it looks forward to conferring with the Civil Rules Committee on this important project.