

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, 2001

RE: Report of the Advisory Committee on Evidence Rules

I. Introduction

The Advisory Committee on Evidence Rules did not hold a Fall 2001 meeting. The Advisory Committee has proposed amendments to Evidence Rules 608(b) and 804(b)(3), and these proposals have been released for public comment. The Advisory Committee is also working on two long-term projects, but those did not require immediate consideration by the Committee at a Fall meeting. This memorandum reports on the status of the proposed amendments and the long-term projects.

II. Action Items

No Action Items

III. Information Items

A. Proposed Amendments Released for Public Comment

At its June 2001 meeting the Standing Committee authorized the proposed amendments to two Evidence Rules—Rules 608(b) and 804(b)(3)—to be released for public comment.

The proposed amendment to Rule 608(b) would clarify that the Rule's preclusion of extrinsic evidence applies only if it is offered to prove the witness' character for truthfulness. Extrinsic proof when offered for any other form of impeachment, such as for bias or prior inconsistent statement, would remain governed by the balancing test of Rule 403. The proposed amendment refines the overbroad language of the existing rule, thereby clarifying the original intent of the drafters.

The proposed amendment to Rule 804(b)(3) would provide that a declaration against penal interest is admissible only if corroborating circumstances clearly indicate the trustworthiness of the statement. Currently the Rule requires a showing of corroborating circumstances if the statement is offered by a criminal defendant, but the Rule does not impose that requirement on statements proffered by the government in criminal cases or by any party in civil cases. The proposed amendment to Rule 804(b)(3) extends the corroborating circumstances requirement to all proffering parties, rendering it consistent with the vast majority of case law that reads an across-the-board corroborating circumstances requirement into the Rule. The Advisory Committee has concluded that the current one-way corroboration requirement has never been justified and that it resulted from an oversight during the legislative process. A unitary approach to the admissibility of declarations against penal interest would result in both fairness and efficiency in the administration of the Rule.

At its last meeting, the Standing Committee approved the release of both proposed amendments for public comments, but several members of the Committee expressed some concern about the proposed amendment to Rule 804(b)(3). These members suggested that the Advisory Committee consider, and seek input on, some specific questions with regard to the operation of the existing Rule and the impact of the proposed amendment. Some of the questions raised were:

1. the practical effect that a corroborating circumstances requirement would have on the government's ability to admit declarations against penal interest;
2. whether declarations against penal interest that exculpate the accused are sufficiently distinguishable from inculpatory statements so as to justify the application of a corroborating circumstances requirement to the former and not to the latter; and
3. the interaction between a corroborating circumstances requirement and the accused's right to confrontation.

The Advisory Committee is currently considering these questions and others. The request for public comment on the proposed Rule change was specifically designed to obtain information that would address the Standing Committee's questions and possible concerns about the amendment. Specific questions on which the Advisory Committee sought public comment are these:

1. In terms of trustworthiness, is there a difference between statements against penal interest when offered to exculpate an accused and such statements when offered to inculcate the accused? Are the circumstances under which exculpatory statements are or may be made different from those surrounding inculpatory statements in such a way as to justify, as a

bright-line rule of law, the asymmetry of the corroborating circumstances requirement in the current Rule?

2. Are there other examples of rules, evidentiary or otherwise, that are asymmetrical in the government's favor? If so, what is their justification?

3. Are there examples of government-proffered statements that have satisfied or would satisfy the against-penal-interest requirement of Rule 804(b)(3) but have not satisfied or would not satisfy a corroborating circumstances requirement?

4. Would the corroborating circumstances requirement add anything to the Rule that is not already required by the Confrontation Clause?

5. Several states, e.g., Kentucky and Texas, have written a two-way corroborating circumstances requirement into the state version of Rule 804(b)(3). How has the Rule operated in practice in those states? Have prosecutors been unduly burdened by the Rule?

The Advisory Committee is currently collecting public comments on both proposed amendments. Comments received to this point are highly supportive of both proposals. A public hearing on the proposed amendments is scheduled for January 23 in Washington, D.C.

B. 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 Advisory Committee at the April, 2002 meeting. Those rules would codify: 1) the lawyer-client privilege; 2) an interspousal privilege for confidential communications; 3) rules on waiver; and 4) a catch-all provision similar to current Rule 501, that would permit further development of privileges. The subcommittee on privileges is also working on proposals that would codify the psychotherapist-patient privilege and the governmental privileges.

C. Long-Term Issues

At its April 2002 meeting, the Evidence Rules Committee intends to consider three sources of information in order to determine whether there are any serious problems with the current Evidence Rules that might warrant a proposed amendment. Those sources are: 1. Rule changes proposed in legal scholarship; 2. federal case law that substantially diverges from the text of an Evidence Rule; and 3. significant circuit splits on the meaning of an Evidence Rule.

While considering these sources for suggested amendments, the Evidence Rules Committee retains its long-held view that amendments to the Evidence Rules are costly and should not be proffered simply for the sake of change. The Committee has always taken and will continue to take

a conservative approach on the question of Rule amendments. Amendments to an Evidence Rule will not be proposed unless the existing Rule is causing significant confusion, substantial dispute or unfair results.