

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, 1999**

**RE: Report of the Advisory Committee on Evidence Rules**

## **I. Introduction**

The Advisory Committee on Evidence Rules met on October 25<sup>th</sup> in Washington, D.C. It reviewed a number of possible long-term projects, but it is not proposing any amendments to the Federal Rules of Evidence at this time or in the near future. Part III of this Report provides a summary discussion of these long-term projects, which is more fully elaborated in the draft minutes of the October meeting attached to this Report.

## **II. Action Items**

**No Action Items**

## **III. Information Items**

### **A. Committee Report on Case Law Divergence From Rules or Notes**

The Committee is considering whether to prepare a report that would inform judges and practitioners 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 Committee believes

that divergent case law presents a trap for the unwary, not because the case law is wrongly decided but simply because the text of the Rule or the Note would not necessarily lead to an investigation of the case law. In a report to the Evidence Rules Committee, the Reporter noted that there are more than 30 examples of Rules in which there is substantial case law divergence from the text.

The Committee does not intend to propose new Committee Notes. The goal of the project would be to publish the Committee report alongside the Rules themselves, for example in the publications of the Evidence Rules prepared each year by West Group. The report would make clear that there is no intent on the part of the Committee to imply that courts have reached the wrong result in diverging from the text of any Rule. Instead the goal is to provide information to the bench and bar.

The Committee has directed the Reporter to sample entries for a possible report, focusing on three rules where the case law diverges significantly from the text: Evidence Rules 803(8), 804(b)(1), and Rule 1101. The Reporter will also prepare an introduction to the possible report. This introduction would set forth the goals of the report and emphasize that the report does not draw conclusions on the merits of the case law, and is designed only to assist the bench and bar by highlighting the situations in which the case law diverges from the Rule. The Evidence Rules Committee will consider this report at its next meeting.

## **B. Privileges**

The Subcommittee on Privileges has begun 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 Committee believes that an attempt to state the federal law of privileges would be useful even if amendments are never proposed or adopted, because the effort would at any rate be useful to the bench and bar for guidance on the current state of privilege law. The Subcommittee will start with attorney-client privilege, using the new ALI Restatement provision as a guideline. The Committee has resolved that any codification effort must include a residual provision (much like current Rule 501) that would permit federal courts to adopt and develop new privileges in light of reason and experience.

## **C. Other Evidence Rules**

At its October meeting the Committee discussed whether there are any other Evidence Rules that are in need of amendment. The Committee determined that no Rules are in need of amendment at this time. However, the Committee did resolve to investigate certain problems that might be arising under three Evidence Rules, to determine whether amendments to these Rules might be justified in the long-term. These three Rules are:

1. *Rule 608(b)* — The Reporter was directed to investigate whether courts are reaching inconsistent results in applying the exclusion on extrinsic evidence set forth in Rule 608(b). The Rule precludes extrinsic evidence when offered to prove “credibility”, but the Supreme Court has construed the limitation to apply only when the proponent is attacking the witness’ character for veracity. The Reporter will investigate whether lower courts have reached disparate results despite the Supreme Court’s decision.

2. *Rule 804(b)(3)* — Courts have reached different results on whether the corroboration requirement of the Rule applies to declarations against penal interest offered by the prosecution. There is also a difference of opinion over the degree of corroboration required under the Rule. The Reporter will prepare a report on these matters for consideration by the Committee at the next meeting.

3. *Rule 902* — The Rule provides for authentication of public documents by the use of a seal. Many states have discontinued the use of seals, however. This has created problems for the Justice Department when it is necessary to enter a state public record into proof. The Committee will consider whether Rule 902 should be amended to provide for an “update” of the provisions concerning seals.

#### **D. Attorney Conduct Rules**

The Evidence Rules Committee was asked to provide guidance to the Subcommittee on Attorney Conduct Rules. The specific question was whether the Subcommittee should continue its project. The Committee agreed that the project should continue. The Committee recognized that problems can arise from a proliferation of local rules when they conflict with state rules of professional responsibility. It also recognized the concerns of the Justice Department over state variations in Rule 4.2 and their potential effect on federal prosecutors. But the Committee expressed reservations about the draft rule of attorney conduct insofar as it 1) created a distinction between matters of professional responsibility and matters of procedure and 2) provided for preemption of state rules of professional responsibility in certain circumstances.

The first concern is in part that all of the current local rules could simply be recharacterized as rules of procedure rather than rules of attorney conduct; thus, the draft rule might not result in any meaningful change. Even in the absence of such a recharacterization, the absence of any bright line between the two categories would be problematic, given the purpose of such rules to provide clear standards for attorney conduct.

The second concern about supremacy of federal “procedure” is that states have a strong interest and expertise in regulating attorney conduct. These state interests must not be lightly disregarded, as may be the case if the term “procedure” is construed too broadly.

The Committee unanimously supports the Subcommittee's decision to investigate further whether local rules on attorney conduct are in fact creating a problem in practice. It is important to determine whether a real problem exists before any decision is made to propose a federal rule.

#### **IV. Minutes of the October, 1999 Meeting**

The Reporter's draft of the minutes of the Evidence Rules Committee's October, 1999 meeting are attached to this report. These minutes have not yet been approved by the Evidence Rules Committee.

Attachment:

Draft Minutes