

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

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TO: Honorable Alicemarie H. Stotler, Chair
Standing Committee on Rules of Practice
and Procedure

FROM: Honorable Fern M. Smith, Chair
Advisory Committee on Evidence Rules

DATE: December 1, 1996

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

Introduction

The Advisory Committee on Evidence Rules met on November 12, 1996, in San Francisco, California. At the meeting, the Committee took action on the question of whether the Federal Rules of Evidence should be amended to include a rape counselor privilege. The Committee's resolution of this question is discussed in Part I of this report. The Committee also set an agenda for the near future--agreeing to consider some possible amendments to the Evidence Rules and not to consider others at this time. The discussion on these matters is summarized in Part II of this report, and is more fully set forth in the draft minutes of the November meeting, which are attached to this report.

I. Action Item

Congress, in 42 U.S.C. § 13942(c) (1996), directed that:

The Judicial Conference of the United States shall evaluate and report to Congress its views on whether the Federal

Rules of Evidence should be amended, and if so, how they should be amended, to guarantee that the confidentiality of communications between sexual assault victims and their therapists or trained counselors will be adequately protected in Federal court proceedings.

The Evidence Rules Committee examined the advisability of amending the Federal Rules of Evidence to include a specific privilege protecting confidential communications from victims of sexual assault to their therapists and counselors. The Committee examined state laws and cases, federal cases, and a Report to Congress prepared by the Department of Justice, dated December, 1995, entitled "The Confidentiality of Communications Between Sexual Assault or Domestic Violence Victims and Their Counselors." After this extensive review by the Committee, and discussion at the November meeting, the Evidence Rules Committee has concluded that it is not advisable to amend the Federal Rules of Evidence to include a privilege for confidential communications from sexual assault victims to their therapists or counselors.

The Evidence Rules Committee recommends that the Standing Committee make the following recommendation to the Judicial Conference:

The Federal Rules of Evidence should not be amended to include a privilege for confidential communications from sexual assault victims to their therapists or counselors. An amendment is not necessary to guarantee that the confidentiality of these communications will be fairly and adequately protected in federal court proceedings.

Federal Rule of Evidence 501 provides that privileges "shall be governed by the principles of the common law as they may be interpreted in the light of reason and experience." The Rule gives the federal courts the primary responsibility for developing evidentiary privileges. Recently the Supreme Court, operating under the common law approach mandated by Rule 501, recognized the existence of a privilege under federal law for confidential statements made in psychological therapy sessions. The Court specifically held that this privilege protected confidential statements made to a licensed clinical social worker in a therapy session. *Jaffee v. Redmond*, 116 S.Ct. 812 (1996). The *Jaffee*

Court further held that the privilege was absolute rather than qualified.

While the exact contours of the privilege recognized in *Jaffee* remain to be developed, the Court's generous view of the therapeutic privilege can be adequately applied to protect confidential communications from sexual assault victims to licensed therapists or counselors. In light of the recency of *Jaffee*, and the well-entrenched common law approach to privileges set forth in the Federal Rules, the Committee concludes that legislative intervention at this time is neither necessary nor advisable. There is every reason to believe that confidential communications from victims of sexual assault to licensed therapists and counselors are and will be adequately protected by the common law approach mandated by Rule 501. At the very least, the federal courts should be given the chance to apply and develop the *Jaffee* principle before legislative intervention is considered.

Most importantly, it is not advisable to single out a sexual assault counselor privilege for legislative enactment. Amending the Federal Rules to include a sexual assault counselor privilege would create an anomaly: that very specific privilege would be the only codified privilege in the Federal Rules of Evidence. All of the other federally-recognized privileges would be grounded in the common law. The Committee believes that such an inconsistent, patchwork approach to federal privilege law is unnecessary and unwarranted, especially given the infrequency of cases involving sexual assault in the federal courts. Granting special legislative treatment to one of the least-invoked privileges in the federal courts is likely to result in confusion for both Bench and Bar.

For these reasons, the Committee recommends that the Federal Rules of Evidence not be amended to include a specific privilege for confidential communications from sexual assault victims to their therapists or counselors.

II. Information Items

A. Issues the Committee Will Pursue

After discussion at the November meeting, the Evidence Rules Committee agreed to research and consider the following issues:

1. *Rule 103(e)*: While the Committee's proposal to amend Rule 103 was withdrawn, the Committee voted to revisit whether the Rule should be amended to provide instruction to litigants as to when an *in limine* motion must be renewed at trial.

2. *Rules 404(b) and 609*--The Committee will determine whether it would be useful to provide a more structured procedure for trial courts to follow in considering the admissibility of evidence of uncharged misconduct and prior convictions.

3. *Rule 615*--The "Victim of Crime Bill of Rights," 42 U.S.C. 10606, passed in 1990, places some limits on Rule 615, the Rule which requires sequestration of witnesses. The statute guarantees victims the right to be present at trial under certain circumstances. The Committee has agreed to explore the relationship between Rule 615 and the Victim of Crime Bill of Rights, and to consider whether Rule 615 should be amended.

4. *Rule 703*--The Committee will consider whether Rule 703, which permits an expert to rely on inadmissible evidence, is being used as a means of improperly evading the hearsay rule.

5. *Rule 706*--The funding of court-appointed experts in the breast implant litigation has raised a question for the Committee concerning the requirement of party-funding set forth in Rule 706. Judges in the breast implant litigation have argued that a party-funding requirement is unfair when the expert's testimony will be used in many subsequent trials. It has also been argued that Rule 706 is not even applicable when the court-appointed expert's testimony is used in more than one trial. Another important question is whether Rule 706 has any applicability where the expert is retained by the court for technical assistance, rather than to testify as a witness. The Committee has agreed to consider whether Rule 706 should be amended to

accommodate some of the concerns expressed by the judges involved in the breast implant litigation, and to determine whether the Rule should be amended to permit funding by the government in civil cases.

6. *Self-authenticating Business Records*--The Committee voted to consider whether Rule 803(6) should be amended to dispense with the requirement of a qualified witness.

7. *Obsolete or Inaccurate Rules and Notes*--The Committee will conduct a complete review of the Evidence Rules and the original Advisory Committee Notes, in order to identify where the Rules and/or notes are obsolete or inaccurate. Consideration will be given to whether the original Advisory Committee Notes can and should be updated, or whether supplementary notes should be added, to account for developments in the case law.

8. *Circuit Splits*--The Evidence Rules Committee has begun a long-term project to identify evidentiary issues on which the circuit courts are split, and to determine whether these circuit splits warrant amending the Evidence Rules.

9. *Statutes Bearing on Admissibility of Evidence*--The Committee has begun a long-term project to identify all of the statutory provisions, outside the Evidence Rules, which regulate the admissibility of evidence proffered in federal court. The Committee will then consider whether the Evidence Rules should be amended to incorporate by reference all of the statutes identified.

10. *Automation*--The Committee will investigate whether the Evidence Rules should be amended to accommodate changes in automation and technology.

B. Issues the Committee Has Decided Not to Pursue

After discussion at the November meeting, the Evidence Rules Committee has decided not to pursue the following issues at this time:

1. *Rule 201*: Rule 201(g) makes no reference to whether a criminal defendant should or must be permitted a conclusive fact against the government. Also, the Rule in general makes no

attempt to delineate the distinction between legislative and adjudicative fact. The Committee decided, however, that the Rule was not presenting a problem for courts or counsel.

2. *Rule 301*--Rule 301 applies to evidentiary presumptions but does not apply to substantive presumptions. The Committee agreed that it might be useful to develop a definitional hierarchy as to what effect a given presumption would have. But the Committee concluded that it would be prudent to wait to see the results of the Uniform Rules Committee, which is currently drafting a proposal on presumptions.

3. *Rule 404b*--The Committee decided not to act on a proposal that uncharged misconduct could only be admitted if the probative value of the evidence substantially outweighs the prejudicial effect.

4. *Privileges*--The Committee decided not to attempt to codify the federal law of privileges at this time.

5. *Rule 611(b)*--The Committee concluded that it would not pursue a proposal to amend Rule 611(b) to provide that the scope of cross-examination would not be limited by the subject matter of the direct.

6. *Admissibility of Videotaped Expert Testimony*--The admissibility of videotaped expert testimony will probably arise in the breast implant litigation. At the November meeting, the Committee agreed to continue to monitor the phenomenon of videotaped expert testimony, but concluded that no action should be taken at this time.

7. *Rule 803(8)(B)*--The Rule does not on its face permit a law enforcement report favorable to the criminal defendant to be admitted against the government. The Committee concluded, however, that the courts have construed the Rule to permit such reports to be admitted in favor of a criminal defendant, so the Rule as applied was not posing any problems.

8. *Rule 806*--No mention is made in the Rule as to whether extrinsic evidence, which would be excluded under Rule 608(b) if offered against a testifying witness, would be admitted to impeach the character for veracity of a hearsay declarant. The Committee agreed, however, that the Rule was not creating a problem in the courts.

9. *Residual Exception*--The Committee determined that the residual exception was working reasonably well, that any conflict in the courts with respect to the residual exception was not serious, and that the exception need not be amended at this time.

10. *Sentencing Proceedings*--The Committee decided not to pursue the question whether the Evidence Rules should be amended to apply to sentencing proceedings. A proposal to extend the Evidence Rules to sentencing proceedings was determined to be bound up with policy questions that are beyond the scope of the Committee's jurisdiction.

III. Minutes

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