

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

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MEMORANDUM

TO: Honorable Jeffrey S. Sutton, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Sidney A. Fitzwater, Chair
Advisory Committee on Evidence Rules

DATE: May 7, 2013

RE: Report of the Advisory Committee on Evidence Rules

I. Introduction

The Advisory Committee on Evidence Rules (the “Committee”) met on May 3, 2013 at the University of Miami School of Law, Coral Gables, Florida.

The Committee seeks final Standing Committee approval and transmittal to the Judicial Conference of the United States of four proposals: an amendment to Rule 801(d)(1)(B)—the hearsay exemption for certain prior consistent statements—to provide that prior consistent statements are admissible under the hearsay exemption whenever they would otherwise be admissible to rehabilitate the witness’s credibility, and amendments to Rules 803(6)-(8)—the hearsay exceptions for business records, absence of business records, and public records—to eliminate an ambiguity uncovered during the restyling project and clarify that the opponent has the burden of showing that the proffered record is untrustworthy.

II. Action Items

A. Proposed Amendment to Evidence Rule 801(d)(1)(B)

The Committee proposes that Rule 801(d)(1)(B) be amended to provide that prior consistent statements are admissible under the hearsay exemption whenever they would otherwise be admissible to rehabilitate the witness's credibility. The Standing Committee approved proposed amended Rule 801(d)(1)(B) for publication at its June 2012 meeting. The proposed rule and committee note now presented for final Standing Committee approval are attached as an appendix to this report. They have been modified slightly from the versions issued for publication to address certain concerns raised by public comment.

The proposal to amend Rule 801(d)(1)(B) originated with Judge Frank W. Bullock, Jr., when he was a member of the Standing Committee. Judge Bullock proposed that Rule 801(d)(1)(B) be amended to provide that prior consistent statements are admissible under the hearsay exemption whenever they would be admissible to rehabilitate the witness's credibility. Under the current Rule, some prior consistent statements offered to rehabilitate a witness's credibility—specifically, those that rebut a charge of recent fabrication or improper influence or motive—are also admissible substantively. But other rehabilitative statements—such as those that explain a prior inconsistency or rebut a charge of faulty recollection—are not admissible under the hearsay exemption, but only for rehabilitation. There are two basic practical problems in distinguishing between substantive and credibility use as applied to prior consistent statements. First, the necessary jury instruction is almost impossible for jurors to follow. The prior consistent statement is of little or no use for credibility unless the jury believes it to be true. Second, and for similar reasons, the distinction between substantive and impeachment use of prior consistent statements has little, if any, practical effect. The proponent has already presented the witness's trial testimony, so the prior consistent statement ordinarily adds no real substantive effect to the proponent's case.

The public comment on the proposed amendment is summarized in the appendix to this report. Although largely negative, it is sparse. The Committee found two concerns expressed in the public comment to merit revisions to the proposed rule and committee note. First, there was a concern that the phrase “otherwise rehabilitates the declarant's credibility as a witness” is vague and could lead courts to admit prior consistent statements that heretofore have been excluded for any purpose. Second, there was a more specific concern that the language could lead courts to admit prior consistent statements to rebut a charge that the witness had a motive to falsify, even though the statement was made *after* the motive to falsify arose, thereby undermining the Supreme Court's ruling in *Tome v. United States*, 513 U.S. 150 (1995).

In response to these concerns, the Committee voted, with one member dissenting, to approve proposed Rule 801(d)(1)(B) with the slight modification to (ii) shown on the following blacklined version. The Committee concluded that the proposal preserves the *Tome* pre-motive rule as to consistent statements offered to rebut a charge of bad motive, while properly expanding substantive admissibility to statements offered to rehabilitate on other grounds—such as to explain an inconsistency or to rebut a charge of bad memory. And the proposal does so without resorting to the potentially vague “otherwise rehabilitates” language.

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) A Declarant-Witness's Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

* * *

(B) is consistent with the declarant's testimony and is offered:
(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or
(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; * * *

The committee note has also been slightly modified to account for the proposed changes to the Rule.

At the suggestion of the Chair of the Standing Committee, this report includes Judge Friendly's observation that Rule 801(d)(1)(B) was problematic when enacted because it relied on an insubstantial distinction between substantive and rehabilitative use. *See United States v. Quinto*, 609 F.2d 66-67 (2d Cir. 1979) (Friendly, J., concurring) ("Before adoption of the Federal Rules of Evidence, there had been . . . little need to consider the use of prior consistent statements as affirmative evidence, since they were no more probative for that purpose than what the witness had said or could say on the stand.").

Recommendation: The Committee recommends that the proposed amendment to Evidence Rule 801(d)(1)(B) be approved and transmitted to the Judicial Conference of the United States.

B. Proposed Amendments to Evidence Rules 803(6)-(8)

The Committee proposes that Evidence Rules 803(6)-(8) be amended to address an ambiguity uncovered during restyling, but left unaddressed at that time because the changes required to clarify the ambiguity were viewed as substantive. The Standing Committee approved proposed amended Rules 803(6)-(8) for publication at its June 2012 meeting. The proposed rules and committee notes now presented for final Standing Committee approval are attached as appendixes to this report. The committee notes have been modified slightly from the versions issued for publication to address the concern, raised by public comment, that the notes use language that fails to track the text of the Rules. No changes have been made to the proposed rules as published.

The restyling project uncovered an ambiguity in Rules 803(6)-(8)—the hearsay exceptions for business records, absence of business records, and public records. These exceptions originally set out admissibility requirements and then provided that a record that met these requirements, although hearsay, was admissible "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." The Rules did not specifically state which party had the burden of showing trustworthiness or untrustworthiness.

The restyling project initially sought to clarify this ambiguity by providing that a record that fit the other admissibility requirements would satisfy the exception if "the opponent does not show that" the source of information or the method or circumstances of preparation indicate lack of

trustworthiness. But this proposal did not go forward as part of restyling because research into the case law indicated that the change would be substantive. While most courts impose the burden of proving untrustworthiness on the opponent, a few courts require the proponent to prove that the record is trustworthy. Because the proposal would have changed the law in at least one court, it was deemed substantive and therefore outside the scope of the restyling project. When the Standing Committee approved the Restyled Rules, several members suggested that this Committee consider making the minor substantive change to clarify that the opponent has the burden of showing untrustworthiness.

Initially, the Committee did not think it necessary to propose clarifying amendments to these Rules. At its spring 2012 meeting, however, the Reporter noted that the Texas restyling committee had unanimously concluded that restyled Rules 803(6) and (8) could be interpreted as making substantive changes by placing the burden on the *proponent* of the evidence to show trustworthiness. The Committee then revisited the matter. The proposed amendments clarify that the *opponent* has the burden of showing that the proffered record is untrustworthy. The reasons espoused by the Committee for the amendments are: first, to resolve a conflict in the case law by providing uniform rules; second, to clarify a possible ambiguity in the Rules as originally adopted and as restyled; and third, to provide a result that makes the most sense, as imposing a burden of proving trustworthiness on the proponent is unjustified given that the proponent must establish that all the other admissibility requirements of these Rules are met—requirements that tend to guarantee trustworthiness in the first place.

There were only two public comments on the proposed amendments. Both approved of the text, but one comment suggested that the committee notes use language that fails to track the text of the Rules. Slight changes have been made to each of the three committee notes to address this concern.

Recommendation: The Committee recommends that the proposed amendment to Evidence Rules 803(6)-(8) be approved and transmitted to the Judicial Conference of the United States.

III. Information Items

A. Symposium on Technology and the Federal Rules of Evidence

As noted in a prior report, the Committee plans to convene a symposium in conjunction with its fall 2013 meeting at the University of Maine School of Law to consider the intersection of the Evidence Rules and emerging technologies. The Committee will examine whether the Evidence Rules should be amended to accommodate technological advances in the presentation and preservation of evidence. This symposium will follow the same process as the previous symposia on the Restyled Rules of Evidence and Rule 502. The Committee intends to invite outstanding members of the bench, bar, and legal academy, as well as leaders in the area of electronic information management, to make presentations. The proceedings will be published in the *Fordham Law Review*.

B. Possible Amendment of Rule 902(1)

The Committee considered whether the Reporter should prepare materials for discussion at a future meeting on a proposed amendment to Evidence Rule 902. Judge Andrew D. Hurwitz, a judge of the Ninth Circuit and a former Committee member, suggested that the Committee consider whether federally-regulated Indian tribes should be included in the list of public entities that issue self-authenticating documents under Evidence Rule 902. In *United States v. Alvirez*, No. 11-10244 (9th Cir. Mar. 14, 2013), the Ninth Circuit held that documents bearing the seal of a federally-recognized Indian tribe were not self-authenticating under Rule 902(1). Judge Hurwitz suggested that it is anomalous that self-authentication is granted to cities and, for example, the Trust Territory of the Pacific Islands, but not to Indian tribes.

The Chair of the Standing Committee informed the Committee of the experience of the Appellate Rules Committee in reviewing whether Indian tribes should have the right to file *amicus* briefs in the circuit courts.

Following a wide-ranging discussion, the Committee concluded that it should not proceed at this time to consider an amendment to Rule 902. Instead, because the treatment of Indian tribal documents raises questions that potentially impact rules other than the Evidence Rules, the Committee should await the direction of the Standing Committee concerning whether this is an issue for the Committee or for more than one advisory committee to consider.

C. *Crawford v. Washington* and the Hearsay Exceptions in the Evidence Rules

As previous reports have noted, the Committee continues to monitor case law developments after the Supreme Court's decision in *Crawford v. Washington*, in which the Court held that the admission of "testimonial" hearsay violates the accused's right to confrontation unless the accused has an opportunity to confront and cross-examine the declarant.

The Reporter regularly provides the Committee a case digest of all federal circuit cases discussing *Crawford* and its progeny. The goal of the digest is to enable the Committee to keep current on developments in the law of confrontation as they might affect the constitutionality of the Federal Rules hearsay exceptions. If the Committee determines that it is appropriate to propose amendments to prevent one or more of the Evidence Rules from being applied in violation of the Confrontation Clause, it will propose them for the Standing Committee's consideration.

D. Electronic Signatures and Bankruptcy Rule 5005(a)

The Bankruptcy Rules Committee asked the Committee to review a proposed amendment to Bankruptcy Rule 5005—the rule on filing and signature—for its potential impact on the Evidence Rules.

The proposal would add a new subdivision (3) to govern signatures on documents filed by electronic means. Proposed subdivision (3)(A) provides that if a filer is registered with ECF, the filer's username and password will serve as the filer's signature on any electronic document. Subdivision (3)(B) provides that, if a document is signed by a person who is not registered with ECF, a scanned signature page can be filed with the document as a single filing, without any need for the filing user to retain the original document. Both subdivisions provide that a signature in accord with

the Rule “may be used with the same force and effect as a written signature for the

purpose of applying these rules and for any other purpose for which a signature is required in proceedings before the court.”

The Committee provided preliminary feedback on the proposed amendment to Bankruptcy Rule 5005, including the view that the amendment would not require a corresponding amendment to the Evidence Rules.

E. Privileges Report

At the spring 2013 meeting, Professor Kenneth S. Broun, the Committee’s consultant on privileges, presented his analysis of the clergy-penitent privilege and the trade secret privileges. He noted that he would add to his analysis of the clergy-penitent privilege by discussing a possible crime-fraud exception.

Professor Broun’s work on privileges is informational and is part of his continuing work to develop an article that he will publish on the federal common law of privileges. It neither represents the work of the Committee itself nor suggests explicit or implicit approval by the Standing Committee or the Committee.

IV. Minutes of the Spring 2013 Meeting

The draft of the minutes of the Committee’s spring 2013 meeting is attached to this report. These minutes have not yet been approved by the Committee.