

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 David F. Levi, Chair
Standing Committee on Rules of Practice
and Procedure

FROM: Honorable Jerry E. Smith, Chair
Advisory Committee on Evidence Rules

DATE: December 10, 2004

RE: Report of the Advisory Committee on Evidence Rules

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") postponed its Fall meeting to January 15, 2005 in San Francisco, as part of scheduled public hearings on the proposed amendments to the Federal Rules of Evidence that are currently out for comment. At the upcoming meeting, the Committee will 1) review any comments to the proposed amendments, 2) discuss the need, if any, to amend the Federal Rules of Evidence to comply with the Supreme Court's expected rulings in *United States v. Booker* and *United States v. Fanfan*, 3) monitor developments in the law of confrontation after *Crawford v. Washington*, 4) consider an amendment to Evidence Rule 803(8) proposed by a member of the public, and 5) continue to work on a long-term project that will result in a report on the federal law of privileges.

Part III of this Report provides a summary of the matters that will be taken up at the January meeting. The minutes of the January meeting will be attached to our report to the Standing Committee for its June 2005 meeting.

II. Action Items

No action items

III. Information Items

A. Long-Term Project on Possible Changes to Evidence Rules

At its meeting in June 2004 the Standing Committee authorized the release for public comment of proposed amendments to Evidence Rules 404(a), 408, 608(b) and 609. Public hearings have been scheduled on these proposed amendments. The Evidence Rules Committee has received four public comments on these amendments, and it is anticipated that a number of comments will be received before the end of the public comment period.

B. Sentencing Proceedings and the Federal Rules of Evidence

At this writing the Supreme Court has not handed down its decisions in *United States v. Booker* and *United States v. Fanfan*. The question in those cases is whether a jury must decide facts that are used to enhance a sentence under the Federal Sentencing Guidelines. If the Court decides that a jury must decide such facts (absent waiver) then the Federal Rules of Evidence may need to be amended, because the Evidence Rules currently do not apply to sentencing proceedings. See Fed.R.Evid. 1101. At its January 2005 meeting the Evidence Rules Committee will begin to consider the possibility of an amendment to Rule 1101. It will also consider amendments to any other Evidence Rules made necessary by the Court's decisions in *Booker* and *Fanfan*.

C. Federal Rules Hearsay Exceptions and the Right to Confrontation After *Crawford v. Washington*.

The Supreme Court's decision in *Crawford v. Washington* has created some uncertainty about the constitutionality, as applied, of some of the hearsay exceptions in the Federal Rules of Evidence. The *Crawford* Court held that "testimonial" hearsay cannot be admitted in the absence of cross-examination of the declarant. The Court gave some examples of testimonial hearsay (e.g., accomplice statements to law enforcement and grand jury testimony) but declined to provide a precise definition for when hearsay is to be considered "testimonial." Moreover, the Court did not decide whether the Confrontation Clause imposes any restrictions on the admission of hearsay that is not testimonial.

In light of the uncertainty created by *Crawford*, the Evidence Rules Committee has resolved to defer consideration of any proposed amendments to the hearsay exceptions in the Federal Rules of Evidence, insofar as an amendment could apply to a criminal case. The Committee will continue to monitor developments in the federal courts in light of *Crawford*, and will be prepared at the

appropriate time to propose amendments to the hearsay exceptions that might be required to bring them into conformity with the Confrontation Clause.

D. Suggestion from Member of the Public for an Amendment to Evidence Rule 803(8).

The Center for Regulatory Effectiveness has proposed an amendment to Evidence Rule 803(8), the hearsay exception for public reports. The purported goal of the amendment is to ensure that federal statutory standards regulating information quality in agency reports are incorporated into the admissibility requirements of Rule 803(8). This proposal will be considered by the Evidence Rules Committee at its January 2005 meeting.

E. Privileges

The Committee's Subcommittee on Privileges has been working on a long-term project to prepare a "survey" of the existing federal common law of privileges. The end-product is intended to be a descriptive, non-evaluative presentation of the existing federal law, and not a proposal for any amendment to the Evidence Rules. The survey is intended to help courts and lawyers in working through the existing federal common law of privileges, and if completed it will be published as a work of the Consultant to the Committee, Professor Ken Broun, and the Reporter. At this stage, the survey of the psychotherapist-patient privilege has been substantially completed. Professor Broun will present materials on the attorney-client privilege to the Committee at its January 2005 meeting.