August 9, 2004

Peter G. McCabe
Secretary, Committee on Rules
of Practice and Procedures
Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Bldg.
1 Columbus Circle, NE – Rm. 4-170
Washington, DC 20544

Dear Mr. McCabe:

Re: Suggestion for an amendment to the "trustworthiness" proviso of Federal Rule of Evidence 803(8)(C), Hearsay Exceptions, Availability of Declarant Immaterial, Public Records and Reports (findings from an investigation)

On behalf of the Center for Regulatory Effectiveness ("CRE"), I am submitting the attached memorandum which suggests an amendment to the "trustworthiness" proviso of evidence rule 803(8)(C).[1] The amendment is suggested for the purposes of (1) resolving conflicts and inconsistencies in federal case law interpreting and applying the Rule's "trustworthiness" proviso, including a circuit split; and (2) achieving consistency between federal case law interpreting the proviso and the recent federal information quality legislation and the agency rules promulgated in 2002 to implement that legislation. The information quality legislation and agency rules have now established basic quality standards which must be met by all information disseminated to the public by federal agencies.

We request that this suggestion be considered for distribution with a request for comments to the bench, bar, Congress, the legal academic community, and other interested parties by the Advisory Committee on Evidence Rules at its Fall meeting, currently scheduled for November 15, 2004 in Washington, D.C.

---

[1] CRE addresses not only issues concerning federal regulations, but also issues concerning federal "regulation by information" and "regulation by litigation". CRE, Congress, and others have recognized that dissemination of information by government agencies can affect the private sector to an extent similar to direct regulation. That recognition was the impetus for the information quality legislation.

We understand that the Committee recently decided, at its April 2004 meeting, to defer consideration of certain potential proposed amendments to Rules 803(8), 803(3) and 804(b)(3); however, those proposed amendments were not related to the ones suggested here, which, we believe, deserve, and require, more immediate attention. We are fully aware of the situation with regard to the U.S. Supreme Court's March 2004 decision in *Crawford v. Washington*, and the Advisory Committee's subsequent statements of reluctance to address amendments to the hearsay exceptions in view of that decision. We believe that such reluctance should not extend to the suggestion we are submitting.

The *Crawford* decision did not address the trustworthiness or reliability of information sought to be introduced into evidence under one of the hearsay exceptions; it turned on whether law enforcement reports proffered in criminal cases against the accused under a hearsay exception are "testimonial" in nature, regardless of reliability. Allowing the case law on what constitutes "testimonial" evidence to evolve and mature before addressing issues concerning the use of law enforcement records and reports in criminal cases under 803(8) or other hearsay exceptions – the rationale for deferring consideration of the amendments to 803(8) that were under consideration in April 2004 -- will not assist in addressing the need to resolve circuit conflicts and inconsistences in interpreting the trustworthiness proviso, nor ensure that the trustworthiness provision is consistent with Congressional intent regarding the reliability of public records and reports. While the case law on "testimonial"public records or reports is evolving, the courts will still need to confront issues of trustworthiness and reliability which were not in any way addressed in *Crawford*, and which were explicitly avoided. Congressional primacy with regard to the Rules appears to require that the issues raised here, and the suggested amendment, be addressed expeditiously. Even if deferral of a Committee recommendation on the suggested amendment were desirable, it would be appropriate to begin the process of soliciting comments from the bench, bar, Congress, and others, and Committee consideration of the issues, especially given the extended period often required for consideration of a rules amendment.

The federal legislation on information quality was enacted in 1995 and 2000, and government-wide final rules implementing the legislation were promulgated in 2002. Rule 803(8) was enacted in 1975; therefore, the supersession provisions of 28 U.S.C. § 2072 do not apply, and the later Congressional directives on information quality and the rules implementing the legislation control.

An amendment is necessary because some federal circuit and district courts have interpreted the "trustworthiness" proviso of 803(8)(C) in a manner that is inconsistent with other circuits, and is now inconsistent with the information quality legislation and rules, by disallowing consideration of accuracy, bias, reliability of methodology and underlying data, and reproducibility when ruling on trustworthiness for the purpose of admissibility. An amendment, and explanatory notes, would also increase the awareness of the legal community concerning these new information quality requirements in those circuits and districts that do not have such inconsistent case law. Furthermore, the amendment would provide an opportunity to revise the Advisory Committee's Note on 803(8)(C) to reflect other important developments since 1975, such as the Supreme Court's decision in *Beech*

Aircraft Corp v. Rainey, 488 U.S. 153 (1988), which resolved the split among the circuits as to whether 803(8)(C) covers "evaluative" reports by governmental entities. The current Note was prepared and issued prior to 1973 and is now inaccurate in reflecting an unresolved conflict.

We believe it is particularly important to circulate this suggested amendment for comment because it appears that many pertinent court decisions on admissibility under 803(8)(C) are unpublished, and many more might never have been the subject of a written opinion, and might not have been appealed in view of the highly deferential review standard of "abuse of discretion" observed in all circuits. Even in the case of published or unpublished opinions available for review, the opinions often do not contain sufficient detail to ascertain the exact nature of the objection(s) to admission. It therefore appears that circulation of the suggestion with an explanation of the issues it would address is the only way to gauge fully the seriousness of the current inconsistencies in interpretation of the trustworthiness proviso of 803(8)(C) and the need for clarification. In addition, our suggestion and supporting memorandum address only federal case law, and it would be valuable to obtain some idea of the extent to which inconsistent federal case law has influenced state case law. We have information indicating that federal agency reports – particularly reports relating to potential health hazards – are frequently used in personal injury litigation in state courts. We also have received anecdotal information that inconsistencies in interpreting the trustworthiness proviso have given rise to considerable forum shopping. It does not appear that comments on these subjects in connection with a suggested amendment have ever been solicited by the Standing Committee.[2]

If you or others have questions regarding the attached memorandum or subject matter, or requests for additional information, please address them to me, using the contact information below, with a copy to the Center for Regulatory Effectiveness at the address shown in the letterhead. I will plan to attend the Fall meeting of the Advisory Committee.

Respectfully submitted,

William G. Kelly, Jr., Esq.
General Counsel
184 Mt. Owen Dr.
Driggs, ID 83422
(208) 354-3050
wgkelly@tetontel.com

Attachment

[2] There is precedent for the Advisory Committee and Standing Committee soliciting comment even on a tentative decision not to propose an amendment, as in the case of the Standing Committee's September 1995 Request for Comment, which included a tentative decision not to amend rule 803(8).