

December 27, 2004

Via FedEx

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:

Several days ago we received a copy of the Reporter's memorandum commentary, dated December 15, regarding our August 9, 2004 suggestion for an amendment to the trustworthiness proviso of FRE 803(8)(C). Although we have had only several days to review the Reporter's complex memorandum, it is clear to us that there are many aspects of the memorandum that appear to require a reply from the Center in order to ensure that its suggestion is fairly evaluated.

We intend to attempt to prepare such a reply in time for the Advisory Committee's January 15, 2005 meeting in San Francisco. In the meantime, we hope that the Committee will carefully review the materials supporting our August 9 suggestion in their entirety and compare them against the Reporter's critique. If this is done, we believe it likely that many of the inaccuracies and weaknesses in the critique will be apparent.

In the meantime, we would like to comment briefly on several illustrative inaccuracies, omissions, and important points in the Reporter's critique that deserve more attention.

As a first example, much is made of the Center's alleged failure to recognize that a government report might be sufficiently reliable to justify admission despite the presence of one or more possible weaknesses in reliability. In this connection, the Reporter also pointedly asserts (pp. 15-16) that the Center omitted recognition of certain qualifying footnotes (numbers 5 and 3) in the court's opinion in *Moss v. Ole South Realty*. Neither assertion is accurate. In fact, the Center addressed both related points very clearly at, for example, pages 15, 34, and 39.

Second, the Reporter asserts that there is really no need to address the issue of inconsistency with the federal information quality standards at this time, and that the Center's suggestion can either

be declined or deferred indefinitely until other potential amendments to 803(8) are considered or there is a “package” of proposed amendments moving through the process. In our view, an indefinite deferral of consideration of a suggestion is equivalent to a denial. The Center has raised an issue of inconsistency of the Rules, and interpretation of the Rules, with Federal law, and such an inconsistency should be dealt with as expeditiously as possible. We find the Reporter’s argument for deferral based on the *Crawford* decision to be very unpersuasive. In addition, as we have pointed out (p. 3 or the cover letter and p. 28 of the supporting memorandum), in the past (1995-1996) the Advisory Committee and Standing Committee have circulated for public comment a tentative decision declining to propose an amendment to Rule 803(8). The Center’s suggestion, involving as it does, an asserted inconsistency with Federal law, appears more deserving of public comment than those tentative negative decisions which were circulated in 1995-96.

Third, the Reporter’s argument that the Center’s suggestion and the existing Rule and interpretive case law do not raise an issue of inconsistency with Federal law is not supported. This issue clearly lies at the heart of the Center’s suggestion and is not, as the Reporter indicates, only “a passing argument” (p. 9). This issue is addressed prominently, for example, at page 2 of the cover letter, and in section IV, C (pp. 12-13) and pages 2 (& n.3), 5, 14, and 25 of the supporting memorandum. And we believe the Reporter’s reliance on *United States v. Lowery* (p. 9) for the proposition that Federal legislation must state explicitly that it applies to evidence in order to create an inconsistency is an overbroad interpretation of *Lowery*. The Reporter provides only a partial quotation from *Lowery*; and the full quotation is that “If Congress wants to give state courts and legislatures veto power over the admission of evidence in federal court, it will have to tell us that in plain language using clear terms.” Such a conclusion is not pertinent to the inconsistency issue presented by the Center, and we believe Congress’ intent to bar public dissemination in every respect of influential federal reports which do not meet specified minimal standards of reliability is clear.

We look forward to attending the Advisory Committee’s discussion of the Center’s suggestion at its January 15 meeting.

Respectfully,

William G. Kelly, Jr.
General Counsel