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

LEE H. ROSENTHAL
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JEFFREY S. SUTTON
APPELLATE RULES

LAURA TAYLOR SWAIN
BANKRUPTCY RULES

MARK R. KRAVITZ
CIVIL RULES

RICHARD C. TALLMAN
CRIMINAL RULES

ROBERT L. HINKLE
EVIDENCE RULES

MEMORANDUM

DATE: December 14, 2009

TO: Honorable Lee H. Rosenthal, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Robert L. Hinkle, Chair
Advisory Committee on Evidence Rules

RE: Report of the Advisory Committee on Evidence Rules

Introduction

The Advisory Committee on Evidence Rules met on November 20, 2009, in Charleston, S.C. The meeting produced no action items for Standing Committee consideration at the January 2010 meeting. This report is submitted for the Standing Committee's information.

I. Information Item: Restyling Project

At its last meeting, the Standing Committee approved publication of the proposed restyled rules for public comment. The deadline for comments is February 16, 2010. So far, we have received extensive comments from the American College of Trial Lawyers and more limited comments from others. The comments are generally favorable, with specific suggestions. Historically, most comments on rules arrive at or near the deadline, and we expect that to be true this time, too.

We of course can take no further action until the comment period ends. But the Advisory Committee and the Standing Committee's Style Subcommittee have begun consideration of the comments received to date, with the goal of having all work done on all remaining issues in time for the Standing Committee's final consideration of the restyling project at the summer 2010 meeting. In preparing the package for that Standing Committee meeting, the standard protocol will apply: the Advisory Committee will have final say on whether a proposed change is substantive, and the Style Subcommittee will have final say on matters of style. The Advisory Committee greatly appreciates the level of diligence and cooperation the Style Subcommittee has provided.

II. Information Item: Crawford and Its Progeny

The Advisory Committee continues to monitor developments following the Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004). The decision concludes that, under the Confrontation Clause, a person's "testimonial" out-of-court statement is inadmissible against the defendant in a criminal case unless the person appears at the trial or the defendant had a prior opportunity for cross-examination.

Late last term, in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), the Court applied *Crawford* to hold inadmissible a laboratory report concluding that a substance was cocaine. The Advisory Committee considered a memorandum from the Reporter addressing the decision's possible effect on several hearsay exceptions.

The memorandum concluded that one exception is now of doubtful validity. Under Rule 803(10), a certificate may be admitted to show the absence of a public record—and as proof in turn that an event did not occur. *Melendez-Diaz* includes language indicating that the introduction of such a certificate against the defendant in a criminal case violates the Confrontation Clause.

The Advisory Committee nonetheless elected not to propose an amendment to Rule 803(10) at this time. One proposal might be a notice-and-objection procedure of the kind used in some states. Under such an approach, the government would give notice of its intent to introduce a certificate, and the defendant would be required to object prior to the trial. If the defendant objected, the government would have to call the witness live. If the defendant did not object, the government could introduce the certificate. Before proposing a rule adopting such an approach—or any similar approach—it makes sense to await further developments.

The Supreme Court has granted certiorari in *Briscoe v. Virginia*. The case will be argued on January 11, 2010. Under the procedure at issue there, the state must give notice of its intent to introduce a certificate setting out a forensic analyst's conclusion. The defendant cannot require the state to call the analyst as a witness, but the defendant may call the analyst in the defense case and may proceed as if on cross-examination. The Supreme Court in *Briscoe* will not necessarily indicate the validity of a notice-and-objection procedure under which the witness would be called in the government's case. But the decision could provide further guidance and could be especially important because of the change in the court's membership. Both *Crawford* and *Melenez-Diaz* were 5-4 decisions with Justice Souter in the majority.

It thus makes sense to wait before proposing a fix for Rule 803(10). Another reason for waiting, at least at this time, is that continuing developments may bear on the desirability of amending other hearsay exceptions. It would be best to adopt all needed amendments at one time, both because the best fix might be a single new provision applicable to all affected hearsay exceptions, and because making all needed changes at one time would be less disruptive.

III. Information Item: Physician-Patient Privilege and Related Matters

The Advisory Committee considered a set of proposals submitted by a physician interest group. The group proposed adoption of rules recognizing a physician-patient privilege and medical peer-review privilege. The group proposed requiring the court to instruct the jury in a medical malpractice case to give added weight to the testimony of a specialist in the field at issue. And the group proposed amending the rules to make a pretrial *Daubert* hearing mandatory.

The Advisory Committee thanked the group for its proposals; the group had raised serious issues in a serious way. But the Advisory Committee decided not to go forward with any of the proposals. The Rules Enabling Act would require any privilege rule to be adopted directly by Congress. Comments at the meeting included these: proposing privilege rules, especially in only one field, would be inadvisable; the proposal for a peer-review privilege raises substantive ideological issues best addressed in the political field; and district judges should have discretion on whether to hold a *Daubert* hearing and on instructing a jury on the weight to be given expert testimony.

IV. Minutes of the November 2009 Meeting

The Reporter's draft of the minutes of the November 2009 meeting is attached to this report as Appendix A. The Advisory Committee has not yet approved the minutes.