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

MEMORANDUM

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

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

DATE: **November 3, 2010**

RE: **Report of the Advisory Committee on Evidence Rules**

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on October 12, 2010 in San Diego, California. Now that the restyled Evidence Rules has been approved by the Standing Committee and the Judicial Conference, the Committee is focusing primarily on possible rule changes necessitated by the Supreme Court's decision in *Crawford v. Washington* and its progeny, including the Court's decision in *Melendez-Diaz v. Massachusetts*. The Committee is not proposing any action items for the Standing Committee at its January 2011 meeting. But as explained below, the Committee may request approval at the June 2011 meeting of the Standing Committee to publish an amended Rule 803(10) for public comment.

II. Action Items

No action items.

III. Information Items

A. Possible Amendment to Evidence Rule 803(10) in Light of *Melendez-Diaz v. Massachusetts*

The Committee is considering whether, in light of the Supreme Court's June 2009 decision in *Melendez-Diaz v. Massachusetts*, Rule 803(10) should be amended. The Committee may request approval at the June 2011 meeting of the Standing Committee to publish a proposed amended Rule 803(10) for public comment.

The Court held in *Melendez-Diaz* that certificates reporting the results of forensic tests conducted by analysts are "testimonial" within the meaning of the Confrontation Clause, as construed in *Crawford v. Washington.* Consequently, admitting such certificates in lieu of in-court testimony violates the accused's right to confrontation. The Committee discussed whether *Melendez-Diaz* would also bar the admission of certificates offered to prove the absence of a public record under Rule 803(10). Like the certificates at issue in *Melendez-Diaz,* certificates proving the absence of public records are prepared with the sole motivation that they be used at trial as a substitute for live testimony. Lower courts after *Melendez-Diaz* have recognized that admitting certificates of the absence of public records under Rule 803(10) violates the accused's right to confrontation.

The Committee will consider at its April 2011 meeting whether to recommend that Rule 803(10) be amended and, if so, how it should be amended to eliminate any Confrontation Clause deficiencies. One option is to add a "notice-and-demand" procedure to the Rule. This would require that the person who prepared the certificate testify in person only if the defendant makes a pretrial demand for in-court testimony. In *Melendez-Diaz* the Court specifically approved a state version of a notice-and-demand procedure. The Committee has asked the Reporter to work with the Justice Department to review all the possible viable alternatives for a notice-and-demand procedure. The Committee has also requested that the Reporter consider an alternative draft that would prevent the use of Rule 803(10) when a record is offered by the government in a criminal case.

B. Evidence Rules That Do Not Appear to Require Amendment after *Melendez-Diaz v. Massachusetts*

The Committee also considered whether other Evidence Rules may require amending after *Melendez-Diaz.* It tentatively concluded (1) that records fitting within the business records exception are unlikely to be testimonial, and that any uncertainty about the admissibility of business records in certain unusual cases should await case law development; (2) records that are admissible under the public records exception are unlikely to be testimonial because, to be admissible under that exception, the record cannot be prepared with the primary motivation of use in a criminal prosecution; and (3) authenticating business and public records by certificate under various provisions in Rule 902 is unlikely to raise constitutional concerns because the Court in *Melendez-Diaz* held that certificates that merely authenticate documents are not testimonial, and addressing any uncertainty about the constitutionality of the Rule 902 provisions in criminal cases should await case law development.

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 Committee reviewed a memorandum from the Reporter that contained a case digest of all federal circuit cases discussing *Crawford v. Washington* and its progeny. The Committee concluded that there is nothing in the case law that mandates amending the Evidence Rules (except Rule 803(10)) at this time. The Committee will continue to monitor important developments, including (1) the Court's consideration of *Michigan v. Bryant*, which may impact the admissibility of excited utterances under Rule 803(2); (2) the Court's consideration of *Bullcoming v. New Mexico*, which concerns whether certificates can be introduced by a witness other than the person who prepared them, and which may have an effect on the application of Rule 703; and (3) the case law allowing testimonial statements to be admitted not for their truth but for "background" or "context."

D. Evidence Rules 803(6)-(8)

The restyling project uncovered an ambiguity in Rules 803(6)-(8), the hearsay exceptions for business records, absence of business records, and public records. Under the Rules, records that meet specified requirements are admissible "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." The Rules do not specify who has the burden of showing trustworthiness or untrustworthiness.

During the restyling project it was proposed that this ambiguity be eliminated by placing the burden on the opponent to show lack of trustworthiness. But the Committee did not adopt this proposal as part of restyling because it concluded that the change would be substantive. When the Standing Committee approved the Restyled Rules, several members suggested that the Committee consider changing Rules 803(6)-(8) to clarify that the opponent has the burden of showing untrustworthiness. At its October 2010 meeting, the Committee discussed this question. It then requested that the Reporter consult with representatives of the ABA Litigation Section, the American College of Trial Lawyers, and other interested parties to determine whether it would be helpful to propose such an amendment. At its April 2011 meeting, the Committee will revisit the possibility of amending these Rules.

E. Circuit Conflict on Rule 804(b)(1)

A circuit split has developed in applying Rule 804(b)(1), which provides a hearsay exception for testimony offered against a party who, at the time it was made, had a motive and opportunity to develop it that was "similar" to the motive and opportunity it would have if the declarant could be produced for trial. A split has developed regarding the admissibility of grand jury testimony that is favorable to the accused. Some circuits have held that such favorable testimony is generally inadmissible against the government at trial because the prosecutor's motive to develop such testimony is ordinarily not similar to what it would be at trial, given the differing operative standards of proof before the grand jury and at trial. Other circuits have held that such testimony is admissible, noting that the respective motives need only be "similar" and not identical or equally intense.

The Committee determined that attempting to amend the Rule would not be beneficial. Although the issue is important, it is narrow. And drafting a solution may be controversial and extremely difficult. The Committee also noted that the Supreme Court has previously shown an interest in interpreting Rule 804(b)(1) as it applies to grand jury testimony, so it is possible that the Court will resolve the current circuit split. The Committee will continue to monitor this matter, but it will not propose an amendment to Rule 804(b)(1) at this time.

F. Other Rules Comments Considered

The Committee considered a public comment suggesting a change to the designation of hearsay statements admissible under Rule 801(d) as "not hearsay." Although statements that fall under Rule 801(d) — prior statements of testifying witnesses and statements of party-opponents — in fact fit the definition of hearsay, the Rule designates them as "not hearsay." Analytically, it would be better to designate these provisions "hearsay exceptions."

The Committee concluded that courts and litigants are familiar with Rule 801(d) as written and that it has not caused problems in practice. The disruption of amending the Rule would outweigh the marginal benefit of an amendment. The Committee will not propose an amendment to change the designation of Rule 801(d) statements.

During the restyling process, the American College of Trial Lawyers commented on the Restyled Rules. One set of comments addressed Rule 410. Because the comments were substantive, the Committee did not consider them until the restyling project was completed. The College proposes two basic changes: (1) clarify that the protections of Rule 410 apply only to a party in the case in which the evidence is offered, i.e., that a withdrawn guilty plea is admissible if the person who entered the plea is only a witness and not a party in the case; and (2) provide that the protection for "withdrawn" guilty pleas also extends to guilty pleas that are rejected or vacated by the court.

The Committee was advised that the case law, while sparse, uniformly holds that Rule 410 does not apply to withdrawn guilty pleas of testifying witnesses, and that all the major treatises conclude that Rule 410 does not apply to the withdrawn guilty pleas of testifying witnesses. Regarding vacated and rejected guilty pleas, the Committee was informed that the case law, while sparse, uniformly holds that Rule 410 does preclude admission of a vacated or rejected guilty plea of the defendant in the case. The DOJ and public defender committee members noted that they had surveyed others and found no problems in the operation of Rule 410. The Committee will not propose an amendment to Rule 410.

G. Privilege Project

Several years ago the Committee undertook a project to publish a pamphlet describing the federal common law on evidentiary privileges. The Committee determined that, although it would be inappropriate to propose to Congress a codification of the evidentiary privileges, it would be valuable to the Bench and Bar to set out in text and commentary the federal common law privileges. The Consultant to the Committee has prepared drafts of a number of privileges, but this project has been deferred until the restyling project was completed.

The Committee has asked the Consultant to resume the project and to report back with drafts and commentary at the April 2011 meeting.

IV. Minutes of the Fall 2010 Meeting

The Reporter's draft of the minutes of the Committee's October 2010 meeting is attached to this report. These minutes have not yet been approved by the Committee.