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

MEMORANDUM

DATE: **April 8, 2011**

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

FROM: **Honorable Sidney A. Fitzwater, Chair, Advisory Committee on Federal Rules of Evidence Procedure**

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

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on April 1, 2011 in Philadelphia at The University of Pennsylvania Law School.

The Committee seeks approval of one proposal for release for public comment: an amendment to Evidence Rule 803(10)—the hearsay exception for absence of public record or entry—that is intended to address a constitutional infirmity in light of the Supreme Court's decision in *Melendez-Diaz v. Massachusetts*.

A complete discussion of this proposal can be found in the draft minutes of the Spring 2011 meeting, attached as an appendix to this Report.

II. Action Item

Proposed Amendment to Evidence Rule 803(10)

In June 2009 the Supreme Court decided *Melendez-Diaz v. Massachusetts*. The Court held 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 of confrontation. The Committee has concluded that, in a criminal case, *Melendez-Diaz* also precludes the admission under Rule 803(10) of certificates offered to prove the *absence* of a public record. 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 a certificate of the absence of a public record under Rule 803(10), where the certificate is prepared for use in court, violates the accused's right of confrontation.

The Committee at its Fall 2010 meeting discussed the possibility of amending Rule 803(10) to correct this constitutional infirmity, and it voted unanimously to consider a proposed amendment at the Spring meeting. The Reporter suggested adding a "notice-and-demand" procedure to the Rule that would require production of the person who prepared the certificate only if, after receiving notice from the government of intent to introduce a certificate, the defendant made a timely pretrial demand for production of the witness. The Court in *Melendez-Diaz* specifically approved a state version of a notice-and-demand procedure. The Committee directed the Reporter to work with the Justice Department to review all the possible viable alternatives for a notice-and-demand procedure, including ones that added procedural details such as providing for continuances. After consulting with the DOJ, the Reporter prepared proposed amendments to Rule 803(10).

At its Spring meeting, the Committee voted unanimously to refer a proposed amendment to Rule 803(10), and the Committee Note, to the Standing Committee, with the recommendation that the amendment be released for public comment. The proposed Rule and Committee Note are set out in an appendix to this report. As amended, Rule 803(10) would permit a prosecutor who intends to offer a certification to provide written notice of that intent at least 14 days before trial. If the defendant does not object in writing within 7 days of receiving the notice, the prosecutor would be permitted to introduce a certification that a diligent search failed to disclose a public record or statement rather than produce a witness to so testify. The amended Rule would allow the court to set a different time for the notice or the objection.

Recommendation: The Committee recommends that the proposed amendment to Evidence Rule 803(10) be approved for release for public comment.

III. Information Items

A. Possible Amendment to Rule 801(d)(1)(B)

At its Spring meeting, the Committee considered a proposed amendment to Rule 801(d)(1)(B) initially suggested by Judge Bullock when he was a member of the Standing Committee. Judge Bullock proposed that Rule 801(d)(1)(B)—the hearsay exemption for certain prior consistent statements—be amended to provide that prior consistent statements are admissible under the hearsay exemption whenever they would be admissible to rehabilitate the witness's credibility.

Under the current rule, some prior consistent statements offered to rehabilitate a witness's credibility—specifically those that rebut a charge of recent fabrication or improper motive—are also admissible substantively under the hearsay exemption. But other rehabilitative statements—such as those that explain a prior inconsistency or rebut a charge of bad memory—are not admissible under the hearsay exemption but only for rehabilitation. The justification for amending the Rule is that there is no meaningful distinction between substantive and rehabilitative use of prior consistent statements.

The Committee voted to consider at its Fall 2011 meeting a proposed amendment to Rule 801(d)(1)(B). The Committee requested that the Department of Justice representative and the Public Defender representative solicit the views of interested parties. The Committee directed the Reporter to research the practices in the states with similar rules. And one committee member will solicit the views of state supreme court justices.

B. Decision Not to Continue Considering Possible Amendments of Rules 803(6)-(8)

The restyling project revealed an ambiguity in Rules 803(6)-(8), the hearsay exceptions for business records, absence of business records, and public records. These exceptions set out admissibility requirements and provide that a record meeting the requirements is admissible, despite the fact that it is hearsay, "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." The Rules do not specify which party has the burden of showing trustworthiness or untrustworthiness.

The Committee did not submit proposed amendments to these Rules as part of restyling because research into the case law indicated that the changes would be substantive. While most courts impose the burden of proving untrustworthiness on the opponent, a few courts require the proponent to prove that the record is trustworthy. When the Standing Committee approved the Restyled Rules, however, several members suggested that the Evidence Advisory Committee consider making minor substantive changes that would clarify who has the burden.

At its Fall meeting, the Committee, while dubious about the need for amendments, directed the Reporter to consult representatives of the ABA Litigation Section, the American College of Trial Lawyers, and other interested parties to determine whether amendments should be proposed. The American College, the Litigation Section, and the Department of Justice favor amending the Rules to clarify that the opponent has the burden of showing untrustworthiness. They believe amending the Rules will provide a useful clarification.

At the Spring meeting, however, the Committee voted not to propose amendments to Rules 803(6)-(8). Members stated that any problems in applying the Rules are the result of a few outlier cases, that amending the Rules could create new problems for courts and litigants, and that the Rules clearly place the burden of establishing untrustworthiness on the party who opposes admitting the evidence.

C. Decision Not to Continue Considering Possible Amendment of Rule 806

In response to a directive from the Committee to identify rules that have been the subject of conflicting interpretations in the courts, the Reporter identified Rule 806, the Rule that allows impeachment of hearsay declarants.

At the Spring meeting, the Committee considered possible changes to the Rule and voted unanimously not to proceed with any. It concluded that difficulties in amending the Rule, coupled with concerns that changing the Rule could undermine a good policy of barring extrinsic evidence to impeach hearsay declarants, warranted a decision not to proceed further.

D. *Crawford* Developments

The Committee continues to monitor case law developments after the Supreme Court's decision in *Crawford v. Washington*. The Reporter has provided the Committee a case digest of all federal circuit cases discussing *Crawford* and its progeny. The goal of the digest is to allow the Committee to keep current on developments in the law of confrontation because such developments might affect the constitutionality of hearsay exceptions contained in the Evidence Rules. Apart from Rule 803(10), nothing in the developing case law appears to require amending the Evidence Rules at this time. The Supreme Court is currently considering the case of *Bullcoming v. New Mexico*, in which it will address whether lab results can be introduced by a witness other than the person who conducted the test. The Court's decision in *Bullcoming* could affect the application of Rule 703. The Committee will continue monitoring developments in this area.

E. Privilege Project

Several years ago, the Committee voted to undertake a project to publish a pamphlet that describes the federal common law of evidentiary privileges. The project is only intended as a restatement of the federal common law, not a proposed codification of the law of privileges or a set

of proposals for consideration by the Congress. This project is considered a valuable service to the bench and bar because it will set out in text and commentary the privileges that exist under federal common law.

At its Spring meeting, the Committee considered materials on the attorney-client privilege and the psychotherapist-patient privilege. It determined that the project should cover the basic privileges: attorney-client; interspousal; psychotherapist; clergy; journalist; informant; deliberative process; and other governmental privileges. The Committee also concluded that there should be a separate section on waiver.

F. Restyling Symposium

The Committee is sponsoring a Symposium on the Restyled Rules of Evidence in conjunction with its Fall meeting. The symposium and the meeting will take place at William and Mary Law School on Friday, October 28, 2011. The proceedings of the Symposium will be published in the *William and Mary Law Review*. Standing Committee members who are not already participating as panelists are invited to attend. Members of the William and Mary Law School community have also been invited, as has been a representative from the National Center for State Courts.

IV. Minutes of the Spring 2011 Meeting

The Reporter's draft of the minutes of the Committee's Spring 2011 meeting is attached to this report as an appendix. These minutes have not yet been approved by the Committee.

Appendix to Report to the Standing Committee from the Advisory Committee on Evidence Rules

June 2011

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 803(10)

Rule 803. Exceptions to the Rule Against Hearsay — Regardless of Whether the Declarant Is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

* * *

(10) ***Absence of a Public Record.*** Testimony — or a certification under Rule 902 — that a diligent search failed to disclose a public record or statement if ~~the testimony or certification is admitted to prove that~~:

(A) the testimony or certification is admitted to prove that

(~~A~~ i) the record or statement does not exist; or

(~~B~~ ii) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind; and

(B) if the prosecutor in a criminal case intends to offer a certification, the prosecutor provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice — unless the court sets a different time for the notice or the objection.

Committee Note

Rule 803(10) has been amended in response to *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009). The *Melendez-Diaz* Court declared that a testimonial certificate could be admitted if the accused is given advance notice and does not timely demand the presence of the official who prepared the certificate. The amendment incorporates, with minor variations, a "notice-and-demand" procedure that was approved by the *Melendez-Diaz* Court. See Tex. Code Crim. P. Ann., art. 38.41.