MEMORANDUM

TO: Honorable David G. Campbell, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Debra A. Livingston, Chair
Advisory Committee on Evidence Rules

DATE: November 15, 2019

RE: Report of the Advisory Committee on Evidence Rules

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on October 25, 2019 at Vanderbilt University Law School. On the morning of the meeting, the Committee held a miniconference on "Best Practices" for managing *Daubert* issues, which is described below.

The Committee at the meeting discussed ongoing projects involving possible amendments to Rules 106, 615 and 702.

A full description of these matters can be found in the draft minutes of the Committee meeting, attached to this Report.

II. Action Items

No action items.

III. Information Items

A. Miniconference on Best Practices in Managing *Daubert* Issues.

The miniconference on the morning of the meeting involved an exchange of ideas among the panel and Committee members regarding a number of questions involving *Daubert,* Rule 702, and *Daubert* hearings. The miniconference was designed to further the Committee's objective to provide education to the bench and bar on proper management of expert testimony as an addition to (or an alternative to) an amendment to Fed. R. Evid. 702. The Committee invited five experienced federal judges and a distinguished professor to share suggestions about "Best Practices" in managing *Daubert* questions and in conducting *Daubert* hearings. The judges all have extensive experience in managing *Daubert* issues, and each has written extensive and influential *Daubert* opinions.

Among the questions addressed by the panel were:

1. What are the "red flags" that might lead to the inadmissibility of scientific testimony?

2. How does the court handle experience-based experts under *Daubert*?

3. In figuring out a scientific or other complex issue, is the information supplied by the adversaries usually sufficient, or does the court sometimes need to do independent inquiry?

4. How does the court deal with the fact that *Daubert* instructs on the one hand that the admissibility requirements are to be determined by the preponderance of the evidence, and on the other hand that the solution to concerns about expert testimony is generally to be cross-examination and argument?

5. What best practices can help ensure that expert witnesses use the same level of intellectual rigor in the courtroom that characterizes the standards in the experts' field?

6. In toxic tort cases, how does the court separate general causation experts from specific causation experts? How does the court handle specific causation experts who say they need to provide a general causation conclusion as a grounding for their specific causation opinion?

7. How much should a judge get involved in questioning experts in a *Daubert* hearing?

8. What does a judge do if the judge does not understand the principles being discussed by the expert?

9. In multidistrict litigation and other cases that follow a pattern, trials to be conducted in different jurisdictions can involve the same expert witnesses, the same lawyers, and the same issues as to admissibility of expert testimony. Does the court take the possibility of uniformity into account and how so?

10. Would an amendment to Rule 702 that prohibits an expert from overstating quantifiable results be helpful to a court at a *Daubert* hearing?

11. Is it ever useful for the court to appoint an expert or a technical advisor? 1.

A transcript of the miniconference will be published in the Fordham Law Review and copies will be distributed to federal judges.

A. Possible Amendment to Rule 106

At the suggestion of Hon. Paul Grimm, the Committee is considering whether Rule 106 - the rule of completeness - should be amended. Rule 106 provides that if a party introduces all or part of a written or recorded statement in such a way as to create a misimpression about the statement, then the opponent may require admission of a completing statement that would correct the misimpression. Judge Grimm suggests that Rule 106 should be amended in two respects: 1) to provide that a completing statement is admissible over a hearsay objection; and 2) to provide that the rule covers oral as well as written or recorded statements.

The Committee is continuing to consider various alternatives for an amendment to Rule 106. One option is to clarify that the completing statement should be admissible over a hearsay objection because it is properly offered to provide context to the initially proffered statement. Another option is to state that the hearsay rule should not bar the completing statement, but that it should be up to the court to determine whether it is admissible for context or more broadly as proof of a fact. The final consideration will be whether to allow unrecorded oral statements to be admissible for completion, or rather to leave it to parties to convince courts to admit such statements under other principles, such as the court's power under Rule 611(a) to exercise control over evidence.

The Committee plans to consider and vote on whether to recommend a proposed amendment to Rule 106 for public comment at its next meeting.

B. Possible Amendment to Rule 615

The Committee is considering problems raised in the case law and in practice regarding the scope of a Rule 615 order: does it apply only to exclude witnesses from the courtroom (as stated in the text of the rule) or does it extend outside the confines of the courtroom to prevent prospective witnesses from obtaining or being provided trial testimony? Most courts have held that a Rule 615 order extends to prevent access to trial testimony outside of court, but other courts have read the rule as it is written. The Committee has been considering an amendment that would clarify the extent of an order under Rule 615. Committee members have noted that where parties can be held in contempt for violating a court order, some clarification of the operation of sequestration outside the actual trial setting itself could be helpful. The Committee's investigation of this problem is consistent with its ongoing efforts to ensure that the Evidence Rules are keeping up with technological advancement, given the increasing witness access to information about testimony through news, social media, or daily transcripts.

At its Spring, 2019 meeting, the Committee resolved that if a change is to be made to Rule 615, it should provide that a court order that extends beyond courtroom exclusion would be discretionary, not mandatory. At the Fall, 2019 meeting the Committee considered whether any amendment to Rule 615 should address whether trial counsel can be prohibited from preparing prospective witnesses with trial testimony. The Committee tentatively resolved that any amendment to Rule 615 should not mention trial counsel in text, because the question of whether counsel can use trial testimony to prepare witnesses raises issues of professional responsibility and the right to counsel that are beyond the purview of the Evidence Rules.

The Committee plans to consider and vote on whether to recommend a proposed amendment to Rule 615 for public comment at its next meeting.

C. Forensic Expert Testimony, Rule 702, and *Daubert.*

The Committee has been exploring how to respond to the recent challenges to and developments regarding forensic expert evidence since its symposium on forensics and *Daubert* held at Boston College School of Law in October 2017. A Subcommittee on Rule 702 was appointed to consider possible treatment of forensics, as well as the weight/admissibility question discussed below. The Subcommittee, after extensive discussion, recommended against certain courses of action. The Subcommittee found that: 1) It would be difficult to draft a

freestanding rule on forensic expert testimony, because any such amendment would have an inevitable and problematic overlap with Rule 702; 2) It would not be advisable to set forth detailed requirements for forensic evidence either in text or Committee Note because such a project would require extensive input from the scientific community, and there is substantial debate about what requirements are appropriate; and 3) It would not be advisable to publish a "best practices manual" for forensic evidence because such a manual could not be issued formally by the Committee, and would involve the same science-based controversy of what standards are appropriate.

The Committee agreed with these suggestions by the Rule 702 Subcommittee. But the Subcommittee did express interest in considering an amendment to Rule 702 that would focus on one important aspect of forensic expert testimony - the problem of overstating results (for example, by stating an opinion as having a "zero error rate", where that conclusion is not supportable by the methodology). The Committee has heard extensively from DOJ on the efforts it is now employing to regulate the testimony of its forensic experts. The Committee continues to consider a possible amendment on overstatement of expert opinions, especially directed toward forensic experts.

The current draft being considered by the Committee provides that "if the expert's principles and methods produce quantifiable results, the expert does not claim a degree of confidence unsupported by the results." The language is intended to avoid wordsmithing the testimony of experts who testify to a conclusion that is not grounded is a numerical probability – such as an electrician testifying that "the house was not properly wired."

The Committee plans to consider and vote on whether to recommend a proposed amendment to Rule 702 for public comment at its next meeting.

D. *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 cross-examine the declarant.

The Reporter regularly provides the Committee a case digest of all federal circuit cases discussing *Crawford* and its progeny. The goal of the digest is to enable the Committee to keep current on developments in the law of confrontation as they might affect the constitutionality of the Federal Rules hearsay exceptions. If the Committee determines that it is appropriate to propose amendments to prevent one or more of the Evidence Rules from being applied in

violation of the Confrontation Clause, it will propose them for the Standing Committee's consideration - as it did previously with the 2013 amendment to Rule 803(10).

IV. Minutes of the Fall, 2019 Meeting

The draft of the minutes of the Committee's Fall, 2019 meeting is attached to this report. These minutes have not yet been approved by the Committee.