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December 18, 2008

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Washington, D.C. 20544

Re: Proposed Rules Amendments
For Consideration by the Advisory
Committee on Evidence Rules

Dear Mr. McCabe:

Professor Paul Rothstein of Georgetown University Law Center and I represent a physician interest group relevant to the Federal Rules amendment process, covering both the Federal Rules of Civil Procedure and the Federal Rules of Evidence. Our physician interest group includes the American Medical Association, the American Academy of Neurology Professional Association, the American College of Obstetricians and Gynecologists, the American Academy of Otolaryngology – Head and Neck Surgery, the American Osteopathic Association, the Medical Group Management Association, the Physician Insurers Association of America and the American Association of Neurological Surgeons.

As the Advisory Committee on Evidence Rules moves toward the completion of its project to restyle the Federal Rules of Evidence, we offer for its consideration in formulating a new agenda a series of proposed amendments that we believe would further the interests of the public by promoting the efficiency and accuracy of trials and basic adversarial fairness in cases involving physicians

I. Evidentiary Privileges

In the original enactment of the Federal Rules of Evidence, Congress rejected an initially proposed codification of a broad range of specific evidentiary privileges It never disapproved the privileges on the list. Rather, it simply elected not to codify them. Pub. L. 93-595. The ultimate solution was a single privilege rule (Rule 501) creating a jurisdictional bifurcation that is unusual for the Federal Rules of Evidence and providing

(a) a common-law evolutionary process (judge-made law) that is controlling for privileges in pure federal-law cases; and (b) reliance upon state privilege law for "diversity" cases.

As a result of the reliance on common-law regarding privileges, the benefits flowing from the codification of federal evidentiary rules - easy availability, uniformity and orderly development - are not provided to lawyers and judges in the privilege area. Evidentiary law regarding privilege continues to grow in a haphazard and disjointed fashion, varying from circuit to circuit and, at times. from district to district Clients continue to pay for extensive legal research on privilege issues for no good purpose.

Despite Congressional rejection of the specific privilege approach, the Advisory Committee on Evidence Rules does not seem averse to adding specific privilege provisions, recently proposing Rule 502 regulating certain aspects of the lawyer-client privilege that became law.

We propose the delineation of specific evidentiary privileges.

A. Physician-Patient Privilege (New Rule)

The physician-patient relationship, unlike that of attorney-client, did not give rise to a testimonial privilege at common law. However, in 1828, New York became the first jurisdiction to alter the common-law rule by establishing a general statutory privilege covering physician-patient communications. Since that time, many, perhaps most, states have followed New York's lead and enacted similar statutory provisions *See* N.Y.C P.L.R. § 4504 (a). With respect to the advisability of a general physician-patient privilege, *see* Rothstein, *The Proposed Amendments to the Federal Rules of Evidence*, 62 Geo. L J 125 (1973); *see also* Testimony of Professor Charles L. Black, Hearings on Proposed Rules of Evidence, 93d Cong., 1st Sess , Vol. 2 at 241-42 (1973) (arguing in support of a privacy basis for protection of physician-patient discussions).

Generally, federal common law, following Rule 501 of the Federal Rules of Evidence, does not provide a physician-patient privilege *See* Gilbreath v. Guadalupe Hosp Foundation Inc., 5 F.3d 785 (5th Cir.1993). However, the Supreme Court has created a more limited psychotherapist-patient privilege that is now a part of federal jurisprudence. Jaffee v. Redmond, 518 U.S. 1 (1996). On the status of physician-patient and psychotherapist-patient privilege in federal law, *see* generally P. Rothstein & S. Crump, Federal Testimonial Privileges, Ch. 3 (2007-2008 Edition, West Publishing)

Our group believes that there is something very important at stake in

communications between a patient and his physician. If a patient knows that his confidences may someday be disclosed, he may hesitate to tell all facts necessary to obtain appropriate treatment. Additionally, patients routinely go to their physicians expecting the highest degrees of privacy and confidentiality. Physician ethical codes honor such privacy and confidentiality. *See* AMA Code of Medical Ethics § 5.05 (1994 ed.) ("information disclosed to a physician during the course of the relationship between physician and patient is confidential to the greatest possible degree") At the same time, however, our group is sensitive to competing demands, including the search for truth that is inherent in the judicial process and certain calls for transparency incident to the efficient administration of our health-care systems. There are situations when it is in the public interest to disclose a patient-physician communication, s*ee, e.g.,* 45 CFR § 164 512, the HIPAA rule, authorizing disclosure in prescribed circumstances..

Accordingly, our group is undertaking a review of the proper scope of the physician-patient privilege. Should it be limited to the psychotherapist-patient relationship or should it be more broadly defined? Further, should it be absolute or limited in nature, yielding to higher interests in prescribed circumstances, consistent with the treatment accorded attorney-client communications under the federal common law. *See* Wells v. Rushing, 755 F.2d 376 (5th Cir. 1985); Mead Data Central, Inc. v. U.S. Dept. of Air Force, 566 F.2d 242 (D C Cir. 1977)

Regardless of the scope of the privilege, we believe that it should be codified in the context of the Federal Rules of Evidence. We shall share with you the results of our review regarding the proper scope of the privilege in due course

B. Peer-Review Privilege (New Rule)

"Peer review," as it relates to medical practice, is the system by which groups or committees of physicians review the work of a colleague to evaluate the soundness of the colleague's medical decisions in any given situation, normally in a hospital setting The practice helps to root out physician error which in turn, is intended to lead to better quality health care for patients. The practice is invaluable to the teaching and delivery of medical care. Physicians have an obvious interest in maintaining the confidentiality of peer review so as to encourage candor by those who review the physician's work, and to prevent such reviewers from becoming unnecessarily involved in a civil suit arising out of such reviews Patient privacy interests and rights are also implicated. We believe that he public interest is advanced by the recognition of confidentiality regarding such reviews.

An evidentiary peer-review privilege is recognized by many states but it does not

exist in federal common law. University of Pa. v EEOC, 493 U.S 182 (1990). For a helpful discussion of the interplay between state and federal law relating to the peer-review privilege, *see* Nilavar v. Mercy Health System-Western Ohio, 210 F.R.D 597 (S D.Ohio 2002).

We believe that the establishment of a peer-review privilege on the federal level, will serve the legitimate interests of the medical community and the public good.

II. Remedial Measures Amendment (Amendment to Rule 407)

Following injury or harm to a patient allegedly caused by the negligence of a physician, the physician may adopt remedial measures to minimize the recurrence of such injury or harm in order to improve patient safety and welfare. Such remedial measures might include modifications of surgical techniques or the establishment of additional screening criteria, preliminary to surgery.

Rule 407 of the Federal Rules of Evidence, in its current form, provides that evidence of subsequent remedial measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. However, the rule does not require the exclusion of evidence of subsequent remedial measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures (if controverted) or impeachment.

The exclusion of evidence of a party's subsequent remedial measures as proof of the party's negligence or culpable conduct is based on the sound policy of encouraging parties to undertake beneficial safety measures Kelly v Crown Equipment Co., 970 F 2d 1273, 1276 (3d Cir 1992). But the admissibility of remedial measures, particularly to establish something as wide-open as "feasibility" or for purposes of "impeachment," almost completely undermines the salutary purpose of Rule 407. Although routinely admitted for authorized purposes, juries take proof of remedial measures as admissions of guilt. Thus, it appears to us that the exceptions have all but swallowed the rule. [1]/

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[1]/ It should be noted that when Rule 407 does not bar the introduction of subsequent remedial measure evidence, it may still be ruled inadmissible under Rule 403 but only if the trial court expressly determines that the probative value of its permissible use is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.

We propose that Rule 407 be amended to minimize abuse of the permissible use of evidence of remedial measures.

III. Expert Testimony Rules

We also offer for your consideration two proposed amendments to the Rules governing the utilization of expert testimony.

A. Added Weight For Testimony of Specialists (Amendment to Rule 702)

Lay witnesses may only testify to facts within their personal knowledge. Qualified experts, on the other hand, may present their opinions as evidence in a case

Rule 702 governs the admissibility of expert testimony. Because the resolution of many cases requires an understanding of scientific, technical or other types of specialized information, experts traditionally have been permitted to provide their opinions to jurors, applying their expertise to the facts in the case As long as an expert's opinions are determined by the court to be sufficiently reliable, they may be considered by the jury, basically on an equal footing with the opinions of any opposing expert. Of course, the qualifications of all experts are fair game for cross examination under existing law.

In medical malpractice cases, opinion testimony has particular significance and it is our view that the Rules should permit the jury to give added weight to the testimony of an expert "with an advanced level of experience, training, education or certification relevant to the fact at issue in the case." Thus, in an invasive cardiology malpractice case, the opinion testimony of a practicing, board-certified, invasive cardiologist could be given more weight by the jury than the opinion testimony of a non-practicing, general practitioner

Accordingly, we propose that rule 702 be amended by adding a proviso at the end thereof, permitting a jury to give added weight to the testimony of specialists, along the lines described above [2]/
Peter G. McCabe

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[2]/ In actually crafting such a rule, care must, of course, be taken to either limit its application to medical cases or to avoid any unintended consequences in non-medical cases.

B. Mandatory Reliability Hearing on Experts (Creation of New Rule 707)

Rule 702 incorporates the principle articulated in a series of cases beginning with Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); *see also* Kumho Tire Co. v Carmichael, 526 U.S. 137 (1999). Those cases hold that trial judges should admit expert testimony only if they first determine that the opinions proferred by the expert are reliable. Standards are provided for such determination In this respect, trial judges are expected to serve as "gatekeepers" for expert testimony. Under current law, the choice of the particular procedure to be utilized in determining reliability is generally left to the discretion of the trial judge. *See* United states v. Nichols, 169 F 3d 1255 (10th Cir. 1999), *cert. denied,* 526 U.S. 1007 (1999).

Uneven and sometimes inadequate attention is given to proper procedures for determining the reliability of expert opinions. Some courts base their rulings merely on the paper record in a case. Others do not take up the matter until the eve of trial. On occasion, a case is well into trial before it is discovered that "expert" testimony is properly excludable, technically unsound or representative of so-called "junk science " In the view of the practicing physicians that we represent, a matter as important as the reliability of expert testimony deserves a formal pre-trial hearing, preferably in advance of the bar date for summary judgment motions. Accordingly, we propose the addition of a new Rule 707 imposing such procedural requirement.

IV. Closing Note

Professor Rothstein and I are available to discuss our proposals with Professor Capra, other Reporters and/or members of the Advisory Committee. Our group appreciates the splendid work of the Advisory Committees and we want you to know that we intend to continue our active participation in the rules formulation processes.

Your consideration of our views is very much appreciated.

Sincerely,

Kenneth A Lazarus

cc: Professor Paul Rothstein, Georgetown University Law Center
Judge Lee H. Rosenthal, Chairman, Committee on Rules of Practice and Procedure
Judge Robert L. Hinkle, Chairman, Advisory Committee on Evidence Rules
Professor Daniel J. Capra, Reporter, Advisory Committee on Evidence Rules
George E. Cox, III, Esq., American Medical Association
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