

**ADVISORY COMMITTEE  
ON  
EVIDENCE RULES**

**Washington, DC  
November 16, 2006**

# **ADVISORY COMMITTEE ON EVIDENCE RULES**

## **AGENDA FOR COMMITTEE MEETING**

**Washington, D.C.**

**November 16, 2006**

### **I. Opening Business**

Opening business includes 1) introduction of new members; 2) approval of the minutes of the Spring 2006 meeting; 3) a report on the status of the proposed amendments to Evidence Rules 404, 408, 606(b) and 609; and 4) a report on the June 2006 meeting of the Standing Committee. The draft minutes of the Spring 2006 meeting are included in this agenda book.

### **II. Marital Privileges**

Congress has directed the Evidence Rules Committee to study “the necessity and desirability of amending the Federal Rules of Evidence to provide that the confidential marital communications privilege and the adverse spousal privilege shall be inapplicable in any Federal proceeding in which a spouse is charged with a crime against (1) a child of either spouse or (2) a child under the custody or control of either spouse.”

The agenda book contains a memorandum prepared by the Reporter and the consultant on privileges, to assist the Committee in determining the “necessity and desirability” of amending the Evidence Rules to provide for a harm-to-child exception to the marital privileges.

### **III. Proposed Rule 502**

The Committee’s proposed Rule 502, concerning waiver of attorney-client privilege and work product, has been released for public comment. The Committee’s final review of the proposed Rule and all the public comments will take place at the Spring 2007 meeting.

The agenda book contains a memorandum by the Reporter and the consultant on privileges, discussing certain comments and suggestions that have been made about the proposed rule outside the public comment period. The intent of the memorandum is to provide an opportunity for Committee members to consider and discuss, on a preliminary basis, some of the issues concerning proposed Rule 502 that might need to be resolved at the next meeting.

#### **IV. Restylized Evidence Rules**

At its last meeting, the Committee approved a pilot project to explore the possibility of restylizing the Evidence Rules.

The agenda book contains three Evidence Rules that have been restylized by Professor Joe Kimble, as examples of what the restylized Federal Rules of Evidence might look like. The restyling examples are for Rules 103, 404 and 612. Reporter's comments on the restylized rules are included.

#### **V. Time-Counting Project**

The Standing Committee has appointed a Subcommittee to prepare rules that would provide for uniform treatment for counting time-periods under the national rules. The Subcommittee has prepared a template and is seeking input from the Advisory Committees. The goal of the Subcommittee is to have amendments proposed by the relevant Advisory Committees for consideration in the Spring of 2007.

The agenda book includes a memorandum prepared by the Reporter, which includes the time-counting template, background material, and a discussion of whether the Evidence Rules need to be amended either to change the few time periods set forth in those Rules, or to provide generally for a method of counting time.

#### **VI. Update on Case Law Development After *Crawford v. Washington*.**

The agenda book contains a memorandum from the Reporter setting forth the federal case law applying the Supreme Court's decision in *Crawford v. Washington*, and discussing the implications of that case law on any future amendments of hearsay exceptions.

#### **VII. Next Meeting**

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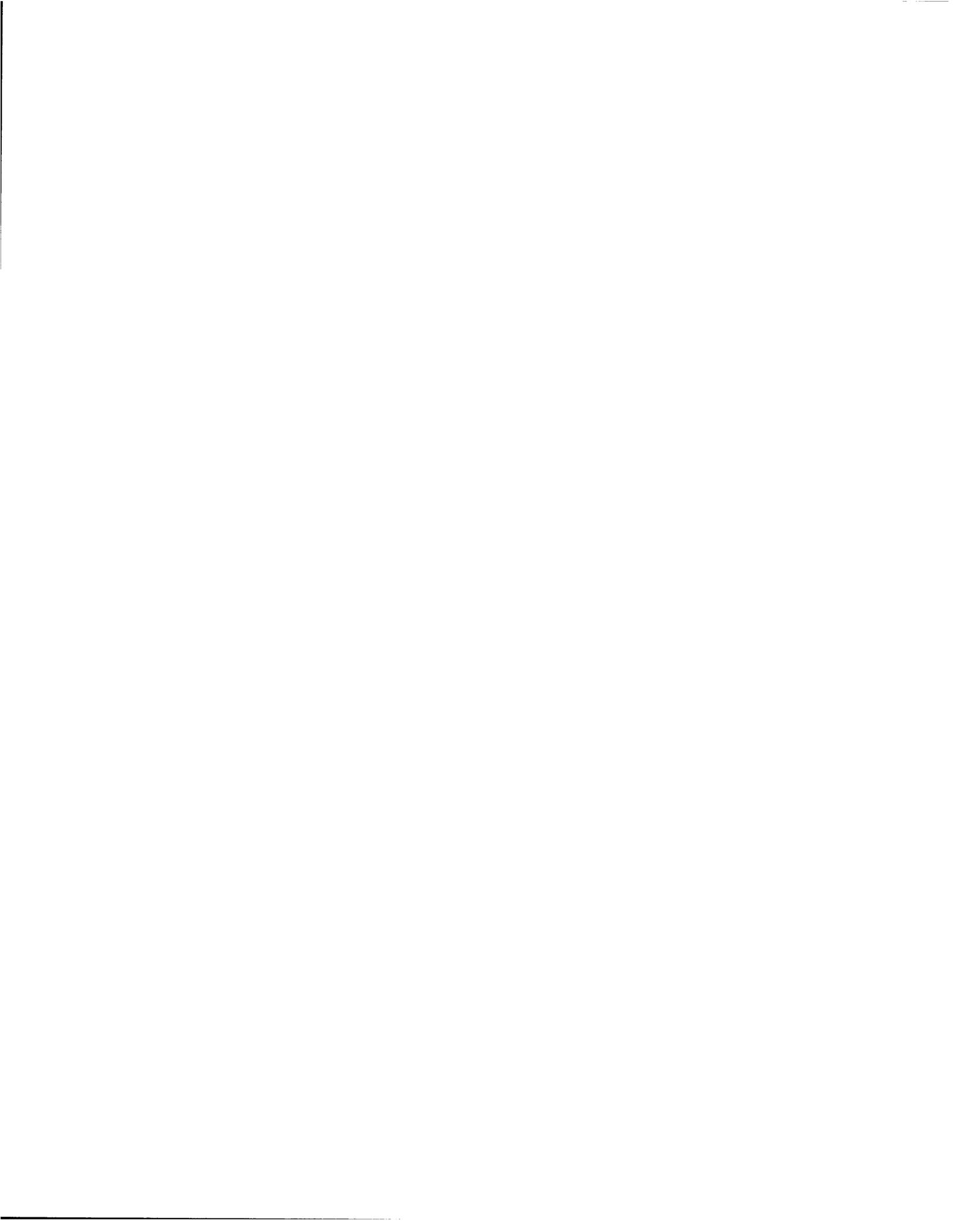
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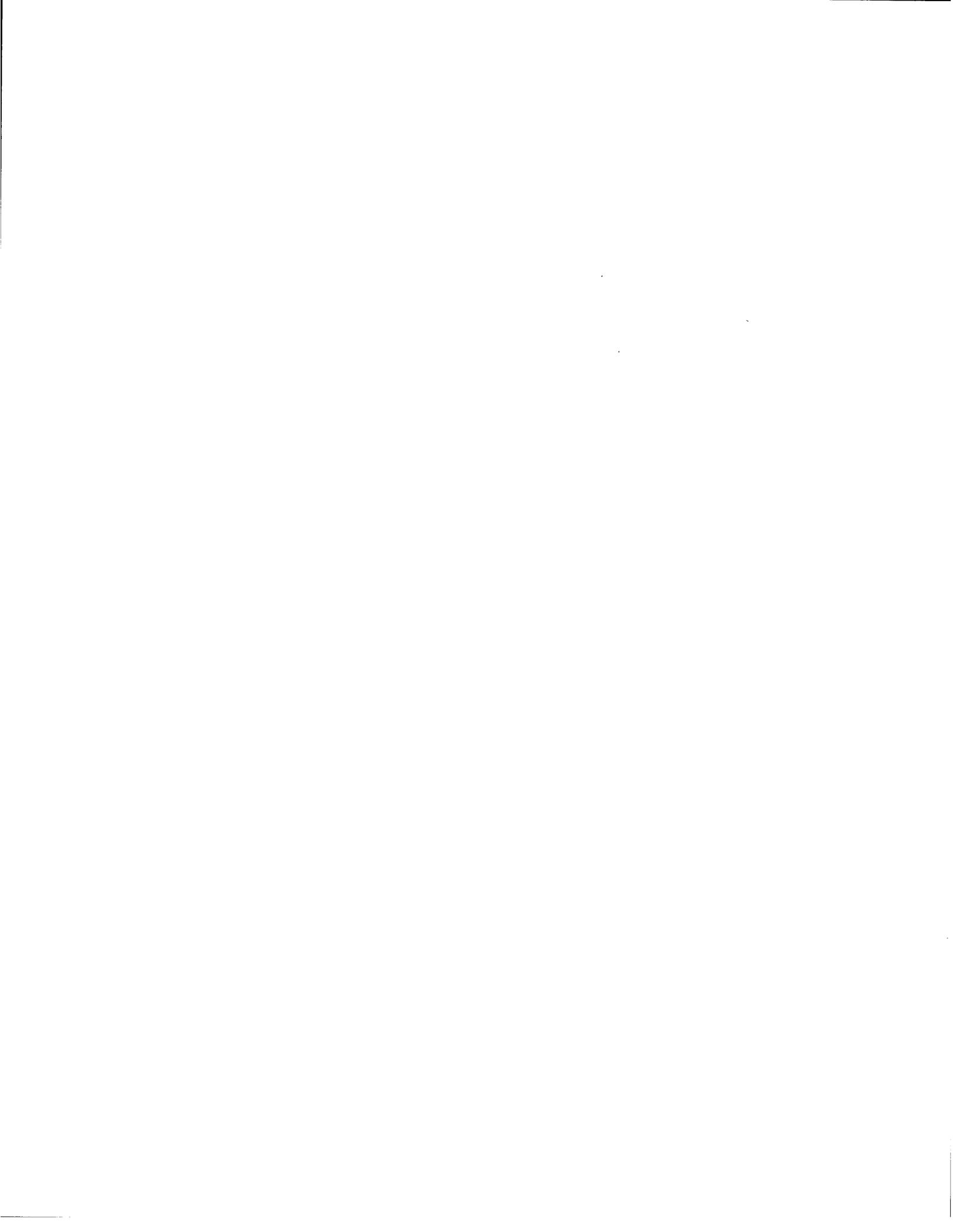
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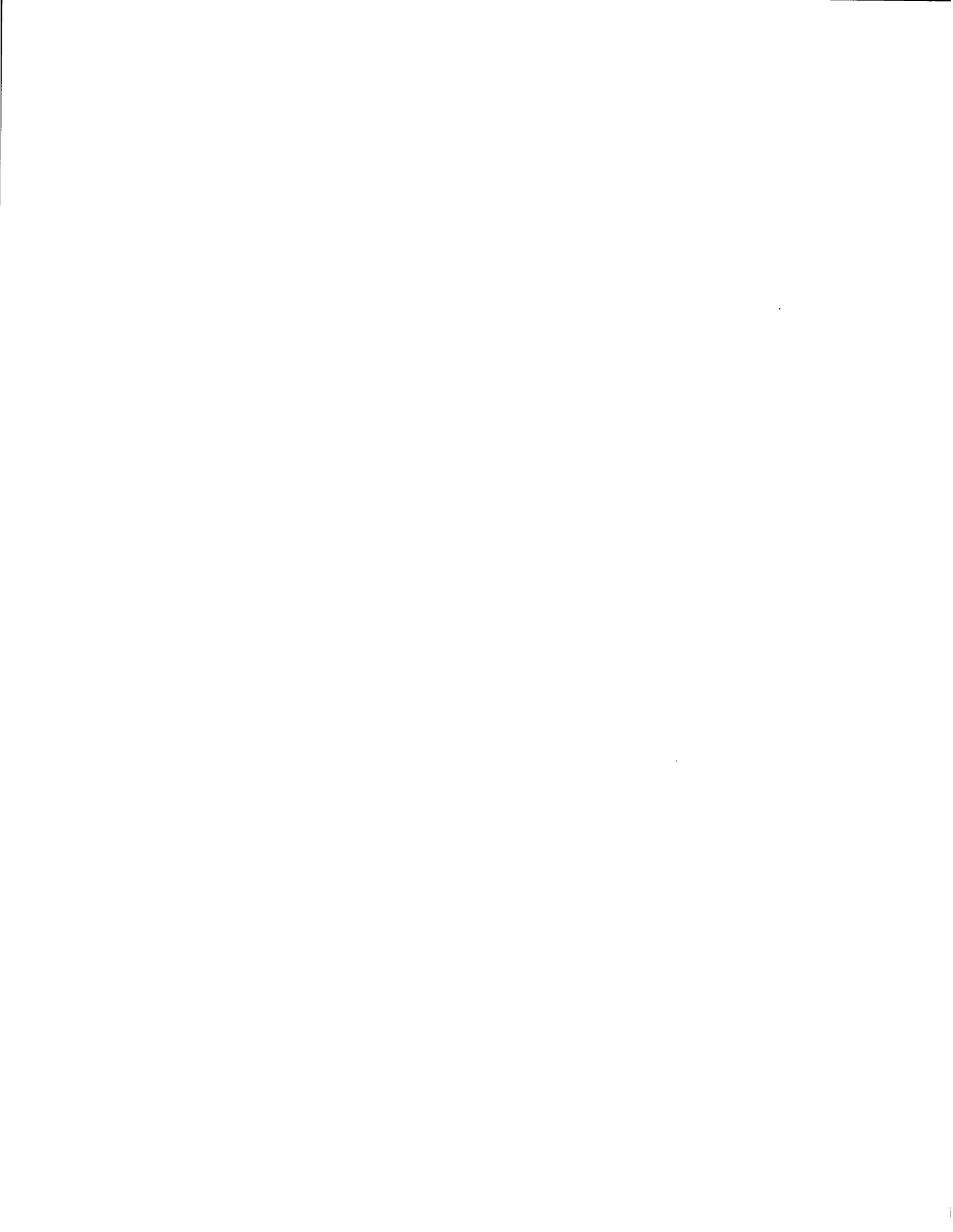
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# Advisory Committee on Evidence Rules

Minutes of the Meeting of April 24-25, 2006

New York, New York

The Advisory Committee on the Federal Rules of Evidence (the "Committee") met on April 24-25, 2006 at Fordham Law School in New York City.

*The following members of the Committee were present:*

Hon. Jerry E. Smith, Chair  
Hon. Joseph F. Anderson, Jr.  
Hon. Robert L. Hinkle  
Hon. Andrew D. Hurwitz  
Thomas W. Hillier II  
Patricia L. Refo, Esq.  
Ronald J. Tenpas, Esq., Department of Justice

*Also present were:*

Hon. David F. Levi, Chair of the Standing Committee on Rules of Practice and Procedure  
Hon. Thomas W. Thrash, Jr., Liaison from the Standing Committee on Rules of Practice and Procedure  
Hon. Christopher M. Klein, Liaison from the Bankruptcy Rules Committee  
Hon. Michael M. Baylson, Liaison from the Civil Rules Committee  
Hon. David G. Trager, Liaison from the Criminal Rules Committee  
Hon. Lee H. Rosenthal, Chair of the Civil Rules Committee  
Professor Edward H. Cooper, Reporter to the Civil Rules Committee  
Chilton D. Varner, Esq., Member of the Civil Rules Committee  
Daniel Girard, Esq., Member of the Civil Rules Committee  
Professor Richard L. Marcus, Consultant to the Civil Rules Committee  
Timothy Reagan, Esq., Federal Judicial Center  
Brooke Coleman, Esq., Rules Clerk for Judge Levi  
Peter G. McCabe, Esq., Secretary, Committee on Rules of Practice and Procedure  
John K. Rabiej, Esq., Chief, Rules Committee Support Office  
James Ishida, Esq., Rules Committee Support Office  
Jeffrey N. Barr, Esq., Rules Committee Support Office  
Professor Daniel J. Capra, Reporter to the Evidence Rules Committee  
Professor Kenneth S. Broun, Consultant to the Evidence Rules Committee

## **Opening Business**

Judge Smith welcomed the members of the Civil Rules Committee who were attending the meeting in order to provide comment on the proposed rule on waiver of privilege and work product that is being prepared by the Evidence Rules Committee. Judge Smith reported on the actions taken on the proposed amendments to Rules 404, 408, 606(b) and 609, which have been approved by the Supreme Court and are before Congress.

Judge Smith asked for approval of the minutes of the November 2005 Committee meeting. The minutes were approved.

## **Proposed Rule 502 on Waiver of Attorney-Client Privilege and Work Product**

At previous meetings, Committee members noted a number of problems with the current federal common law governing the waiver of attorney-client privilege and work product. In complex litigation the lawyers spend significant amounts of time and effort to preserve the privilege, even when many of the documents are of no concern to the producing party. The reason is that if a privileged document is produced, there is a risk that a court will find a subject matter waiver that will apply not only to the instant case and document but to other cases and documents as well. Moreover, an enormous amount of expense is put into document production in order to protect against inadvertent disclosure of privileged information, because the producing party risks a ruling that even a mistaken disclosure can result in a subject matter waiver. Committee members also expressed the view that the fear of waiver leads to extravagant claims of privilege. Members observed that if there were a way to produce documents in discovery without risking subject matter waiver, the discovery process could be made less expensive. Other concerns include the problem that arises if a corporation cooperates with a government investigation by turning over a report protected as privileged or work product. Most federal courts have held that this disclosure constitutes a waiver of the privilege, i.e., the courts generally reject the concept that a selective waiver is enforceable. This is a problem because it can deter corporations from cooperating in the first place.

Concerns about the common law of waiver of privilege and work product have been voiced in Congress as well. The Chairman of the House Committee on the Judiciary, by letter dated January 23, 2006, requested the Judicial Conference to initiate the rulemaking process to address the litigation costs and burdens created by the current law on waiver of attorney-client privilege and work product protection. The Chairman recognized that while any rule prepared by the Advisory Committee could proceed through the rulemaking process, it would eventually have to be enacted directly by Congress, as it would be a rule affecting privileges. See 28 U.S.C. § 2074(b).

At the November 2005 Committee meeting, Professor Broun had presented for the Committee's consideration a draft rule covering 1) inadvertent disclosures; 2) disclosure to

government agencies; 3) subject matter waiver; 4) the protective effect of a confidentiality order; and 5) the effect of a confidentiality agreement among the parties. The Committee extensively discussed the draft and provided comments and suggestions at that meeting, and Professor Broun and the Reporter revised the draft rule and added a proposed Committee Note for the consideration of the Committee at the April 2006 meeting. The draft proposed Rule 502 provided for the following:

1. A voluntary disclosure of privilege or work product would operate as a waiver unless an exception could be found in the Rule. But a waiver of privilege would cover only the information disclosed, unless fairness required a broader subject matter waiver.

2. Inadvertent disclosures during discovery in either state or federal court would not constitute a waiver so long as the producing party acted reasonably in trying to maintain the privilege and promptly sought return of the privileged material.

3. Disclosure of privileged information to a federal or state government agency during an investigation would not constitute a waiver to private parties in either state or federal litigation.

4. A federal or state court could enter an order protecting against the consequences of waiver in a case, and such an order would be binding on third parties in state or federal court.

5. Parties could enter into agreements protecting against the consequences of waiver in a case, but those agreements would not bind third parties unless they were incorporated into a court order.

The morning of the April 2006 meeting was devoted to a mini-hearing on the proposed rule 502 and Committee Note. The Committee invited the views of a federal judge, a federal magistrate judge, a number of practitioners and two academics. Much of the discussion and controversy was about the merits of the "selective waiver" rule, i.e., the provision that disclosure to a government agency would not constitute a waiver to private parties. Concern was also expressed about the breadth of the proposed rule, insofar as it would alter state law on waiver of privilege and would even provide that a waiver ruling in one state would bind non-parties in a court of a different state.

After the presentations and discussion, Professor Broun and the Reporter revised the proposal for consideration by the Committee in its afternoon session. The basic changes were:

1. The rule would not regulate state-to-state waiver issues, nor would it bind a federal court to a confidentiality order issued by a state court. It would, however, bind state courts to the federal waiver rule with respect to inadvertent disclosure, selective waiver, and federal court confidentiality orders.

2. The rule would not state that a voluntary disclosure constitutes a waiver unless an exception could be found. Rather, the rule would take the law of voluntary disclosure as it found it, and would provide exceptions and limitations whenever a court would otherwise find a waiver.

3. The inadvertent disclosure provision would not be limited to disclosures in discovery, but rather would cover any mistaken disclosure of privilege or work product.

The Committee and its many guests then discussed the text of the proposal at the afternoon session. A number of considerations were raised and discussed concerning, among other things:

- 1) the breadth of the rule;
- 2) whether a rule adopting selective waiver made sense in light of the fact that most federal courts had rejected the concept;
- 3) whether the selective waiver language, which would apply to disclosures “during an investigation” might be overbroad or too vague;
- 4) whether the rule should include a proviso that it was not intended to regulate the government’s disclosure of information to other government agencies or as required by law;
- 5) whether the rule should cover the effect of a disclosure of information to a state regulator;
- 6) whether the rule should even cover the question of selective waiver;
- 7) whether the rule should provide that inadvertent disclosure should always, or never, constitute a waiver;
- 8) whether the rule should cover unauthorized disclosures; and
- 9) whether the language providing for confidentiality orders should be narrowed to provide that such an order could only cover confidentiality of material disclosed in connection with litigation pending before the court.

Based on this discussion, the Committee determined that the draft rule before it should be revised as follows:

1. The selective waiver provision would be bracketed, to indicate that the Committee had not determined to approve the provision, but was seeking public comment on its merits.

2. The language in the selective waiver provision concerning disclosures “during an investigation” needed to be narrowed or better defined.

3. The selective waiver provision should specify that it was not intended to cover disclosures to state regulators, nor to affect the government agency’s disclosure to other agencies or as required by law.

4. Confidentiality orders should be enforceable only insofar as they covered disclosure of material in the case before the court.

After extensive discussion, the Committee voted unanimously to recommend that a proposed Rule 502 and Committee Note, as revised during its discussion, be released for public comment. The Reporter and Professor Broun then redrafted the proposed Rule and Committee Note for review by the Committee and its guests the next morning. This redraft addressed all the changes approved by the Committee; and specifically, with respect to the selective waiver language covering disclosures “during an investigation,” the drafters borrowed language from the recently amended Rule 408 — language that was previously offered by the Justice Department to cover statements made to government regulators. That language covers disclosures “when made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority.”

At the Tuesday morning session, the Committee and its guests reviewed the revised Rule 502 and Committee Note. After a short discussion— including some suggestions on style, which were implemented — the Committee voted unanimously to recommend that the proposed Rule 502 and Committee Note (as set forth below) be released for public comment.

**The Rule and Committee Note, as unanimously approved by the Committee for release for public comment, provides as follows:**

**Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver**

(a) Scope of waiver. — In federal proceedings, the waiver by disclosure of an attorney-client privilege or work product protection extends to an undisclosed communication or information concerning the same subject matter only if that undisclosed communication or information ought in fairness to be considered with the disclosed communication or information.

(b) Inadvertent disclosure. — A disclosure of a communication or information covered by the attorney-client privilege or work product protection does not operate as a waiver in a state or federal proceeding if the disclosure is inadvertent and is made in connection with federal litigation or federal administrative proceedings — and if the holder of the privilege or work product protection took reasonable precautions to prevent disclosure and took reasonably prompt measures, once the holder knew or should have known of the disclosure, to rectify the error, including (if applicable) following the procedures in Fed. R. Civ. P. 26(b)(5)(B).

[( c ) Selective waiver. — In a federal or state proceeding, a disclosure of a communication or information covered by the attorney-client privilege or work product protection — when made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority — does not operate as a waiver of the privilege or protection in favor of non-governmental persons or entities. The effect of disclosure to a state or local government agency, with respect to non-governmental persons or entities, is governed by applicable state law. Nothing in this rule limits or expands the authority of a

government agency to disclose communications or information to other government agencies or as otherwise authorized or required by law.]

(d) Controlling effect of court orders. — A federal court order that the attorney-client privilege or work product protection is not waived as a result of disclosure in connection with the litigation pending before the court governs all persons or entities in all state or federal proceedings, whether or not they were parties to the matter before the court, if the order incorporates the agreement of the parties before the court.

(e) Controlling effect of party agreements. — An agreement on the effect of disclosure of a communication or information covered by the attorney-client privilege or work product protection is binding on the parties to the agreement, but not on other parties unless the agreement is incorporated into a court order.

(f) Included privilege and protection. — As used in this rule:

- 1) “attorney-client privilege” means the protection provided for confidential attorney-client communications, under applicable law; and
- 2) “work product protection” means the protection for materials prepared in anticipation of litigation or for trial, under applicable law.

#### **Committee Note**

This new rule has two major purposes:

1) It resolves some longstanding disputes in the courts about the effect of certain disclosures of material protected by the attorney-client privilege or the work product doctrine—specifically those disputes involving inadvertent disclosure and selective waiver.

2) It responds to the widespread complaint that litigation costs for review and protection of material that is privileged or work product have become prohibitive due to the concern that any disclosure of protected information in the course of discovery (however innocent or minimal) will operate as a subject matter waiver of all protected information. This concern is especially troubling in cases involving electronic discovery. *See, e.g., Rowe Entertainment, Inc. v. William Morris Agency*, 205 F.R.D. 421, 425-26 (S.D.N.Y. 2002) (finding that in a case involving the production of e-mail, the cost of pre-production review for privileged and work product material would cost one defendant \$120,000 and another defendant \$247,000, and that such review would take months). *See also* Report to the Judicial Conference Standing Committee on Rules of Practice and Procedure by the Advisory Committee on the Federal Rules of Civil Procedure, September 2005 at 27 (“The volume of information and the forms in which it is stored make privilege determinations more difficult and privilege review correspondingly more expensive and time-consuming yet less likely to detect all privileged information.”); *Hopson v. City of Baltimore*, 232 F.R.D. 228, 244

(D.Md. 2005) (electronic discovery may encompass “millions of documents” and to insist upon “record-by-record pre-production privilege review, on pain of subject matter waiver, would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation”).

The rule seeks to provide a predictable, uniform set of standards under which parties can determine the consequences of a disclosure of communications or information covered by the attorney-client privilege or work product protection. Parties to litigation need to know, for example, that if they exchange privileged information pursuant to a confidentiality order, the court’s order will be enforceable. For example, if a federal court’s confidentiality order is not enforceable in a state court then the burdensome costs of privilege review and retention are unlikely to be reduced.

The Committee is well aware that a privilege rule proposed through the rulemaking process cannot bind state courts, and indeed that a rule of privilege cannot take effect through the ordinary rulemaking process. See 28 U.S.C § 2074(b). It is therefore anticipated that Congress must enact this rule directly, through its authority under the Commerce Clause. *Cf.* Class Action Fairness Act of 2005, 119 Stat. 4, PL 109-2 (relying on Commerce Clause power to regulate state class actions).

The rule makes no attempt to alter federal or state law on whether a communication or information is protected as attorney-client privilege or work product as an initial matter. Moreover, while establishing some exceptions to waiver, the rule does not purport to supplant applicable waiver doctrine generally.

The rule governs only certain waivers by disclosure. Other common-law waiver doctrines may result in a finding of waiver even where there is no disclosure of privileged information or work product. *See, e.g., Nguyen v. Excel Corp.*, 197 F.3d 200 (5th Cir. 1999) (reliance on an advice of counsel defense waives the privilege with respect to attorney-client communications pertinent to that defense); *Ryers v. Burlison*, 100 F.R.D. 436 (D.D.C. 1983) (allegation of lawyer malpractice constituted a waiver of confidential communications under the circumstances). The rule is not intended to displace or modify federal common law concerning waiver of privilege or work product where no disclosure has been made.

Subdivision (a). The rule provides that a voluntary disclosure generally results in a waiver only of the communication or information disclosed; a subject matter waiver (of either privilege or work product) is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to protect against a selective and misleading presentation of evidence to the disadvantage of the adversary. *See, e.g., In re von Bulow*, 828 F.2d 94 (2d Cir. 1987) (disclosure of privileged information in a book did not result in unfairness to the adversary in a litigation, therefore a subject matter waiver was not warranted); *In re United Mine Workers of America Employee Benefit Plans Litig.*, 159 F.R.D. 307, 312 (D.D.C. 1994)(waiver of work product limited to materials

actually disclosed, because the party did not deliberately disclose documents in an attempt to gain a tactical advantage). The language concerning subject matter waiver — “ought in fairness” — is taken from Rule 106, because the animating principle is the same. A party that makes a selective, misleading presentation that is unfair to the adversary opens itself to a more complete and accurate presentation. *See, e.g., United States v. Branch*, 91 F.3d 699 (5th Cir. 1996) (under Rule 106, completing evidence was not admissible where the party’s presentation, while selective, was not misleading or unfair). The rule rejects the result in *In re Sealed Case*, 877 F.2d 976 (D.C.Cir. 1989), which held that inadvertent disclosure of documents during discovery automatically constituted a subject matter waiver.

Subdivision (b). Courts are in conflict over whether an inadvertent disclosure of privileged information or work product constitutes a waiver. A few courts find that a disclosure must be intentional to be a waiver. Most courts find a waiver only if the disclosing party acted carelessly in disclosing the communication or information and failed to request its return in a timely manner. And a few courts hold that any mistaken disclosure of protected information constitutes waiver without regard to the protections taken to avoid such a disclosure. *See generally Hopson v. City of Baltimore*, 232 F.R.D. 228 (D.Md. 2005) for a discussion of this case law.

The rule opts for the middle ground: inadvertent disclosure of privileged or protected information in connection with a federal proceeding constitutes a waiver only if the party did not take reasonable precautions to prevent disclosure and did not make reasonable and prompt efforts to rectify the error. This position is in accord with the majority view on whether inadvertent disclosure is a waiver. *See, e.g., Zapata v. IBP, Inc.*, 175 F.R.D. 574, 576-77 (D. Kan. 1997) (work product); *Hydraflow, Inc. v. Enidine, Inc.*, 145 F.R.D. 626, 637 (W.D.N.Y. 1993) (attorney-client privilege); *Edwards v. Whitaker*, 868 F.Supp. 226, 229 (M.D. Tenn. 1994) (attorney-client privilege). The rule establishes a compromise between two competing premises. On the one hand, information covered by the attorney-client privilege or work product protection should not be treated lightly. On the other hand, a rule imposing strict liability for an inadvertent disclosure threatens to impose prohibitive costs for privilege review and retention, especially in cases involving electronic discovery.

The rule refers to “inadvertent” disclosure, as opposed to using any other term, because the word “inadvertent” is widely used by courts and commentators to cover mistaken or unintentional disclosures of information covered by the attorney-client privilege or the work product protection. *See, e.g., Manual for Complex Litigation Fourth* § 11.44 (Federal Judicial Center 2004) (referring to the “consequences of inadvertent waiver”); *Alldread v. City of Grenada*, 988 F.2d 1425, 1434 (5th Cir. 1993) (“There is no consensus, however, as to the effect of inadvertent disclosure of confidential communications.”).

Subdivision (c): Courts are in conflict over whether disclosure of privileged or protected information to a government agency conducting an investigation of the client constitutes a general waiver of the information disclosed. Most courts have rejected the

concept of “selective waiver,” holding that waiver of privileged or protected information to a government agency constitutes a waiver for all purposes and to all parties. *See, e.g., Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414 (3d Cir. 1991). Other courts have held that selective waiver is enforceable if the disclosure is made subject to a confidentiality agreement with the government agency. *See, e.g., Teachers Insurance & Annuity Association of America v. Shamrock Broadcasting Co.*, 521 F. Supp. 638 (S.D.N.Y. 1981). And a few courts have held that disclosure of protected information to the government does not constitute a general waiver, so that the information remains shielded from use by other parties. *See, e.g., Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977).

The rule rectifies this conflict by providing that disclosure of protected information to a federal government agency exercising regulatory, investigative or enforcement authority does not constitute a waiver of attorney-client privilege or work product protection as to non-governmental persons or entities, whether in federal or state court. A rule protecting selective waiver in these circumstances furthers the important policy of cooperation with government agencies, and maximizes the effectiveness and efficiency of government investigations. *See In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289, 314 (6th Cir. 2002) (Boggs, J., dissenting) (noting that the “public interest in easing government investigations” justifies a rule that disclosure to government agencies of information covered by the attorney-client privilege or work product protection does not constitute a waiver to private parties).

The Committee considered whether the shield of selective waiver should be conditioned on obtaining a confidentiality agreement from the government agency. It rejected that condition for a number of reasons. If a confidentiality agreement were a condition to protection, disputes would be likely to arise over whether a particular agreement was sufficiently air-tight to protect against a finding of a general waiver, thus destroying the predictability that is essential to proper administration of the attorney-client privilege and work product immunity. Moreover, a government agency might need or be required to use the information for some purpose and then would find it difficult or impossible to be bound by an air-tight confidentiality agreement, however drafted. If a confidentiality agreement were nonetheless required to trigger the protection of selective waiver, the policy of furthering cooperation with and efficiency in government investigations would be undermined. Ultimately, the obtaining of a confidentiality agreement has little to do with the underlying policy of furthering cooperation with government agencies that animates the rule.

Subdivision (d). Confidentiality orders are becoming increasingly important in limiting the costs of privilege review and retention, especially in cases involving electronic discovery. *See Manual for Complex Litigation Fourth* § 11.446 (Federal Judicial Center 2004) (noting that fear of the consequences of waiver “may add cost and delay to the discovery process for all sides” and that courts have responded by encouraging counsel “to stipulate at the outset of discovery to a ‘nonwaiver’ agreement, which they can adopt as a case-management order.”). But the utility of a confidentiality order in reducing discovery

costs is substantially diminished if it provides no protection outside the particular litigation in which the order is entered. Parties are unlikely to be able to reduce the costs of pre-production review for privilege and work product if the consequence of disclosure is that the information can be used by non-parties to the litigation.

There is some dispute on whether a confidentiality order entered in one case can bind non-parties from asserting waiver by disclosure in a separate litigation. *See generally Hopson v. City of Baltimore*, 232 F.R.D. 228 (D.Md. 2005) for a discussion of this case law. The rule provides that when a confidentiality order governing the consequences of disclosure in that case is entered in a federal proceeding, according to the terms agreed to by the parties, its terms are enforceable against non-parties in any federal or state proceeding. For example, the court order may provide for return of documents without waiver irrespective of the care taken by the disclosing party; the rule contemplates enforcement of “claw-back” and “quick peek” arrangements as a way to avoid the excessive costs of pre-production review for privilege and work product. As such, the rule provides a party with a predictable protection that is necessary to allow that party to limit the prohibitive costs of privilege and work product review and retention.

Subdivision (e). Subdivision (e) codifies the well-established proposition that parties can enter an agreement to limit the effect of waiver by disclosure between or among them. *See, e.g., Dowd v. Calabrese*, 101 F.R.D. 427, 439 (D.D.C. 1984) (no waiver where the parties stipulated in advance that certain testimony at a deposition “would not be deemed to constitute a waiver of the attorney-client or work product privileges”); *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 290 (S.D.N.Y. 2003) (noting that parties may enter into “so-called ‘claw-back’ agreements that allow the parties to forego privilege review altogether in favor of an agreement to return inadvertently produced privilege documents”). Of course such an agreement can bind only the parties to the agreement. The rule makes clear that if parties want protection from a finding of waiver by disclosure in a separate litigation, the agreement must be made part of a court order.

Subdivision (f). The rule’s coverage is limited to attorney-client privilege and work product. The limitation in coverage is consistent with the goals of the rule, which are 1) to provide a reasonable limit on the costs of privilege and work product review and retention that are incurred by parties to litigation; and 2) to encourage cooperation with government investigations and reduce the costs of those investigations. These two interests arise mainly, if not exclusively, in the context of disclosure of attorney-client privilege and work product. The operation of waiver by disclosure, as applied to other evidentiary privileges, remains a question of federal common law. Nor does the rule purport to apply to the Fifth Amendment privilege against compelled self-incrimination.

## **Crawford v. Washington and the Hearsay Exceptions**

The Reporter prepared a report for the Committee on case law developments after *Crawford v. Washington*. The Court in *Crawford* held that if hearsay is “testimonial,” its admission against an accused violates the right to confrontation unless the declarant is available and subject to cross-examination. The Court rejected its previous reliability-based confrontation test, at least as it applied to “testimonial” hearsay. The Court in *Crawford* declined to define the term “testimonial” and also declined to establish a test for the admissibility of hearsay that is not “testimonial.”

*Crawford* raises questions about the constitutionality as-applied of some of the hearsay exceptions in the Federal Rules of Evidence. The Evidence Rules Committee has therefore resolved to monitor federal case law developments after *Crawford*, in order to determine whether and when it might be necessary to propose amendments that would be necessary to bring a hearsay exception into compliance with constitutional requirements. The memorandum prepared by the Reporter indicated that the federal courts are in substantial agreement that certain hearsay statements are always testimonial and certain others are not. Those considered testimonial include grand jury statements, statements made during police interrogations, prior testimony, and guilty plea allocutions. Statements uniformly considered nontestimonial include informal statements made to friends, statements made solely for purposes of medical treatment, and garden-variety statements made during the course and in furtherance of a conspiracy. In contrast, courts are in dispute about whether 911 calls and statements made to responding officers are testimonial. The Committee is monitoring developments and is awaiting the Supreme Court’s decisions in two state cases involving *Crawford*’s effect on the admissibility of 911 calls and statements made to responding officers.

The Evidence Rules Committee decided that because of the uncertainty created by *Crawford*, and the pending Supreme Court decisions on the subject, it would be imprudent to propose amendments to specific hearsay exceptions that might be construed to admit testimonial hearsay. Any attempt to determine the correct scope of the term “testimonial” might be undermined by subsequent case law handed down during the time that the rule would be going through the rulemaking process.

At the Fall 2005 meeting, some Committee members suggested that a generic reference to constitutional requirements might usefully be placed either in the hearsay rule itself (Rule 802) or before each of the rules providing exceptions that might be problematic after *Crawford* (Rules 801(d)(2), 803, 804 and 807). Such a generic reference does not run the risk of being inconsistent with the Supreme Court’s subsequent interpretations of the Confrontation Clause. The Committee directed the Reporter to prepare a draft amendment that would provide a basic reference to the constitutional rights of the accused with regard to admission of hearsay under the Federal Rules hearsay exceptions.

At the April 2006 meeting, the Committee considered the draft prepared by the Reporter and resolved not to proceed with any amendment that would provide a reference to constitutional limitations in the hearsay exceptions or the hearsay rule. Committee members stated that such

language was not necessary because most counsel are now aware of *Crawford*; an amendment would make the already-long Rules 801, 803 and 804 even longer; and any amendment adding constitutional language would raise the anomaly that other rules, such as perhaps Rule 403 and 404, might be subject to unconstitutional application and yet would not have similar constitutional-warning language. One member dissented from the Committee's determination, on the ground that constitutional-warning language in the hearsay exceptions might provide important notice to counsel who are inexperienced in criminal defense.

## **Electronic Evidence, and Restylizing the Evidence Rules**

At its Fall 2005 meeting the Committee tentatively approved a new Rule 107, an amendment that would make it clear that the Evidence Rules cover evidence presented in electronic form. The proposed Rule 107 would update the "paper-based" language in the Evidence Rules as follows:

### **Rule 107. Electronic Form**

As used in these rules, the following terms, whether singular or plural, include information in electronic form: "book," "certificate," "data compilation," "directory," "document," "entry," "list," "memorandum," "newspaper," "pamphlet," "paper," "periodical," "printed," "publication," "published," "record," "recorded," "recording," "report," "tabulation," "writing" and "written." Any "attestation," "certification," "execution" or "signature" required by these rules may be made electronically. A certificate, declaration, document, record or the like may be "filed," "recorded," "sealed" or "signed" electronically.

Upon reconsideration at the April 2006 meeting, the Committee determined unanimously that it would not proceed with the proposed amendment at this time. The Committee noted that courts are not having any trouble in applying the existing, paper-based Evidence Rules to all forms of electronic evidence. One member observed that paper-based language might actually be appropriate in some Rules, such as Rule 612, which requires a "writing" to be produced when it refreshes recollection; if "writing" covers electronic information as well, then the Rule might be read to require production of a telephone call that refreshed a witness's recollection.

Judge Thrash, the liaison from the Standing Committee, observed that the Rule would not really serve a notice function, because counsel would not think to look at a freestanding Rule 107 to determine what "writing" means in, e.g., Rule 902. He concluded that the only way to update the language of the Evidence Rules was to amend each paper-based rule directly.

Judge Thrash's comment led to a discussion of whether the Committee might wish to propose a restylization project for the Evidence Rules. The Committee determined that such a project would be worthy of consideration, so long as it was understood that the project would not result in a major restructuring of the Rules, such as a change of rule numbers.

The Committee directed the Reporter to pick a few rules that are clearly in need of restyling, and to work with Professor Kimble to prepare a restyled version of those rules for the Committee's consideration at the next meeting.

## **Other Business**

Judge Smith noted with regret that the terms of two valued Committee members were expiring. He expressed the Committee's thanks to Trish Refo and Tom Hillier for their stellar contributions to the work of the Committee.

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The meeting was adjourned on Tuesday April 25, with the time and place of the Fall 2006 meeting to be announced.



April 12, 2006

Honorable J. Dennis Hastert  
Speaker of the House of Representatives  
Washington, D.C. 20515

Dear Mr. Speaker:

I have the honor to submit to the Congress the amendments to the Federal Rules of Evidence that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

/s/ John G. Roberts, Jr.

April 12, 2006

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Evidence be, and they hereby are, amended by including therein the amendments to Evidence Rules 404, 408, 606, and 609.

[See *infra.*, pp. — — —.]

2. That the foregoing amendments to the Federal Rules of Evidence shall take effect on December 1, 2006, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Evidence in accordance with the provisions of Section 2072 of Title 28, United States Code.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE  
Meeting of June 22-23, 2006  
Washington, D.C.  
**Draft Minutes**

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ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, D.C. on Thursday and Friday, June 22-23, 2006. All the members were present:

Judge David F. Levi, Chair  
David J. Beck, Esquire  
Douglas R. Cox, Esquire  
Judge Sidney A. Fitzwater  
Judge Harris L Hartz  
Dean Mary Kay Kane  
John G. Kester, Esquire  
Judge Mark R. Kravitz  
William J. Maledon, Esquire  
Deputy Attorney General Paul J. McNulty  
Judge J. Garvan Murtha  
Judge Thomas W. Thrash, Jr.  
Justice Charles Talley Wells

Providing support to the committee were: Professor Daniel R. Coquillette, the committee's reporter; Peter G. McCabe, the committee's secretary; John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office; James N. Ishida, Jeffrey N. Barr, and Timothy K. Dole, attorneys in the Office of Judges Programs of the Administrative Office; Emery Lee, Supreme Court Fellow at the Administrative Office; Joe Cecil of the Research Division of the Federal Judicial Center; and Joseph F. Spaniol, Jr., consultant to the committee. Professor R. Joseph Kimble, style consultant to the committee, participated by telephone in the meeting on June 23.

Representing the advisory committees were:

- Advisory Committee on Appellate Rules —  
    Judge Carl E. Stewart, Chair  
    Professor Catherine T. Struve, Reporter
- Advisory Committee on Bankruptcy Rules —  
    Judge Thomas S. Zilly, Chair  
    Professor Jeffrey W. Morris, Reporter
- Advisory Committee on Civil Rules —  
    Judge Lee H. Rosenthal, Chair  
    Professor Edward H. Cooper, Reporter
- Advisory Committee on Criminal Rules —  
    Judge Susan C. Bucklew, Chair  
    Professor Sara Sun Beale, Reporter
- Advisory Committee on Evidence Rules —  
    Judge Jerry E. Smith, Chair  
    Professor Daniel J. Capra, Reporter

Deputy Attorney General McNulty attended part of the meeting on June 22. The Department of Justice was also represented at the meeting by Associate Attorney General Robert D. McCallum, Jr.; Alice S. Fisher, Assistant Attorney General for the Criminal Division; Ronald J. Tenpas, Associate Deputy Attorney General; Benton J. Campbell, Counselor to the Assistant Attorney General; and Jonathan J. Wroblewski and Elizabeth U. Shapiro of the Criminal Division.

### INTRODUCTORY REMARKS

Judge Levi welcomed Supreme Court Justice Samuel A. Alito, Jr. to the meeting and presented him with a plaque honoring his service as a member and chair of the Advisory Committee on Appellate Rules.

Later in the day, Chief Justice John G. Roberts, Jr. came to the meeting, greeted the members, and spent time with them in informal conversations. Judge Levi presented the Chief Justice with a framed resolution expressing the committee's appreciation, respect, and admiration for his support of the rulemaking process and his service as a member of the Advisory Committee on Appellate Rules. Judge Levi noted that the Chief Justice had been nominated as the next chair of that committee, but his elevation to the Supreme Court had intervened with the succession. The Chief Justice expressed his appreciation for the work of the rules committees and emphasized that he had experienced that work from the inside.

Judge Levi reported that Professor Struve had been appointed by the Chief Justice as the new reporter for the Advisory Committee on Appellate Rules, succeeding Patrick Schiltz, who had just been sworn in as a district judge in Minnesota. Judge Levi pointed out that Professor Struve had written many excellent law review articles and has been described as "shockingly prolific."

Judge Levi noted that Dean Kane would retire as dean of the Hastings College of the Law on June 30, 2006. He also reported that she, Judge Murtha, and Judge Thrash would be leaving the committee because their terms were due to expire on September 30, 2006. He said that their contributions to the committee had been enormous, particularly as the members of the committee's Style Subcommittee. He also reported with sadness that the terms of Judge Fitzwater and Justice Wells were also due to expire on September 30, 2006. They, too, had made major contributions to the work of the committee and would be sorely missed. He noted that all the members whose terms were about to expire would be invited to the next committee meeting in January 2007.

Judge Levi noted that the civil rules style project had largely come to a conclusion. The committee, he said, needed to make note of this major milestone. He said that the style project was extremely important, and it will be of great benefit in the future to law students, professors, lawyers, and judges. The achievement, he emphasized, had been the joint product of a number of dedicated members, consultants, and staff.

In addition to recognizing the Style Subcommittee – Judges Murtha and Thrash and Dean Kane – Judge Levi singled out Judge Rosenthal, chair of the Advisory Committee on Civil Rules, and Judges Paul J. Kelly, Jr. and Thomas B. Russell, who served as the chairs of the advisory committee's two style subcommittees. Together, they

shepherded the style project through the advisory committee. Judge Levi also recognized the tremendous assistance provided by Professors R. Joseph Kimble, Richard L. Marcus, and Thomas D. Rowe, Jr., and by Joseph F. Spaniol, Jr., all of whom labored over countless proposed drafts, wrote and read hundreds of memoranda, and participated in many meetings and teleconferences.

Judge Levi also thanked the staff of the Administrative Office for managing the process and providing timely and professional assistance to the committees – Peter G. McCabe, John K. Rabiej, Jeffrey A. Hennemuth, Robert P. Deyling, and Jeffrey N. Barr, and their excellent supporting staff – who keep the records, arrange the meetings, and prepare the agenda books. Finally, he gave special thanks to Professor Cooper who, he emphasized, had been the heart and soul of the style project. Professor Cooper was tireless and relentless in reviewing each and every rule with meticulous care and great insight. He helped shape every decision of the committee.

Judge Levi said that there was little to report about the March 2006 meeting of the Judicial Conference. He noted that the Supreme Court had prescribed the proposed rule amendments approved by the Judicial Conference in September 2005, including the package of civil rules governing discovery of electronically stored information. The amendments, now pending in Congress, are expected to take effect on December 1, 2006.

Judge Levi also thanked Brooke Coleman, his rules law clerk, for her brilliant work over the last several years in assisting him in all his duties as chair of the committee. He noted that she would soon begin teaching at Stanford Law School.

Judge Levi reported that Associate Attorney General McCallum had been nominated by the President to be the U.S. ambassador to Australia. Accordingly, he said, this was likely to be Mr. McCallum's last committee meeting. He emphasized that he had been a wonderful member and had established a new level of cooperation between the rules committees and the Department of Justice. He said that it is very important for the executive branch to be involved in the work of the advisory committees, especially when its interests are affected. He noted that the Department is a large organization, and its internal decision making on the federal rules works well only when its top executives, such as the Associate Attorney General, are personally involved. He emphasized that Mr. McCallum had attended and participated in all the committee meetings, and that he is a brilliant lawyer and a great person.

#### APPROVAL OF THE MINUTES OF THE LAST MEETING

**The committee voted without objection to approve the minutes of the last meeting, held on January 6-7, 2006.**

## REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej reported on three legislative matters affecting the rules system. First, he pointed out that the Rules Enabling Act specifies that, unlike other amendments to the federal rules, any rule that affects an evidentiary privilege must be enacted by positive statute. He noted that the Advisory Committee on Evidence Rules had been working for several years on potential privilege rules, including a rule on waiver of the attorney-client privilege and work product protection. But before the committee could proceed seriously with a privilege waiver rule, it should alert Congress to all the relevant issues and obtain its acceptance in pursuing legislation to enact the rule. Accordingly, he said, Judge Levi and he had met on the matter with the chairman of the Judiciary Committee of the House of Representatives, F. James Sensenbrenner, Jr.

Chairman Sensenbrenner recognized that legislation would be necessary to implement the rule. Judge Levi reported that the chairman was very supportive and had urged the committee by letter to promulgate a rule that would: (1) protect against inadvertent waiver of privilege and protection, (2) permit parties and courts to disclose privileged and protected information to protect against the consequences of waiver, and (3) allow parties and entities to cooperate with government agencies by turning over privileged and protected information without waiving the privilege and protection as to any other party in later proceedings.

Mr. Rabiej reported that the Advisory Committee on Evidence Rules had drafted a proposed rule, FED. R. EVID. 502, addressing the three topics suggested by Chairman Sensenbrenner. He added that Judge Levi would meet on June 23 with the chief counsel to the Senate Judiciary Committee and others to discuss the proposed rule.

Second, Mr. Rabiej reported that the Advisory Committee on Bankruptcy Rules had produced a comprehensive package of amendments and new rules to implement the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. He pointed out that two senators had written recently to the Chief Justice objecting to three provisions in the advisory committee's proposed rules. The Director of the Administrative Office responded to the senators by explaining the basis for the advisory committee's decisions on these provisions and emphasizing that the committee would examine afresh the senators' suggestions, along with other comments submitted by the public, as part of the public comment process.

Third, Mr. Rabiej noted that a provision of the Class Action Fairness Act of 2005 required the Judicial Conference to report on the best practices that courts have used to make sure that proposed class action settlements are fair and that attorney fees are reasonable. He said that the Judicial Conference had filed the report with the judiciary committees of the House and Senate in February 2006. The thrust of the report

emphasized that the extensive 2003 revisions to FED. R. CIV. P. 23 had provided the courts with a host of rule-based tools, discretion, and guidance to scrutinize rigorously class action settlements and fee awards. The revised rule was intended largely to codify and amplify the best practices that district courts had developed to supervise class action litigation.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Cecil reported on the status of pending projects of the Federal Judicial Center. He directed the committee's attention to two projects.

First, he noted, the Center was working with the Administrative Office to monitor developments in the courts following the Class Action Fairness Act of 2005. He said that the study was showing that class-action filings had increased since the Act. But not many class action cases are being removed from the state courts. Rather, he said, cases that previously would have been filed in the state courts are now being filed in the federal courts as original actions.

Second, the Center was studying the issue of appellate jurisdiction and how it affects resources in the appellate courts and district courts. He said that the Center would examine the exercise of jurisdiction under 28 U.S.C. § 1292(b), and a report would be forthcoming soon. He added, in response to a question, that concerns had been expressed regarding § 1292(b) motions in patent cases. He said that it had been difficult in the past to get district courts to certify an appeal and for the courts of appeals to accept the appeal. But the reluctance seems to have diminished, and changes are being seen.

REPORT OF THE TECHNOLOGY SUBCOMMITTEE

*Rules for Final Approval*

- FED. R. APP. P. 25(a)(5)
- FED. R. BANKR. P. 9037
- FED. R. CIV. P. 5.2
- FED. R. CRIM. 49.1

Judge Fitzwater explained that the four proposed rules have been endorsed by the Technology Subcommittee and the respective advisory committees. They comply with the requirement of the E-Government Act of 2002 that rules be prescribed "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." The substance of the proposed rules,

he said, was based on the privacy policy already developed by the Court Administration and Case Management Committee and adopted by the Judicial Conference. In essence, since all federal court documents are now posted on the Internet, the proposed rules impose obligations on people filing papers in the courts to redact certain sensitive information to protect privacy and security interests.

Professor Capra added that the statute specifies that the rules must be uniform “to the extent practicable.” He referred to the chart in the agenda book setting forth the proposed civil, criminal, and bankruptcy rules side-by-side and demonstrating how closely they track each other. (The proposed amendment to the appellate rules would adopt the privacy provisions followed in the case below.) He said that the subcommittee and the reporters had spent an enormous amount of time trying to make the rules uniform, even down to the punctuation. He pointed out that individual rules differ from the template developed by the Technology Subcommittee only where there is a special need in a particular set of rules. For example, a special need exists in criminal cases to protect home addresses of witnesses and others from disclosure. Therefore, the criminal rules, unlike the civil and bankruptcy rules, require redaction of all but the city and state of a home address in any paper filed with the court. Professor Coquillette added that the consistent policy of the Standing Committee since 1989 has been that when the same provision applies in different sets of federal rules, the language of the rule should be the same unless there is a specific justification for a deviation.

Judge Levi pointed out that the Court Administration and Case Management Committee had raised two concerns with the proposed privacy rules. First, that committee had suggested that the criminal rules require redaction of the name of a grand jury foreperson from documents filed with the court. But, he said, the signature of a foreperson on an indictment is essential, and there has been litigation over the legality of an indictment that does not bear the signature of the foreperson.

Second, the Court Administration and Case Management Committee had raised concerns over arrest and search warrants that have been executed. Initially, he said, the Department of Justice had argued, and the advisory committee was persuaded, that the effort required to redact information from arrest and search warrants would be considerable and that redaction of these documents should not be imposed. Now, though, the Department was suggesting that search warrants can be redacted, but not arrest warrants. Judge Levi said that he had advised the Court Administration and Case Management Committee that these matters needed to be studied further, but he did not want to delay approval of the privacy rules because of the concerns over warrants.

**The committee without objection by voice vote agreed to send the proposed new rules to the Judicial Conference for final approval.**

## REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Stewart and Professor Struve presented the report of the advisory committee, as set forth in Judge Stewart's memorandum and attachment of December 9, 2005 (Agenda Item 6).

*Amendments for Final Approval*

## FED. R. APP. P. 25(a)(5)

Judge Stewart reported that the advisory committee had met in April and that the E-Government privacy rule had been the major item on its agenda. He pointed out that the proposed appellate rule on privacy differs from the proposed civil, criminal, and bankruptcy rules in that it adopts a policy of "dynamic conformity." In other words, the appellate rule provides simply that the privacy rule applied to the case below will continue to apply to the case on appeal. He added that the advisory committee had been unanimous in approving this approach. The only objections raised in the committee related to some of the suggested style changes.

As noted above on page 7, the committee approved the proposed E-Government privacy rule and voted to send it to the Judicial Conference for final approval as part of its discussion of the report of the Technology Subcommittee.

*Informational Items*

Judge Stewart reported that the other items in the committee's report in the agenda book were informational. First, he said, the advisory committee had begun to consider implementing the time-computation template developed by the Standing Committee's Time-Computation Subcommittee by establishing a subcommittee to work on it. The subcommittee would begin work this summer to consider each time limit in the appellate rules. He added that Professor Struve had initiated the project with an excellent memorandum in which she identified time limits set forth in statutes. There is concern about statutes that impose time limits, he said, because FED. R. APP. P. 26 specifies that the method of counting in the rules is applicable to statutes. One problem is that the time limits for complying with many statutes — often 10 days — may be shortened because the template calls for counting each day, while the current time computation rule excludes weekends and holidays if a time limit is less than 11 days.

Judge Stewart reported that the advisory committee had also been asked to consider the provision in the time-computation template addressing the "inaccessibility" of the clerk's office. He said that the advisory committee would add Fritz Fulbruge, clerk

of the Court of Appeals for the Fifth Circuit in New Orleans, to the subcommittee. He has had relevant, actual experience with inaccessibility as a result of Hurricane Katrina.

Judge Stewart said that the advisory committee had conducted a thorough discussion of the “3-day rule” – FED. R. APP. P. 26(c). The committee voted unanimously not to make any change in the rule at the present time, but the members had a lively debate on the topic. Since electronic filing and service are just being introduced in the courts of appeals nationally, the committee will monitor their impact on the 3-day rule to see whether the rule should be modified.

#### REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Zilly and Professor Morris presented the report of the advisory committee, as set forth in Judge Zilly’s memorandum and attachments of May 24, 2006 (Agenda Item 11).

Judge Zilly reported that the advisory committee had been very busy during the last 12 months, particularly in drafting rules and forms to implement the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. In all, the committee had held six meetings. The most recent, held in March 2006 at the University of North Carolina in Chapel Hill, had lasted three full days, and the advisory committee took two additional votes after the meeting.

He noted that a great deal of material was being presented to the Standing Committee. In all, more than 70 changes to the rules were under consideration. He said that the advisory committee was recommending:

- (1) final approval of eight rules not related to the recent bankruptcy legislation;
- (2) withdrawal of one rule published for public comment;
- (3) final approval of an amendment to Interim Bankruptcy Rule 1007 and a related new exhibit to the petition form;
- (4) final approval of seven additional changes to the forms, to take effect on October 1, 2006;
- (5) publication of a comprehensive package of amendments to the rules to implement the recent bankruptcy legislation, most of which had been approved earlier as interim rules; and
- (6) publication of all the revisions in the Official Forms.

*Amendments for Final Approval*

Judge Zilly reported that the proposed amendments to FED. R. BANKR. P. 1014, 3001, 3007, 4001, 6006, and 7007.1 and new rules 6003, 9005.1, and 9037 had been published for comment in August 2005. A public hearing on them had been scheduled for January 9, 2006. But there were no requests to appear, and the hearing was cancelled. He noted that the proposed Rules 3001, 4001, 6006 and new Rule 6003 had generated a good deal of public comment.

## FED. R. BANKR. P. 1014(a)

Judge Zilly said that Rule 1014 (dismissal and transfer of cases) would be amended to state explicitly that a court may order a change of venue in a case on its own motion.

Joint Subcommittee Recommendations on  
FED. R. BANKR. P. 3007, 4001, 6003, and 6006

Judge Zilly explained the origin of the proposed changes to Rules 3007, 4001, and 6006, and proposed new Rule 6003. He said that about three years ago, the Bankruptcy Administration Committee of the Judicial Conference, chaired by Judge Rendell, and the Advisory Committee on Bankruptcy Rules had formed a joint subcommittee to examine a number of issues arising in large chapter 11 cases. As a result of the subcommittee's work, changes to Rules 3007, 4001, and 6006, and proposed new Rule 6003 were published. He added that the advisory committee was recommending a number of minor changes to the four rules as a result of the public comments.

## FED. R. BANKR. P. 3007

Judge Zilly explained that Rule 3007 (objection to claims) was being amended in several ways. It would preclude a party in interest from including in a claims objection any request for relief that requires an adversary proceeding. The proposed rule would allow omnibus claims objections. Objections of up to 100 claims could be filed in a single objection to claims. It would also limit the nature of objections that may be joined in a single filing, and it would establish minimum standards to protect the due process rights of claimants.

## FED. R. BANKR. P. 4001

Judge Zilly noted that Rule 4001 (relief from the automatic stay and certain other matters) would be amended to require that movants seeking approval of agreements related to the automatic stay, approval of certain other agreements, or authority to use

cash collateral or obtain credit submit along with their motion a proposed order for the relief requested and give a more extensive notice of the requested relief to parties in interest. The rule would require the movant to include within the motion a statement not to exceed five pages concisely describing the material provisions of the relief requested. Judge Zilly noted that the advisory committee had made some changes in the rule after publication, including deletion of an unnecessary reference to FED. R. BANKR. P. 9024 (relief from judgment or order).

FED. R. BANKR. P. 6003

Judge Zilly explained that proposed Rule 6003 (interim and final relief immediately following commencement of a case) is new. It would set limits on a court's authority to grant certain relief during the first 20 days of a case. Absent a need to avoid immediate and irreparable harm, a court could not grant relief during the first 20 days of a case on: (1) applications for employment of professional persons; (2) motions for the use, sale, or lease of property of the estate, other than a motion under FED. R. BANKR. P. 4001; and (3) motions to assume or assign executory contracts and unexpired leases. He added that subdivision (c) had been amended following publication to delete a reference to the rejection of executory contracts or unexpired leases. The amendment, he said, allows a debtor to reject burdensome contracts or leases.

FED. R. BANKR. P. 6006

Judge Zilly reported that the proposed amendments to Rule 6006 (assumption, rejection, or assignment of an executory contract or unexpired lease) would authorize omnibus motions to reject executory contracts and unexpired leases. It would also authorize omnibus motions to assume or assign multiple executory contracts and unexpired leases under specific circumstances. The amended rule would establish minimum standards to ensure protection of the due process rights of claimants. Following publication, the advisory committee amended the rule to allow the trustee to assume but not assign multiple executory contracts and unexpired leases in an omnibus motion.

FED. R. BANKR. P. 7007.1

Judge Zilly explained that the proposed new Rule 7007.1 (corporate ownership statement) would require a party to file its corporate ownership statement with the first paper filed with the court in an adversary proceeding.

## FED. R. BANKR. P. 9005.1

Judge Zilly noted that the proposed Rule 9005.1 (constitutional challenge to a statute) is new. It would make the new FED. R. CIV. P. 5.1 applicable to adversary proceedings, contested matters, and other proceedings within a bankruptcy case.

**The committee without objection by voice vote agreed to send the proposed amendments and new rules to the Judicial Conference for final approval.**

## FED. R. BANKR. P. 9037

As noted above on page 7, the committee approved the proposed new Rule 9037 (privacy protection for filings made with the court) and voted to send it to the Judicial Conference for final approval as part of its discussion of the report of the Technology Subcommittee. Adopted in compliance with § 205 of the E-Government Act of 2002, the rule would protect the privacy and security concerns arising from the filing of documents with the court, both electronically and in paper form, because filed documents are now posted on the Internet.

Judge Zilly noted that the proposed new bankruptcy rule is similar to the companion civil and criminal rules. It is slightly different in language, though, because it uses the term “entity,” a defined term under the Bankruptcy Code, rather than “party” or “person.” Entity includes a governmental unit under § 101(15) of the Code, while “person” excludes it in the definition section of the Code § 101(41).

*Withdrawal of an Amendment*

## FED. R. BANKR. P. 3001(c) and (d)

Judge Zilly reported that the advisory committee had decided to withdraw the proposed amendments to Rule 3001 (proof of claim) following publication. The current rule states that when a claim (or an interest in property of the debtor) is based on a writing, the entire writing must be filed with the proof of claim. The proposed amendments, as published, would have provided that if the writing supporting the claim were 25 pages or fewer, the claimant would have to attach the whole writing. But if it exceeded 25 pages, the claimant would have to file relevant excerpts of the writing and a summary, which together could not exceed 25 pages. Similarly, any attachment to the proof of claim to provide evidence of perfection of a security interest could not exceed five pages in length.

Judge Zilly said that the advisory committee had received several comments opposing the amendments. One organization objected to the rule on the grounds that

summaries would be difficult to prepare. In light of the comments, the committee discussed increasing the page limitation on proof of perfection from five to 15 pages. After considering and debating all the comments, though, the committee decided to recommend that no changes be made to Rule 3001. But it agreed to change Form 10 (the proof of claim form) to warn users against filing original documents. The proposed language on the form would advise: "Do not send original documents. Attached documents may be destroyed after scanning."

**The committee without objection approved withdrawal of the proposed amendment by voice vote.**

*Amendments to an Interim Rule and the Official Forms*

Judge Zilly explained that to conform to the 2005 bankruptcy legislation, the committee had prepared interim rules that were then approved by the Standing Committee and the Executive Committee of the Judicial Conference for use as local rules in the courts. The interim rules had been drafted as revised versions of the Federal Rules of Bankruptcy Procedure. The courts were encouraged, but not required, to adopt them as local rules. The interim rules included 35 amendments to the existing rules and seven new rules. All the courts adopted the rules before the October 17, 2005, effective date of the bankruptcy law, some with minor variations.

In addition, the advisory committee prepared amendments to 33 of the existing Official Forms and created nine new forms, all of which were approved in August 2005 by the Standing Committee and the Judicial Conference, through its Executive Committee. The forms, under FED. R. BANKR. P. 9009, became new Official Forms and must be used in all cases.

Judge Zilly reported that the advisory committee had received comments from various sources on both the interim rules and the Official Forms. Based on those comments, it was now recommending a change in Interim Rule 1007 to require a debtor to file an official form that includes a statement of the debtor's compliance with the new pre-petition credit counseling obligation under § 109(h) of the Code. The amendment would be sent to the courts with the recommendation that it be adopted as a standing order effective October 1, 2006. Also based on the comments, the advisory committee was recommending changes to OFFICIAL FORMS 1, 5, 6, 9, 22A, 22C, and 23 and new Exhibit D to OFFICIAL FORM 1. In addition, he said, the advisory committee recommended having the Judicial Conference make the changes in the Official Forms and have them take effect on October 1, 2006.

## FED. R. BANKR. P. 1007

Judge Zilly explained that the 2005 Act had amended § 109(h) of the Bankruptcy Code to require that all individual debtors receive credit counseling before commencing a bankruptcy case. In its current form, Interim Rule 1007 (lists, schedules, statements, and other documents) implements § 109(h) by requiring the debtor to file with the petition either: (1) a certificate from the credit counseling agency showing completion of the course within 180 days of filing; (2) a certification attesting that the debtor applied for but was unable to obtain credit counseling within 5 days of filing; or (3) a request for a determination by the court that the debtor is statutorily exempt from the credit counseling requirement.

Case law developments have shown that some debtors have completed the counseling but have been unable to obtain a copy of the certificate from the provider of the counseling. As a result, debtors have filed a petition with the court, paid a filing fee, and then had their case dismissed by the court even when they had received the counseling but not filed the certificate. The proposed amendments to Rule 1007(b) and (c) address the problem by permitting debtors in this position to file a statement that they have completed the counseling and are awaiting receipt of the appropriate certificate. In that event, the debtor will have 15 days after filing the petition to file the certificate with the court.

Professor Morris added that the advisory committee was recommending amending both the interim rule and the final Rule 1007.

**The committee without objection by voice vote agreed to send the proposed amendment to the interim rule to the Judicial Conference for final approval.**

OFFICIAL FORMS 1, 5, 6, 9, 22A, 22C, 23  
and Exhibit D to OFFICIAL FORM 1

Judge Zilly added that the advisory committee was recommending a new Exhibit D to OFFICIAL FORM 1 (voluntary petition) to implement the proposed amendment to Rule 1007(b)(3). Exhibit D is the debtor's statement of compliance with the credit counseling requirement. Among other things, it includes a series of cautions informing debtors of the consequences of filing a bankruptcy petition without first receiving credit counseling. Many pro se debtors, for example, are unaware of the significant adverse consequences of filing a petition before receiving the requisite counseling, including dismissal of the case, limitations on the automatic stay, and the need to pay another filing fee if the case is refiled. The warnings may deter improvident or premature filings, and they should both reduce the harm to those debtors and ease burdens on the clerks, who often are called upon to respond to inquiries from debtors on these matters.

Judge Zilly added that the advisory committee was recommending that the Judicial Conference make changes in the following seven Official Forms, effective October 1, 2006:

- 1 Voluntary petition
- 5 Involuntary petition
- 6 Schedules
- 9 Notice of commencement of a case, meeting of creditors, and deadlines
- 22A Chapter 7 statement of current monthly income and means test calculation
- 22C Chapter 13 statement of current monthly income and calculation of commitment period and disposable income
- 23 Debtor's certification of completion of instructional course concerning personal financial management

Judge Zilly reported that the advisory committee recommended that OFFICIAL FORMS 1, 5, and 6 be amended to implement the statistical reporting requirements of the 2005 bankruptcy legislation that take effect on October 17, 2006. The proposed amendments to OFFICIAL FORMS 9, 22A, 22C, and 23 are stylistic or respond to comments received on the 2005 amendments to the Official Forms.

Judge Zilly pointed out that each of the forms was described in the agenda book. Once approved by the Judicial Conference, he said, they would become official and must be used in all courts. But, he said, the proposed changes in the seven forms will also be published for public comment, even though they will become official on October 1, 2006, because they had been prepared quickly to meet the statutory deadline and had not been published formally.

**The committee without objection by voice vote agreed to send the proposed revisions in the forms to the Judicial Conference for final approval.**

*Amendments to the Rules for Publication*

Judge Zilly reported that the advisory committee was seeking authority to publish the interim rules – together with proposed amendments to five additional rules not included in the interim rules – as a comprehensive package of permanent amendments to implement the 2005 bankruptcy legislation and other recent legislation. They would be published in August 2006 and, following the comment period, would be considered afresh by the advisory committee in the spring of 2007 and brought back to the Standing Committee for final approval in June 2007.

Thirty-five of the rules that the advisory committee was seeking authority to publish had been approved previously by the Standing Committee. They had to be in place in the bankruptcy courts in advance of the effective date of the Act, October 17, 2005 – FED. R. BANKR. P. 1006, 1007, 1009, 1010, 1011, 1017, 1019, 1020, 1021, 2002, 2003, 2007.1, 2007.2, 2015, 2015.1, 2015.2, 3002, 3003, 3016, 3017.1, 3019, 4002, 4003, 4004, 4006, 4007, 4008, 5003, 5008, 5012, 6004, 6011, 8001, 8003, 9006, and 9009. Judge Zilly explained that minor modifications, largely stylistic in nature, had been made in the rules. More significant improvements had been made to nine of the rules and are explained in the agenda book – FED. R. BANKR. P. 1007, 1010(b), 1011(f), 2002(g)(5), 2015(a)(6), 3002(c)(5), 4003, 4008, and 8001(f)(5).

Judge Zilly reported that five changes to the rules in the package were new and had not been seen before by the Standing Committee. Changes to four rules were necessary to comply with the various provisions of the Act, but did not have to be in place by October 17, 2005 – FED. R. BANKR. P. 1005, 2015.3, 3016 and 9009 (the changes to 3016 and 9009 are distinct from previous changes to those rules made by the Interim Rules). In addition, the proposed change to Rule 5001 was necessary to comply with the new 28 U.S.C. § 152(c), which authorizes bankruptcy judges to hold court outside their districts in emergency situations.

He noted that the proposed amendment to Rule 1005 (caption of the petition) conforms to the Act's increase in the minimum time allowed between discharges from six to eight years. New Rule 2015.3 would implement § 419 of the Act requiring reports of financial information on entities in which a Chapter 11 estate holds a controlling or substantial interest. The proposed amendment to Rule 3016(d) (filing plan and disclosure statement) would implement § 433 of the Act and allow a reorganization plan to serve as a disclosure statement in a small business case. The amendment to Rule 9009 (forms) would provide that a plan proponent in a small business Chapter 11 case need not use the Official Form of a plan of reorganization and disclosure statement.

**The committee without objection approved the proposed amendments for publication by voice vote.**

#### *Amendments to the Official Forms for Publication*

Judge Zilly reported that the advisory committee recommended publishing for comment all the amendments made to the 20 forms amended or created in 2005 to implement the changes brought about because of the Act (*i.e.*, OFFICIAL FORMS 1, 3A, 3B, 4, 5, 6, 7, 8, 9, 10, 16A, 18, 19A, 19B, 21, 22A, 22B, 22C, 23, and 24). He noted that publishing for comment forms already in effect as Official Forms was an unusual step. But because the new law required so many changes to the forms, the advisory committee wanted to give the bench and bar a full, formal opportunity to comment on them.

Judge Zilly said that the advisory committee had, at the direction of Congress, finished drafting and was recommending publishing for comment, three new forms to be used in small business cases: Form 25A (sample plan of reorganization); Form 25B (sample disclosure statement); and Form 26 (form to be used to report on value, operations, and profitability as required by § 419 of the Act). He noted that new Rule 2015.3 would require the debtor in possession to file Form 26 in all Chapter 11 cases. He also said that the advisory committee's recommended new change to Rule 9009 was on account of the congressional directive that the sample plan and sample disclosure statement (Forms 25A and 25B) be illustrative only. The change excepts Forms 25A and 25B from Rule 9009's general requirement that the use of applicable Official Forms is mandatory.

**The committee without objection approved the proposed forms for publication by voice vote.**

#### *Informational Items*

Judge Zilly noted that when Congress enacted the 2005 legislation, it required the debtor's attorney in a Chapter 7 case to certify that the attorney has no knowledge, after inquiry, that the information provided by the debtor in the schedules and statements is incorrect. The legislation also states that it is the sense of Congress that FED. R. BANKR. P. 9011 should be modified to include a provision to that effect. In addition, he said, Senator Grassley and Senator Sessions had sent letters urging the committee to include the provision in the rule and forms.

Judge Zilly said that the advisory committee was not yet recommending any change to Rule 9011 or to any of the forms. As it stands now, he said, Rule 9011 provides that an attorney's signature on any paper filed with the court other than the schedules amounts to a certification by the attorney after a reasonable inquiry that any factual allegations are accurate. Changes made by the Act would generally extend the attorney's certification to bankruptcy schedules, at least in chapter 7. He said that it has been a long-standing, consistent principle of the committee not to amend the rules simply to restate statutory provisions. He stated the advisory committee takes the Senators' concerns seriously and has formed a subcommittee to further consider how Rule 9011 and the forms might be amended, and that the subcommittee would report on its progress at the next advisory committee meeting in September.

Judge Zilly reported that the term of Professor Alan Resnick had come to an end. He had been the advisory committee's reporter, and then a member of the committee, for more than 20 years. Judge Zilly noted that Professor Resnick has an extraordinary institutional memory and unmatched insight and wisdom that will be greatly missed by the committee. Judge Zilly also thanked the committee's current reporter, Professor

Morris, its consultant on the bankruptcy forms, Patricia Ketchum, and the staff attorneys in the Administrative Office who have supported the committee with great talent and dedication – James Wannamaker and Scott Myers.

Judge Levi concluded the discussion by observing the enormity of the work and the work product of the advisory committee in implementing the comprehensive 500-plus page legislation within such a short time period.

#### REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Rosenthal and Professor Cooper presented the report of the advisory committee, as set out in Judge Rosenthal's memorandum and attachments of June 2, 2006 (Agenda Item 12).

##### *Amendments for Final Approval*

#### FED. R. CIV. P. 5.2

As noted above on page 7, the committee approved the proposed E-Government privacy rule and voted to send it to the Judicial Conference for final approval as part of its discussion of the report of the Technology Subcommittee.

#### STYLE PACKAGE

Judge Rosenthal explained that the final product of the style project, presented to the Standing Committee for final approval, consisted of four separate parts:

- (1) the pure style amendments to the entire body of civil rules – FED. R. CIV. P. 1-86;
- (2) the style-plus-substance amendments – FED. R. CIV. P. 4(k), 9(h), 11(a), 14(b), 16(c)(1), 26(g)(1), 30(b), 31, 40, 71.1, and 78;
- (3) the restyled civil forms; and
- (4) the restyled version of rule amendments currently pending in Congress – FED. R. CIV. P. 5.1, 24(c), and 50 – and the electronic discovery rules – FED. R. CIV. P. 16, 26, 33, 34, 37, and 45.

Judge Rosenthal reported that the advisory committee had made a few changes in the rules following publication, two of which are particularly important. First, she said, the committee expanded the note to FED. R. CIV. P. 1 to provide more information about the style project and its intentions. She noted that the committee had decided at the very start of the style project that there needed to be a brief statement somewhere in the rules

or accompanying documents describing the aims and style conventions of the project. The committee concluded ultimately that the statement should be placed in an expanded note to Rule 1 identifying the drafting guidelines used and summarizing what the committee did and why. The committee note, for example, emphasizes that the style changes to the civil rules are intended to make no changes in substantive meaning. It also explains the committee's formatting changes and rule renumbering and its removal of inconsistencies, redundancies, and intensifying adjectives.

Second, the advisory committee responded to a fear expressed in some of the public comments that when the restyled rules take effect on December 1, 2007, they will supersede any potentially conflicting provision in existing statutes. Judge Rosenthal explained that that clearly was not the intent of the committee. Moreover, she said, supersession had not proven to be a problem with the restyled appellate rules and criminal rules.

She pointed out that Professor Cooper had prepared an excellent memorandum emphasizing that the committee intended to make no change in any substantive meaning in any of the rules. It also recommends a new FED. R. CIV. P. 86(b) that would make explicit the relationship between the style amendments and existing statutes, putting to rest any supersession concern. The proposed new rule specifies that if any provision in any rule other than new Rule 5.2 "conflicts with another law, priority in time for the purpose of 28 U.S.C. § 2072(b) is not affected by the amendments taking effect on December 1, 2007."

**The committee without objection by voice vote agreed to send all the changes recommended by the style project to the Judicial Conference for final approval.**

Judge Rosenthal commended Judge Levi and Judge Anthony Scirica – the current and former chairs of the Standing Committee – for their decision to go forward with restyling the civil rules after completion of the appellate and criminal rules restyling projects. She noted that an attempt had been made in the 1990's to begin restyling the civil rules, but the project had been very difficult and time-consuming. After laboring through several rules, the advisory committee decided at that time that the effort was simply too difficult and time-consuming, and it was detracting from more pressing matters on the committee's agenda. Therefore, the civil rules project had been deferred for years. She said that it took a great deal of vision, belief, and understanding of the benefits for Judges Scirica and Levi to bring it back and see it through to its successful conclusion.

Judge Rosenthal thanked the Standing Committee's Style Subcommittee – Judges Thrash and Murtha and Dean Kane – emphasizing that they had been tireless, gracious, and amazing. Also, she said, Professors Marcus and Rowe had been stalwarts of the

project, researching every potential problem that arose. The project, she added, could not have been handled without the support of the Administrative Office – Peter McCabe, John Rabiej, James Ishida, Jeff Hennemuth, Jeff Barr, and Bob Deyling – who coordinated the work and kept track of 750 different documents and versions of the rules. She added that Joe Spaniol had been terrific, offering many great suggestions that the committee adopted.

Judge Rosenthal explained that it was hard to say enough about Professor Kimble's contributions. The results of the style project, she said, are a testament to his love of language. His concept was that the rules of procedure can be as literary and eloquent as any other kind of writing. His stamina and dedication to the project, she said, had been indispensable.

Finally, she thanked Professor Cooper, explaining that he had been the point person at every stage of the project. Noting the extremely heavy volume of e-mail exchanges and memoranda during the course of the project, she emphasized that Professor Cooper had read and commented on every one of them and had been an integral part of every committee decision. His unique combination of acute attention to detail and thorough understanding of civil procedure had kept the project moving in the right direction and made the final product the remarkable contribution to the bench and bar that it will be. She predicted that within five years, lawyers will not remember that the civil rules had been phrased in any other way.

Professor Cooper added that the most important element to the success of the project, by far, had been the decision to accelerate the project and get the work done within the established time frame. The success, he said, was due to Judge Rosenthal. The project had been completed well ahead of time and turned out better than any of the participants could have hoped. Judge Murtha and Professor Kimble echoed these sentiments and expressed their personal satisfaction and pride in the results.

#### *Informational Items*

Judge Rosenthal reported that the advisory committee had approved several amendments for publication at its last meeting. The committee, though, was not asking to publish the amendments in August 2006, but would will defer them to August 2007. The bar, she said, deserves a rest. Therefore, the advisory committee was planning to come back to the Standing Committee in January 2007 with proposed amendments to FED. R. CIV. P. 13(f) and 15(a), and 48, and new Rule 62.1. The proposals, she said, were described in the agenda book.

## FED. R. CIV. P. 13(f) and 15(a)

Judge Rosenthal explained that the proposed amendments to Rules 13(f) (omitted counterclaim) and 15(a) (amending as a matter of course) deal with amending pleadings. Rule 13(f) is largely redundant of Rule 15 and potentially misleading because it is stated in different terms. Under the committee's proposal, an amendment to add a counterclaim will be governed by Rule 15. The Style Subcommittee, she said, had recommended deleting Rule 13(f) as redundant, but the advisory committee decided to place the matter on the substance track, rather than include it with the style package.

Judge Rosenthal reported that the advisory committee's proposal to eliminate Rule 13(f) would be included as part of a package of other changes to Rule 15. It would also amend Rule 15(a) to make three changes in the time allowed a party to make one amendment to its pleading as a matter of course.

Professor Cooper added that the advisory committee had decided not to make suggested amendments to Rule 15(c), dealing with the relation back of amendments. The committee had not found any significant problems with the current rule. Moreover, the proposed changes would be very difficult to make because they raise complex issues under the Rules Enabling Act. Therefore, the committee had removed it from the agenda.

One member suggested that the proposed change to Rule 15 could take away a tactical advantage from defendants by eliminating their right to cut off the plaintiff's right to amend. The matter, he said, could be controversial. Judge Rosenthal responded that the advisory committee had thought that amendment of the pleadings by motion is routinely given. Moreover, it is often reversible error for the court not to allow an amendment. She said that the publication period will be very helpful to the committee on this issue.

## FED. R. CIV. P. 48(c)

Judge Rosenthal reported that the advisory committee would propose an amendment to Rule 48 (number of jurors; verdict) to add a new subdivision (c) to govern polling of the jury. The proposal, she said, had been referred to the advisory committee by the Standing Committee. She explained that it was a simple proposal to address jury polling in the civil rules in the same way that it is treated in the criminal rules. But, she added, there is one difference between the language of the civil and criminal rules because parties in civil cases may stipulate to less than a unanimous verdict.

## FED. R. CIV. P. 62.1

Judge Rosenthal reported that the advisory committee would propose a new Rule 62.1 (indicative rulings). It had been on the committee agenda for several years and would provide explicit authority in the rules for a district judge to rule on a matter that is the subject of a pending appeal. Essentially, it adopts the practice that most courts follow when a party makes a motion under FED. R. CIV. P. 60(b) to vacate a judgment that is pending on appeal. Almost all the circuits now allow district judges to deny post-trial motions and also to “indicate” that they would grant the motion if the matter were remanded by the court of appeals for that purpose. The proposed new rule would make the indicative-ruling authority explicit and the procedure clear and consistent.

Professor Cooper added that the advisory committee was considering publishing two versions of the indicative-ruling proposal. One alternative would provide that if the court of appeals remands, the district judge “would” grant the motion. The other would allow the district judge to indicate that he or she “might” grant the motion if the matter were remanded. The court of appeals, though, has to determine whether to remand or not.

One member inquired as to why the advisory committee had decided to number the new rule as Rule 62.1 and entitle it “Indicative Rulings.” Professor Cooper explained that the advisory committee at first had considered drafting an amendment to Rule 60(b) because indicative rulings arise most often with post-judgment motions to vacate a judgment pending on appeal. The committee, however, ultimately decided on a rule that would apply more broadly. Therefore, it placed the proposed new rule after Rule 62, keeping it in the chapter of the rules dealing with judgments. Judge Stewart added that the Advisory Committee on Appellate Rules would like to monitor the progress of the proposed rule and might consider including a cross-reference in the appellate rules. Judge Rosenthal welcomed any suggestions and said that the committee was open to a different number and title for the rule.

## FED. R. CIV. P. 30(b)(6)

Judge Rosenthal reported that the advisory committee had heard from the bar that many practical problems have arisen with regard to Rule 30(b)(6) depositions of persons designated to testify for an organization. The committee was in the process of exploring whether the problems cited could be resolved by amendments to the rules. She noted that the committee had completed a brief summary and was looking further at particular aspects in which amendments might be helpful. For example, should the rules protect against efforts to extract an organization’s legal positions during a deposition? Some treatises state that if a witness testifies, the testimony binds the organization. But that is not the way the rule was intended to operate. Therefore, the advisory committee would consider whether the rule should be changed to make it clear that this is not the case.

That, she said, is just one of the problems that has been cited regarding depositions of organizational witnesses.

FED. R. CIV. P. 26(a)

Judge Rosenthal said that the advisory committee was also considering whether changes were needed to the provision in Rule 26(a) (disclosures) that requires some employees to provide an expert's written report. She noted that the rule and the case law appear to differ as to the type of employee who must give an expert's report. The rule says that no report is needed unless the employee's duties include regularly giving testimony, but the case law is broader. She also noted that the ABA Litigation Section has asked the House of Delegates to approve recommendations with respect to discovery of a trial expert witness's draft reports and discovery of communications of privilege matter between an attorney and a trial expert witness. These questions also will be considered.

One of the members suggested that the advisory committee's inquiry of Rule 26(a) should be broadened to also include the problems that have arisen with regard to the testimony of treating physicians.

FED. R. CIV. P. 56

Judge Rosenthal said that the final area being considered by the advisory committee involves the related subjects of summary judgment and notice pleading. She added that the committee planned to address issues in a leisurely way. She noted that the committee's work on restyling FED. R. CIV. P. 56 (summary judgment) was the most difficult aspect of the style project. It was a frustrating task because the rule is badly written and bears little relationship to the case law and local court rules. Since the national rule is so inadequate, she said, local court rules abound. She said that the advisory committee had decided to limit its focus to the procedures set forth in the summary judgment rule. Some of the time periods currently specified in the rule, such as leave to serve supporting affidavits the day before the hearing, are impracticable. But, she said, there was no enthusiasm in the advisory committee for addressing the substantive standard for summary judgment. That would continue be left to case law.

Related to summary judgment, she noted, is the issue of pleading standards. Much interest had been expressed over the years in reexamining the current notice pleading standard system. To that end, she said, the advisory committee had examined how it might structure an appropriate inquiry into both summary judgment and notice pleading. Certainly, she recognized, it would be difficult, and very controversial, to attempt to replace notice pleading with fact pleading. But, she said, the advisory committee had not closed the door on the subject.

As part of the inquiry, the advisory committee has considered recasting Rule 12(e) (motion for a more definite statement) and giving it greater applicability. Today, a pleading has to be virtually unintelligible before a motion for a more definite statement will be granted. The committee will consider liberalizing the standard as a way to help focus discovery.

FED. R. CIV. P. 54(d)(2), 58(c)(2)

Professor Cooper reported that the Advisory Committee on Appellate Rules had suggested that the Civil Rules Committee consider the interplay between the rules that integrate motions for attorney fees and the rules that govern time for appeal – FED. R. CIV. P. 54(d)(2) (claims for attorney’s fees) and 58(c)(2) (entry of judgment, cost or fee award) and Fed. R. App. P. 4 (time to appeal). He explained that there is a narrow gap in the current rules. But, he said, the Civil Rules Committee was of the view that the matter was extremely complex, and that it was better to live with the current complexity than to amend the rules and run the risk of unintended consequences or even greater complexity.

Judge Rosenthal reported that the Advisory Committee on Civil Rules has begun to work on the time-computation project and would consider it further at its September 2006 meeting. She predicted that the committee could likely come to the conclusion that the problem of time limits set forth in statutes will not turn out to be as great in practice as in theory. The committee planned to go forward in accord with the initial schedule.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Bucklew and Professor Beale presented the report of the advisory committee, as set forth in Judge Bucklew’s memorandum and attachments of May 20, 2006 (Agenda Item 7).

*Amendments for Final Approval*

FED. R. CRIM. P. 11(b)

Judge Bucklew reported that the proposed amendment to Rule 11 (pleas) was part of a package of amendments needed to bring the rule into conformity with the Supreme Court’s decision in *United States v. Booker*, 543 U.S. 220 (2005), which effectively made the federal sentencing guidelines advisory rather than mandatory.

She noted that Rule 11(b) specifies the matters that a judge must explain to the defendant before accepting a plea. Under the current rule, the judge must advise the defendant of the court’s obligation to apply the sentencing guidelines. But, since *Booker*

has made the guidelines advisory, that advice is no longer appropriate. Accordingly, the amended rule specifies that the judge must inform the defendant of the court's obligation to "calculate" the applicable range under the guidelines, as well as to consider that range, possible departures under the guidelines, and the other sentencing factors set forth in 18 U.S.C. § 3553(a).

Judge Bucklew said that the advisory committee had received comments both from the federal defenders and the U.S. Sentencing Commission. The defenders, she said, had argued that the proposed amendment would give too much prominence to the guidelines, and they suggested that the committee recast the language to require a judge to consider all the factors in 18 U.S.C. § 3553(a). The Sentencing Commission asked the committee to change the word "calculate" to "determine and calculate." The advisory committee, she said, had considered both suggestions in detail, but it decided not to make the proposed changes and agreed to send the proposed amendment forward as published.

Professor Beale added that the advisory committee had added a paragraph to the committee note pointing out that there have been court decisions stating that under certain circumstances, the court does not have to calculate the guidelines (*e.g.*, *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005)). She pointed out that the added language was limited and had been worked out with the Department of Justice to make sure that it is not too broad.

One member suggested, though, that the added paragraph was inconsistent with the developing case law in his circuit, which requires district judges to calculate the guidelines in every case. Other members suggested, though, that it is a waste of time for a judge to calculate the guidelines in, say, a case with a mandatory minimum sentence. Some participants suggested possible improvements to the language of the last paragraph of the note. Judge Bucklew and Professor Beale agreed to work on the language during the lunch break, and subsequently reported their conclusion that the language should be withdrawn.

**The committee without objection by voice vote agreed to send the proposed amendment to the Judicial Conference for final approval.**

FED. R. CRIM. P. 32(d) and (h)

Judge Bucklew reported that the advisory committee had proposed several changes to Rule 32 (sentence and judgment). First, it inserted the word "advisory" into the heading of Rule 32(d)(1) (presentence report) to emphasize that the sentencing guidelines are advisory rather than mandatory.

She noted that the committee had received several comments on the proposed revision of subdivision (h) (notice of intent to consider other sentencing factors) to require notice to the parties of a judge's intent to consider other sentencing factors. The current rule, she said, specifies that if the court is going to depart under the guidelines for a reason of which the parties have not been notified, the court must provide "reasonable notice" and a chance to argue. She explained that the advisory committee would expand the rule to require reasonable notice whenever the court is contemplating either departing from the applicable guideline range or imposing a non-guideline sentence for a reason not identified either in the presentence report or a party's pre-hearing submission. She said that the advisory committee had added more specific language to the rule following the comment period, stating that the notice must specify "any ground not earlier identified for departing or imposing a non-guideline sentence on which the court is contemplating imposing such a sentence."

Professor Beale added that there had been litigation on this matter, but the committee was of the view that non-guideline sentences should be treated the same as departures. She noted that the committee had also adopted some refinements in language suggested by the Sentencing Commission.

Judge Bucklew reported that the advisory committee had added language to Rule 32(d)(2)(F) to require the probation office to include in the presentence report any other information that the court requires, including information relevant to the sentencing factors specified in 18 U.S.C. § 3553(a). Professor Beale said that the central question is how much information the probation office must include in the presentence investigation report. As revised, the rule specifies that the report must include any other information that the court requires, including information relevant to the factors listed in § 3553(a). She noted that the probation offices in many districts already include this information in the reports. But, she added, there is quite a variance in practice, and the revised language will provide helpful guidance.

A member expressed concern about the provision requiring special notice of a non-guidelines sentence, questioning whether it would undercut the right of allocution and interfere with judicial discretion. He suggested that matters arise at an allocution that the judge should take into account and may affect the sentence. He asked whether the sentencing judge would be required to adjourn the hearing and instruct the parties to return later. He also saw a difference between the obligation to notify parties in advance that the judge is considering a departure under the guidelines and a sentence outside the guidelines.

Other members shared the same concerns and expressed the view that the language of the proposed rule might restrict the authority of a judge to impose an appropriate sentence under *Booker* and 18 U.S.C. § 3553(a). One asked what the remedy

would be for a failure by the court to comply with the requirement. He added that there is also the question of whether the defendant can forfeit rights on appeal under the rule by not raising objections in the district court.

Judge Bucklew said that the case law in the area was very fluid. She noted that the advisory committee had no intention of restricting the court or requiring that any formal notice be given. Rather, she said, the focus of the committee's effort had been simply to avoid surprise to the parties. One participant emphasized that the rule uses the term "reasonable notice," which has not changed since *Booker* and has a long history of interpretation. Another participant noted that lawyers will have to look at the law of their own circuit.

One member added that the problem of surprise arises because parties normally have an expectation that the judge will impose a sentence within the guideline range. But, he added, in at least one circuit, the guidelines are now only one factor in sentencing, and the parties do not have the expectation of a guideline sentence.

Judge Hartz moved to send the proposed amendments to subdivision (h) back to the advisory committee to consider the matter anew in light of the concerns expressed and the developing case law. One member noted that the appellate court decisions on these precise points appear to be going in different directions. Another added that the matter is very fluid, and the committee should avoid writing into the rules a standard that will change over time.

**The committee with one objection approved Judge Hartz's motion to send the proposed revisions to Rule 32(h) back to the advisory committee.**

**The committee without objection by voice vote agreed to send the proposed amendments to Rule 32(d) to the Judicial Conference for final approval.**

FED. R. CRIM. P. 32(k)

Judge Bucklew reported, by way of information, that the advisory committee had decided to withdraw the published amendment to Rule 32(k) (judgment). It would have required judges to use a standard judgment and statement of reasons form prescribed by the Judicial Conference. But, she said, a recent amendment to the USA PATRIOT Act requires judges to use the standard form. Thus, there was no longer a need for an amendment.

## FED. R. CRIM. P. 35(b)

Judge Bucklew reported that the only purpose of the proposed amendment to Rule 35 (correcting or reducing a sentence) was to remove language from the current rule that seems inconsistent with *Booker*. She added that the National Association of Criminal Defense Lawyers had suggested during the comment period that any party should be allowed to bring a Rule 35 motion, not just the attorney for the government. She said that the advisory committee did not adopt the change and recommended that the rule be approved as published.

**The committee without objection by voice vote agreed to send the proposed amendment to the Judicial Conference for final approval.**

## FED. R. CRIM. P. 45(c)

Judge Bucklew explained that the proposed revision of Rule 45 (computing and extending time) would bring the criminal rule into conformance with the counterpart civil rule, FED. R. CIV. P. 6(e) (additional time after certain kinds of service). It specifies how to calculate the additional three days given a party to respond when service is made on it by mail and certain other specified means.

**The committee without objection by voice vote agreed to send the proposed amendment to the Judicial Conference for final approval.**

## FED. R. CRIM. P. 49.1

As noted above on page 7, the committee approved the proposed new Rule 49.1 (privacy protection for filings made with the court) and voted to send it to the Judicial Conference for final approval as part of its discussion of the report of the Technology Subcommittee.

*Amendments for Publication*

## FED. R. CRIM. P. 29

Judge Bucklew reported that the proposed revision to Rule 29 (motion for judgment of acquittal) had a long and interesting history. She pointed out that the proposal had been initiated by the Department of Justice in 2003. The principal concern of the Department, she said, was that a district judge's acquittal of a defendant in the middle of a trial prevents the government from appealing the action because of the Double Jeopardy Clause of the Constitution. She explained that the Department's

proposed rule would have precluded a judge in all cases from granting an acquittal before the jury returns a verdict.

Judge Bucklew noted that the advisory committee had considered the rule at two meetings, in 2003 and 2004. At the first, she said, the committee had been inclined to approve a rule in principle, and it asked the Department of Justice to provide additional information. At the second meeting, however, the committee decided that no amendment to Rule 29 was necessary.

At the January 2005 Standing Committee meeting, the Department made a presentation in favor of amending Rule 29. In doing so, it pointed to a number of cases in which district judges had granted acquittals in questionable cases. As a result, she said, the Standing Committee returned the rule to the advisory committee and asked it to: (1) draft a proposed amendment to Rule 29, and (2) recommend whether that amendment should be published.

Judge Bucklew reported that the advisory committee had considered the rule again, and it took several meetings to refine the text. The committee was in agreement on the language of the rule. But, she said, it was divided on wisdom of proceeding with the rule as a matter of policy. It recommended publication by a narrow vote of 6-5. She noted that one committee member had been absent, and his vote would have made the vote 7-5 for publication.

She emphasized that the reservations of certain members were not as to the language of the rule, but as to the policy. The objectors, she explained, were concerned that the rule would restrict the authority of trial judges to do justice in individual cases and to further case management. She added that there also was real doubt among the advisory committee members as to the need for any amendment. They accepted the fact that there had been a few cases of abuse under the current rule, but the number of problems had been minimal.

Judge Bucklew stated that the revised Rule 29 would specify that if a court is going to grant a motion for acquittal before the jury returns a verdict, it must first inform the defendant personally and in open court of its intent. The defendant then must waive his or her double jeopardy rights and agree that the court may retry the case if the judge is reversed on appeal.

One of the participants observed that a sentence in the proposed committee note declared that the rule would apply equally to motions for judgment of acquittal made in a bench trial. Professor Beale replied that the rule did not apply to bench trials, and the sentence would be removed.

Deputy Attorney General McNulty thanked the advisory committee and the Standing Committee for considering the recommendations of the Department of Justice. He said that Department attorneys felt very strongly about the subject and wanted the committee to go forward with publication. He added that the vast majority of judges exercise their Rule 29 authority wisely and in a way that allows the government to seek judicial review. But, he said, there had been some bad exceptions that have had a large impact and had undercut the jury's ability to decide the case and the government's right to have its charging decision given appropriate deference. He said that Rule 29 presented a unique situation that needed to be addressed, and he added that it had been the policy of Congress to provide greater opportunity to the government for appellate review.

Finally, he said, the waiver approach adopted by the advisory committee with the revised rule achieves a fine balance. It gives the judge the opportunity to do justice and further case management objectives, while preserving the right of the government to appeal. He concluded by strongly urging the committee to approve publication.

One of the members objected on the grounds that the rule represents a major shift in the architecture of trials that would upset the balance in criminal trials and diminish the rights of defendants. First, he said, such a large change in criminal trials should be made by Congress through legislation, and not through rulemaking by the committee. Second, he expressed concern over the closeness of the vote in the advisory committee. The 6-5 vote, he said, was essentially a statistical tie, and the fact that the matter had been debated and deferred at so many meetings demonstrates that there are serious problems with the proposal. Third, he expressed concern that the defendant must waive his or her constitutional rights. This, he said, was unsettling. Fourth, he emphasized that he was aware of many instances in which the government overcharges, particularly by including extraneous counts and peripheral defendants. The courts, he argued, should have the power to winnow out the extra charges and defendants, and the hands of judges should not be bound by the rule. Fifth, he said that it is unfair for defendants to have a "sword of Damocles" hanging over their heads for two or three years, while the government appeals the trial judge's decision to acquit. Finally, he summarized, the rule was sure to lead to unintended consequences, and the changes the government wants should not be made through the rules process.

Several members of the committee expressed sympathy for these views, but they nevertheless announced that they favored publication of the rule.

Judge Levi added some background on the history of the rules. He noted that it had been on the agenda for some time, and it had been approved originally by the advisory committee with considerable support, perhaps by an 8-4 vote. Then, however, at the next meeting the committee changed its mind.

Initially, he explained, the proposal of the Department of Justice had been to prevent a judge from entering a pre-verdict of acquittal in any circumstances. But the district judges on the advisory committee asked how they would be able to deal with problems arising from excess defendants, excess counts, and hung juries.

The waiver proposal, he said, had been developed to address these competing concerns. It would preserve the discretion of the district judges and help them manage their cases. Yet it would give the government the right to appeal a district judge's pre-verdict acquittal. Nevertheless, he pointed out, the advisory committee rejected the waiver proposal and decided that no change was needed in the rule.

At the January 2005 Standing Committee meeting, Associate Deputy Attorney General Christopher Wray made strong arguments in support of the proposed rule amendment that included the waiver procedure. Judge Levi said that the Department had been very persuasive, and the Standing Committee took a strong position and directed the advisory committee to draft a proposed amendment. Then, he said, the Department went back to the advisory committee and made the argument for the proposed amendment, which the committee approved on a 6-5 vote.

Judge Levi said that he would prefer to handle the proposal through the rulemaking process, rather than have the Department go to Congress for legislation.

One member expressed concerns over the proposal, but said that he had been convinced to support publication because the rule was supported by Robert Fiske, a distinguished member of the advisory committee who had served as both a prosecutor and defense lawyer. He added that while the number of abuses is very small, the cases in which abuse has occurred under Rule 29 have tended to be prominent.

He added that the rules do in fact affect the architecture of trials. The waiver proposal, he said, may be unique, but it is an innovative attempt to assist judges in managing cases and addressing overcharging by prosecutors. He added that it was important to foster dialogue between the judiciary and the Department of Justice and to solicit the views of the bench and bar on the proposal. To date, he said, the proposal had been debated only by the members of the committees, but not by the larger legal community. Publication, he said, would be very beneficial.

Another member said that the proposed rule is a very nice solution to the problem. He said that it can be a travesty of justice when a judge makes a mistake under the current rule. The right of a judge to grant an acquittal remains in the rule, but it is subject to further judicial scrutiny.

One member asked whether there were other rules that require defendants to waive their constitutional rights. One member suggested that an analogy might be made to conditional pleas under FED. R. CRIM. P. 11(a)(2). Professor Capra added that FED. R. CRIM. P. 7 provides for waiver of indictment by the defendant, and FED. R. CRIM. P. 16 (discovery and inspection) contains waiver principles when the defendant asks for information from the government. Both require a defendant to waive constitutional rights in order to take advantage of the rule.

Judge Levi pointed out that the committee could withdraw the rule after the public comment period, and it had done so with other proposals in the past. But, he said, as a matter of policy, the committee should not publish a proposal for public comment unless it has serious backing by the rules committees.

One member expressed concern that if the rule were published, it might lead the public to believe that it enjoyed the unanimous support of the committee. Judge Levi responded that the committee does not disclose its vote in the publication because it wants the public to know that it has an open mind. Mr. Rabiej explained that the publication is accompanied by boilerplate language that tells the public that the published rule does not necessarily reflect the committee's final position. He added that the report of the advisory committee is also included in the publication, and it normally alerts the public that a proposal is controversial.

The Deputy Attorney General stated that the Department of Justice wanted to have its points included in the record to continue the momentum into the next stage of the rules process. He said that he had been surprised over the arguments that the proposed change should be made by legislation, rather than through the rules process. He pointed out that he had worked as counsel for the House Judiciary Committee for eight years and had heard consistently from the courts that the rulemaking process should be respected. He said that it was in the best interest of all for the proposal to proceed through the rulemaking process, rather than have the Department seek legislation. He noted that while there had only been a few cases of abuse by district judges, those few tended to occur in alarming situations and could be cited by the Department if it were to seek legislation.

He said that the Department had worked for several years on the proposal with the committees through the rulemaking process and would like to continue on that route. The proposal, he said, had substantial merit and should be published.

He added that the Department disagreed with the characterization that the proposed amendment would alter the playing field. Rather, he said, it would preserve the right to present evidence and to have the court's ruling on acquittal preserved for appellate review. A pre-verdict judgment of acquittal, he emphasized, stands out from all

other actions and is inconsistent with the way that other matters are handled in the courts. He pointed out, too, that the Department was deeply concerned about the dismissal of entire cases without appellate review. On the other hand, it was not as concerned with a court dismissing tangential charges. He concluded that the Department would do all it could to work toward a balanced solution to a very difficult problem. The waiver proposal, he said, is a good approach. It is a good compromise and offered a balanced solution to the competing interests. He said that the Department appreciated the opportunity to come back to the committee.

One member suggested deleting the word “even” from line 20 in Rule 29(a)(2). It was pointed out that the word had been inserted as part of the style process. Judge Levi suggested that Style Subcommittee take a second look at the wording as part of the public comment process.

**The committee, with one dissenting vote, approved the proposed rule for publication by voice vote.**

FED. R. CRIM. P. 41(b)(5)

Judge Bucklew reported that the proposed amendment to Rule 41(b)(search warrants) would authorize a magistrate judge to issue a search warrant for property located in a territory, possession, or commonwealth of the United States that lies outside any federal judicial district. Currently, a magistrate judge is not authorized to issue a search warrant outside his or her own district except in terrorism cases..

She noted that the Department of Justice had raised its concern about the gap in authority at the last meeting of the advisory committee. The Department had asked the committee to proceed quickly because of concerns over the illegal sales of visas and like documents. It felt constrained because overseas search warrants could not be issued in the districts where the investigations were taking place. She explained that the proposed amendment to Rule 41(b)(5) would allow an overseas warrant to be issued by a magistrate judge having authority in the district where the investigation is taking place, or by a magistrate judge in the District of Columbia. The advisory committee, she added, had voted 10-1 to publish the rule.

Judge Bucklew advised the committee of developments that had occurred since the vote. She noted that at Judge Levi’s suggestion, Mr. Rabiej had sent the proposal to Judge Clifford Wallace, who chairs the Ninth Circuit’s Pacific Islands Committee. In turn, Judge Wallace contacted the Chief Justice of American Samoa, who objected to the proposed amendment. Judge Wallace suggested that the proposal be remanded back to the advisory committee in order to give American Samoa a chance to respond. She added that she was not sure exactly what American Samoa’s concerns were, but it appeared that

the Chief Justice did not want judges in other parts of the country issuing warrants for execution in American Samoa.

Judge Bucklew reported that after speaking with Judge Wallace, the Administrative Office had polled the advisory committee as to whether it should wait until the Chief Justice of American Samoa and the Pacific Islands Committee of the Ninth Circuit respond. Accordingly, it voted 9-2 to allow time for a response. She noted that the Department of Justice representative objected, along with one other advisory committee member. She added that later discussions have suggested that the proposal could still be published, with American Samoa and the Pacific Islands Committee commenting during the public comment period.

She pointed out that after the advisory committee meeting, the House of Representatives passed a bill containing a provision similar to the proposal to amend Rule 41(b). Basically, it would allow investigation of possible fraud and corruption by officers and employees of the United States in possible illegal sales of passports, visas, and other documents. It would authorize the district court in the District of Columbia to issue search warrants for property located within the territorial and maritime jurisdiction of the United States. She added that she was not sure what the Department's position would be on the bill, and she noted that the legislation probably did not cover everything in the proposed rule amendment.

Professor Beale said that the Department of Justice's largest concern was with visa fraud. This, in turn, was connected with larger issues of illegal immigration and terrorism. In addition, the question arose whether the committee would have to republish the current proposal if its reference to a territory of the United States were deleted following the public comment period. She concluded that republication would probably not be required. She explained that subdivision (a) of the rule, which refers to territories, was not connected to subdivisions (b) and (c), which authorize search warrants for property in diplomatic or consular missions and residences of diplomatic personnel. She said that the committee could place brackets around subdivision (a) and invite comment from American Samoa and others as to whether subdivision (a) should be included.

Judge Bucklew also pointed out, as mentioned in the advisory committee's report, that a similar, but broader proposal had been approved by the Judicial Conference but rejected by the Supreme Court in 1990.

Judge Levi suggested bracketing the language regarding American Samoa. He noted from speaking with Judge Wallace that there is a great deal of sensitivity in American Samoa about any intrusion into its judicial process. He noted that the situation is very different from the other Pacific Islands territories, such as Guam and the Northern Marianas, both of which have Article I federal district courts. The history of how the

United States acquired American Samoa is different from that of other territories, and the relevant treaty explicitly requires the United States to respect the judicial culture of American Samoa. He noted, too, that there had been a proposal to establish an Article I federal court in American Samoa, but it has been very controversial.

Judge Levi also pointed out that Judge Wallace warned that if the proposal to amend Rule 41 is published without bracketing American Samoa, there could be a good deal of needless controversy generated. The primary concern of the Department of Justice, he said, is with overseas searches, and not with American Samoa. He asked whether the advisory committee would be amenable to bracketing the language dealing with American Samoa.

Judge Bucklew responded that the advisory committee would certainly approve placing brackets around the provision to flag it for readers. She said that the proposed amendments to Rule 41 were very beneficial, and it would be a shame not to have them proceed because of a controversy over a matter of relatively minor concern to the government.

**The committee unanimously approved the proposed amendment, with the pertinent language of subsection (A) bracketed, for publication by voice vote.**

#### MODEL FORM 9 ACCOMPANYING THE SECTION 2254 RULES

Mr. Rabiej stated that the committee needed to abrogate Form 9 accompanying the § 2254 rules. He noted that the form is illustrative and implements Rule 9 of the § 2254 rules (second or successive petitions). The form, however, was badly out of date, even before the habeas rules were restyled, effective December 1, 2004. For example, it contains references to subdivisions in Rule 9 that no longer exist and includes provisions that have been superseded by the Antiterrorism and Effective Death Penalty Act of 1996.

He added that when the restyled habeas corpus rules had been published for comment in August 2002, the advisory committee received comments from district judges recommending that the form not be continued because the courts relied instead on local forms. The courts wanted to retain flexibility to adapt their forms to local conditions instead of following a national form. The advisory committee and its habeas corpus subcommittee did not specifically address abrogation of the form. Thus, technically Form 9 still remains on the books. He added that the form had been causing some confusion, and the legal publishing companies no longer include it in their publications. In addition, Congressional law revision counsel thought that the form had been abrogated and no longer included it in their official documents. Therefore, Mr. Rabiej said, it would be best for the committee to officially abrogate the form through the

regular rulemaking process. *i.e.*, approval by the committee and forwarding to the Supreme Court and Congress.

**The committee without objection by voice vote agreed to ask the Judicial Conference to abrogate Form 9 accompanying the § 2254 Rules.**

*Informational Items*

Judge Bucklew reported that the advisory committee was still working on a proposed amendment to FED. R. CRIM. P. 16 (discovery and inspection), which would expand the government's obligation to disclose exculpatory and impeaching information to the defendant. She said that the matter was controversial, and the Department of Justice was strongly opposed to any rule amendment. Instead, she said, it had offered to draft amendments to the *United States Attorneys' Manual* as a substitute for an amendment. The matter, she added, was still in negotiation. Deputy Attorney General McNulty and Assistant Attorney General Fisher said that the Department was still working on the manual and was hopeful of making progress.

Judge Bucklew said that the committee was also considering a possible amendment to FED. R. CRIM. P. 41 (search warrants) that would address search warrants for computerized and digital data. It was also looking at possible amendments to the § 2254 rules and § 2255 rules to restrict the use of ancient writs and prescribe the time for motions for reconsideration.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Smith and Professor Capra presented the report of the advisory committee, as set forth in Judge Smith's memorandum and attachments of May 15, 2006 (Agenda Item 8).

*New Rule for Publication*

FED. R. EVID. 502

Judge Smith reported that the advisory committee had only one action item to present — proposed new FED. R. EVID. 502 to govern waiver of attorney-client privilege and work product protection. He referred back to the report of the Administrative Office and Mr. Rabiej's description of the exchange between Judge Levi and the chairman of the House Judiciary Committee. He noted that the committee had received a specific request from Chairman Sensenbrenner to draft a rule that would:

1. protect against inadvertent waiver of privilege and protection,
2. permit parties and courts to disclose privileged and protected information to protect against the consequences of waiver, and
3. allow parties and entities to cooperate with government agencies by turning over privileged and protected information without waiving the privilege and protection as to any other party in subsequent proceedings.

He explained that rules that affect privilege must be addressed by Congress and enacted by legislation. Thus, the rules committees could produce a rule through the Rules Enabling Act process that would then be enacted into law by Congress.

Judge Smith noted that the advisory committee had conducted a very profitable conference at Fordham Law School in New York at which 12 invited witnesses commented on a proposed draft of the rule. He said that the committee had refined the rule substantially as a result of the conference, and the improved product was ready for approval by the Standing Committee to publish. He explained that the rule incorporated the following basic principles agreed upon unanimously by the advisory committee:

1. A subject-matter waiver should be found only when privileged material or work product has already been disclosed and a further disclosure “ought in fairness” to be required.
2. There should be no waiver if there is an inadvertent disclosure and the holder of the protection takes reasonable precautions to prevent disclosure and reasonably prompt measures to rectify the error.
3. Selective waiver should be allowed.
4. Parties should be able to get an order from a court to protect against waiver vis a vis non-parties in both federal and state courts.
5. Parties should be able to contract around the common-law waiver rules. But without a court order, their agreement should not bind non-parties.

Judge Smith pointed out that the rule included some controversial matters, but it was needed badly to control excessive discovery costs. He said that the burdens and cost of preserving the privileged status of attorney-client information and trial preparation materials had gotten out of hand without deriving any countervailing benefits.

Judge Smith pointed out that selective waiver was the most controversial provision in the rule. It would protect a party making a disclosure to a government law enforcement or regulatory agency from having that disclosure operate as a waiver of the privilege or protection vis a vis non-governmental persons or entities. He explained that the advisory committee would place the provision in brackets when the rule is published and state that the committee had not made a final decision to include it in the rule.

Professor Capra agreed that the most controversial aspect of the rule was the selective waiver provision. He pointed out that the proposed rule takes a position inconsistent with most current case law. He emphasized that the advisory committee had not decided to promulgate that part of the rule, so the provision is set forth in brackets. In addition, the accompanying letter to the public states that the committee had not made a decision to proceed and wanted comments directed to the advisability of including a selective waiver provision. Judge Levi added that Chairman Sensenbrenner had specifically asked the committee to include a selective waiver provision in the rule.

Professor Capra explained that the original version of the rule had a greater effect on state court activity and sought to control state law and state rules on waiver. But the Federal-State Jurisdiction Committee of the Judicial Conference – and the advisory committee itself after its hearing in New York – concluded that the draft was too broad. Accordingly, it was amended and now covers only activity occurring in a federal court.

Judge Levi noted that the representative of an American Bar Association's Task Force on the Attorney-Client Privilege opposed the rule at the New York conference because he said that it would foster the "coercive culture of waiver." The task force, he explained, is concerned that waivers are being extorted by government agencies from businesses as part of the regulatory and law enforcement processes.

Judge Levi added that he had spoken to the chair of the task force and emphasized that the committee was not trying to encourage the use of waivers. Nor was it taking a position on Department of Justice memoranda to U.S. attorneys encouraging them to weigh a corporations's willingness to waive the attorney-client privilege in assessing its level of cooperation for sentencing purposes. Rather, he emphasized, the rules committee was just trying to promote the public interest by facilitating the conduct of government investigations into public wrongs. Judge Levi added that, in response to the concerns of the ABA task force, the committee should include a statement in the publication to the effect that the committee was not taking a position regarding the government's requests for waivers. The addition, he said, could avoid misdirected criticism of the rule.

Associate Attorney General McCallum agreed that the explanation would be helpful to the organized corporate bar. He said that the Department had been surprised by the feedback at the Fordham conference, where some participants had voiced strong

opposition to the proposal on the ground that it would foster a culture of waiver. He said that the Department supported the pending new Rule 502 and would continue to work with the organized bar over their concerns.

One member questioned the effect of the proposal on state court proceedings. He asked whether the advisory committee had examined the power of Congress under the Commerce Clause of the Constitution to effect changes in the rules of evidence in the state courts. Professor Capra responded that the committee had indeed examined the issue and had invited an expert to testify on it at the mini-conference. In addition, he said, Professor Kenneth Broun, a consultant to the committee and a former member of the committee, had also completed a good deal of research on the issue. He said that the proposed rule dealt only with the effect on state court proceedings of disclosures made in the federal courts. It did not address the more questionable proposition of whether the rule could control disclosures made in state court proceedings. The literature, he said, suggests that Congress has the power to regulate even those disclosures. But, he said, the advisory committee narrowed the rule to cover only disclosure at the federal level.

One member asked whether the Department of Justice favored selective waiver in order to promote law enforcement and regulatory enforcement efforts. He noted that he had sat on a case in which the panel of the court of appeals had asked the Department to file an amicus curiae brief on the issue, but had received none. He said that the panel had been frustrated by the uncertainty regarding the Department's views on the issue. Associate Attorney General McCallum pointed out that the Department acts as both plaintiff and defendant and that some components of the Department strongly favor selective waiver. He noted, by way of example, that the prosecutions in the Enron case would have been more difficult and time-consuming if waivers had not been given. The waivers, he emphasized, had been voluntarily given with the advice of counsel. He explained that the Department favors selective waiver, but had not yet taken an official position on the matter.

Judge Levi explained that the purpose of selective waiver is to encourage companies to cooperate in regulatory enforcement proceedings. He said that the Securities and Exchange Commission favored the proposed Rule 502, and it would be very helpful to obtain the views of other law enforcement and regulatory authorities in order to develop the record for the advisory committee. Professor Capra added that the strong weight of authority among the circuits, as expressed in the case law, was against selective waiver. Therefore, he said, there needed to be a strong showing in favor of it during the public comment period. Judge Levi concurred and added that a strong case also needs to be made by the state attorneys general and other regulatory authorities.

**The committee unanimously approved the new rule for publication by voice vote.**

*Informational Items*

Professor Capra reported that the advisory committee had been monitoring the developing case law on testimonial hearsay following *Crawford v. Washington*, 541 U.S. 36 (2004). He noted that the Supreme Court had just issued some opinions dealing with *Crawford*, but the issues in the cases were relatively narrow and do not provide sufficient guidance on how to treat hearsay exceptions in the federal rules. The advisory committee, he said, would continue to monitor developments, and it wanted to avoid drafting rules that later could become constitutionally questionable.

Professor Capra also reported that the advisory committee was considering restyling the Federal Rules of Evidence, mainly to conform the rules to the electronic age and to account for information in electronic form. He noted that the committee had had discussions on how to address the matter, and it had considered the possibility of restyling the entire body of evidence rules. He added that he planned to work with Professor Kimble to restyle a few rules for the committee to consider at its next meeting. Finally, he noted, the view of the Standing Committee on whether to restyle the evidence rules will be very important.

Professor Capra reported that draft legislation was being considered in Congress that would establish a privilege for journalists. The legislative activity, he said, stemmed in part from the controversies surrounding the celebrated cases involving the imprisonment of New York Times reporter Judith Miller and the leak of the identity of C.I.A. employee Valerie Plame. He explained that the Administrative Office had reviewed the proposed legislation and offered some suggestions on how its language could be clarified. Mr. Rabiej added that many of the suggestions had been adopted by the Congressional drafters.

**REPORT OF THE TIME-COMPUTATION SUBCOMMITTEE**

Judge Kravitz and Professor Struve presented the report of the subcommittee, as set forth in Judge Kravitz's memorandum of January 20, 2006 (Agenda Item 9).

Judge Kravitz reported that the advisory committees at their Spring 2006 meetings had embraced the time-computation template developed by the subcommittee, including its key feature of counting all days and not excluding weekends and holidays.

He pointed out that the Standing Committee at its January 2006 meeting had asked the subcommittee and the advisory committees specifically to address two issues: (1) the inaccessibility of a clerk's office to receive filings; and (2) whether to retain the provision that gives a responding party an additional three days to act when service is

made on it by mail or by certain other means, including electronic means. He noted that the advisory committees had decided that the issue of inaccessibility needed additional study, and the subcommittee was willing to take on the task. Professor Capra added that the Technology Subcommittee had already considered these issues as part of its participation in the project to develop model local rules to implement electronic filing.

As for the “three-day rule,” Judge Kravitz reported that the sense of the advisory committees was to leave the rule in place without change at this time. He said that it seemed odd to give parties an extra three days when they have been served by electronic means, but many filings are now made electronically over weekends and the committees were concerned about potential gamesmanship by attorneys. So, the general inclination has been not to amend the rule at this point.

Judge Kravitz said that the Advisory Committee on Civil Rules had suggested some helpful improvements to the template. First, he noted, the language of the template speaks in terms of filing a “paper.” But in the electronic age, he said, it makes sense to eliminate the word “paper.”

Second, he pointed out that the template speaks in terms of a day in which “weather or other conditions” make the clerk’s office inaccessible. He said that the advisory committee was concerned about the specific reference to “weather” because it implies that only physical conditions may be considered. Instead, the language might be improved by simply referring to a day on which the clerk’s office “is inaccessible.” The committee note could explain, though, that elimination of the word “weather” is not intended to remove weather as a condition of inaccessibility.

Third, the advisory committee suggested deleting state holidays as days to exclude in computing deadlines. Most federal courts, he said, are in fact open on state holidays. He noted that the subcommittee had not decided to make this change, but would be amenable to doing so if the Standing Committee expressed support for the change.

Fourth, he said that the advisory committee had noted that “virtual holidays” were not included in the template, *e.g.*, the Friday after Thanksgiving and the Monday before a national holiday that falls on a Tuesday. Some federal courts, he said, are effectively closed on those days, although their servers are available to accept electronic filings.

Fifth, he said that the advisory committee had suggested including a definition of the term “last day” in the text of the rule. He reported that Professor Cooper had drafted a potential definition, drawing on the text of local court rules implementing electronic filings. It states that, for purposes of electronic filing, the “last day” is midnight in the time zone where the court is located. For other types of filings, it is the normal business hours of the clerk’s office, or such other time as the court orders or permits.

Judge Kravitz explained that the civil, bankruptcy, and appellate rules – unlike the criminal rules – apply in calculating statutory deadlines as well as rules deadlines. He pointed out that Professor Struve had completed an excellent memorandum on the subject in which she identified many important statutory deadlines. Her initial study had found more than 100 statutory deadlines of 10 days or fewer. Many of them, he added, are found in bankruptcy. Moreover, some apply not to lawyers, but to judges. Under the current rules, he said, a deadline of 10 days usually means 14 days or more because weekends and holidays are not counted. But under the approach adopted in the template, 10 days will mean exactly 10 days.

Judge Kravitz reported that the Advisory Committee on Civil Rules had suggested that the advisory committees should consider expressing all, or most, time periods in multiples of seven days. The concept, he noted, seems generally acceptable but may not work well across-the-board for all deadlines. It may be, he said, that deadlines below 30 days would normally be expressed in multiples of seven, but the longer periods now specified in the rules, such as 30, 60, or 90 days might be retained.

Finally, Judge Kravitz thanked Judge Patrick Schiltz, former reporter for the appellate rules committee and special reporter for the time-computation project, for his superb research and memoranda and for drafting the template and supporting materials that got the project moving. He also thanked Professor Struve for picking up the work from Judge Schiltz and for her excellent memorandum on statutory deadlines. He also praised the advisory committees for their dedication to the project and their invaluable help to the subcommittee.

Professor Struve highlighted the backward-counting provision in the template rule and wondered about its practical effect. Judge Kravitz explained that the advisory committee had wanted a simple rule. He acknowledged that there are scenarios under the template in which litigants may lose a day or two in filing a document, and judges would gain a day or two. But, he said, even though the subcommittee consisted mostly of practicing attorneys, all endorsed the basic principle – in the interest of simplicity – that once one starts counting backward, the count should continue in the same direction.

Professor Cooper added that the bar for years had urged the Advisory Committee on Civil Rules to make the rules as clear as possible, and one attorney recently had asked the committee to draft a clear rule telling users how to count backwards, *e.g.*, to calculate a deadline when a party has to act a certain number of days *before* an event, such as a hearing. To that end, he said, it might be advisable to put back into the template the words “continuing in the same direction,” which had been dropped from an earlier draft in the interest of simplicity. Including those words would make it clear that backward counting follows the same pattern as forward counting. A member of the committee strongly urged including the clarifying language in the rule.

Judge Kravitz said that the most difficult issue appeared to be the applicability of the rule to statutory deadlines. A few statutes, he said, speak specifically in terms of calendar days. But when statutes do not specify calendar days, it can be assumed that only business days are counted under the current rule when a deadline is 10 days or fewer. He pointed out that the practical impact of the template rule would be to shorten statutory deadlines of 10 days or fewer. That result, he said, might undercut the bar's acceptance of the time-computation project.

Professor Morris added that the template rule would have a substantial impact on bankruptcy practice because a great many state statutes are in play in bankruptcy cases. Under the current bankruptcy rule, he said, the statutes are calculated by counting only business days.

Professor Morris also noted that the proposed template rule speaks of inaccessibility in such a way that it could be interpreted to include inaccessibility on a lawyers' end, as well as the inaccessibility of the clerk's office to accept filings. He suggested that the rule might be broad enough to cover the situation where a law firm's server is not working.

Judge Rosenthal explained that the civil advisory committee had considered that situation and had decided tentatively that it was not possible to write a rule to cover all situations. She suggested that it should be left up to the lawyers to decide whether they need to ask a court for an extension of time in appropriate situations. She cautioned, however, that there are a handful of time limits in the rules that a court has no authority to extend.

One participant urged that the time had come to move forward with the time-computation project, despite the complications posed by statutory deadlines. He suggested, moreover, that Congress might well be amenable to making appropriate statutory adjustments in this area to accommodate the time-computation project, especially if the bar associations agree with the committee's proposal.

Judge Levi asked whether the subcommittee was contemplating further changes or additions to the template. Judge Kravitz responded that at least three changes should be made. First, he said the subcommittee would eliminate the word "paper." Second, he said that he had been persuaded to eliminate the word "weather," so the rule would state simply that the last day is not counted if the clerk's office is "inaccessible." Third, he agreed to add to the rule a definition of "last day" along the lines of Professor Cooper's proposal. That definition, he noted, is workable and already exists in most of the local court rules dealing with electronic filing.

In addition to those three changes, Judge Kravitz said that he had no objection to eliminating state holidays from the rule if there were support for the change. As for closure of the federal court on a “virtual holiday,” he said that the problem would be taken care of by revising the rule to specify that the last day is not counted if the clerk’s office is inaccessible. Several members of the committee suggested that both state holidays and virtual holidays be eliminated from the rule. Thus, the only exclusions in the rule would be for federal holidays and days when the clerk’s office is “inaccessible.” Another member added that it should be made clear in the rule that “inaccessibility” applies only to problems arising at the courthouse, and not in a lawyer’s office.

Judge Kravitz noted that the instructions from the Standing Committee were for the advisory committees to review individually each of the individual time limits in their respective rules and to recommend appropriate adjustments to them in light of the template’s mandate to count all days, including weekends and holidays.

One participant suggested that the only significant issue relating to statutes was the problem that the proposed rule would shorten statutory deadlines of 10 days or fewer. Another participant pointed out, though, that the supersession provision of the Rules Enabling Act might also be implicated.

One advisory committee chair suggested that it would be very helpful for the advisory committees to have a list of all the various statutory deadlines and an indication of how often they actually arise in daily situations. Some of the statutes, she said, might make a big difference in federal practice, such as the 10 days given a party by statute to object to a magistrate judge’s report.

One member said that the problem of shortening statutory deadlines had the potentiality of undermining the whole time-computation project and wasting a great deal of time and work by the advisory committees.

Another added that it was questionable whether judges have authority to extend statutory deadlines. He suggested that it might be appropriate to speak with members of Congress about the issue. Another participant said that Congress might give its blessing to fine tuning the calculation of statutory deadlines, as long as the particular deadlines affected are not politically charged.

Professor Struve added that she had just scratched the surface with her initial research into statutory deadlines. She said that it would be a truly major project to gather all the statutes, and the committee was bound to make a mistake or two. Professor Cooper pointed out that, unless the new rule also sweeps up all future statutes, some time periods could end up being counted one way and others another way – the worst possible outcome.

One member asked whether lawyers in fact even look to the federal rules to calculate a deadline in a statute. Or do they merely look to the statute itself? In other words, if a statutory deadline is 10 days, do lawyers assume that it means 10 days, as set forth in the plain language of statute itself, or 14 days, as calculated under the federal rules?

Judge Kravitz suggested that the choice for the advisory committees was either: (1) to continue their examination of each time limit in their respective rules, or (2) to try to solve the statutory deadline problems first, present a solution to those problems at the January 2007 Standing Committee meeting, and then resume work on the specific time limits. One advisory committee chair said that it was important to have a firm road map in place before the advisory committees commit themselves to a great deal of work.

One participant concluded that the committees may not be able to resolve all the open questions regarding statutory interpretation and the interplay between statutes and rules. Professor Cooper pointed out that supersession questions already make it unclear in several instances whether a statute or a related rule should control the computation of a given time limit. Many of those questions have never been faced and answered. In the interest of simplicity, though, he suggested that it may make sense simply to abolish the 11-day rule explicitly for both rules and statutes, even if that results in certain statutory time limits being shortened.

Two members suggested that another possible resolution of the statutory problems would be to eliminate all reference in the rule to calculating time limits set forth in statutes. Therefore, the rules, as revised, would apply only in calculating time limits set forth in rules and court orders. Another member pointed out that this solution would bring the civil and bankruptcy rules into line with the current criminal rules, which do not extend to calculation of statutory time limits.

One advisory committee chair suggested that there was great value in continuing the momentum that the Technology Subcommittee had created. She said that the civil advisory committee had made a good deal of progress, and it would be best to continue its work over the summer, despite the uncertainties over statutes.

Another advisory committee chair pointed out that there is a difference between counting hours and counting days. Under the rules, he explained, days are considered as units, not 24-hour periods. Therefore, a party has until the end of the last day in which to act. On the other hand, in counting hours, an hour counts as exactly 60 minutes, not as a unit. Therefore, a party has exactly 60 minutes in which to act. The time period is not rounded up to the end of the last hour. He suggested that the committee consider specifying in the template that 60 minutes is 60 minutes precisely.

One participant recommended that the committee consider whether Congress contemplates that its statutes will be interpreted according to the time-computation provisions in the federal rules. He suggested that the committee, by changing the method of calculating shorter statutory deadlines, might be contradicting the intentions of Congress in enacting the statutes.

Judge Kravitz added that the rule should provide clear advice to judges and lawyers on how to count time limits set forth in statutes. The proposed revision of the federal rules would effectively shorten the time for people to act. Therefore, he said, the committee should study such matters as how judges and lawyers actually count time in statutes, how many statutory deadlines there are, how often they arise in the courts, and whether they have caused practical problems. Once the committees understand these issues better, they should be able to propose the appropriate solution to the problem of counting time as set forth in statutes.

One member emphasized that the bar wants a clear, revised rule, and the time has come to promulgate it. Among other things, he said, lawyers are deeply concerned about achieving clarity because missing a deadline is a serious mistake that can lead to a malpractice claim. He suggested, among other things, that the committee expressly solicit the views of the bar regarding statutory deadlines or hold a conference with members of the bar on the subject.

Judge Levi suggested that each advisory committee decide how it should proceed on the matter in light of the discussion. Judge Stewart added that the template, with the various adjustments suggested at the meeting, provides the appropriate vehicle for the advisory committees.

#### LONG RANGE PLANNING

Mr. Ishida reported that the Judicial Conference's Long Range Planning Group, comprised of the chairs of the Conference's committees, had met in March 2006, and its report was included in the agenda book (Agenda Item 10). The group, he said, was preparing the agenda for its next meeting and had asked the chairs of each committee to submit suggested topics.

The planning group first asked the Standing Committee to identify key strategic issues affecting the rulemaking process and to report on what initiatives or actions it was taking to address those issues. Second, the planning group asked the committee to identify trends in the courts that merit further study and could lead to new rules. Mr. Ishida asked the members to consider these requests and send him any ideas that could be included in the committee's report to the planning group.

Mr. McCabe suggested that it would be very helpful for the committee to take advantage of the new statistical system being built by the Administrative Office. He said that the committee should consider the kinds of data that might be extracted from court docket events to develop a sound empirical basis for future rules amendments. Judge Levi endorsed the Administrative Office's efforts to improve and expand collection of statistical information from the courts.

One member suggested that the committee might also consider pro se cases as an area that needed to be addressed in future rulemaking.

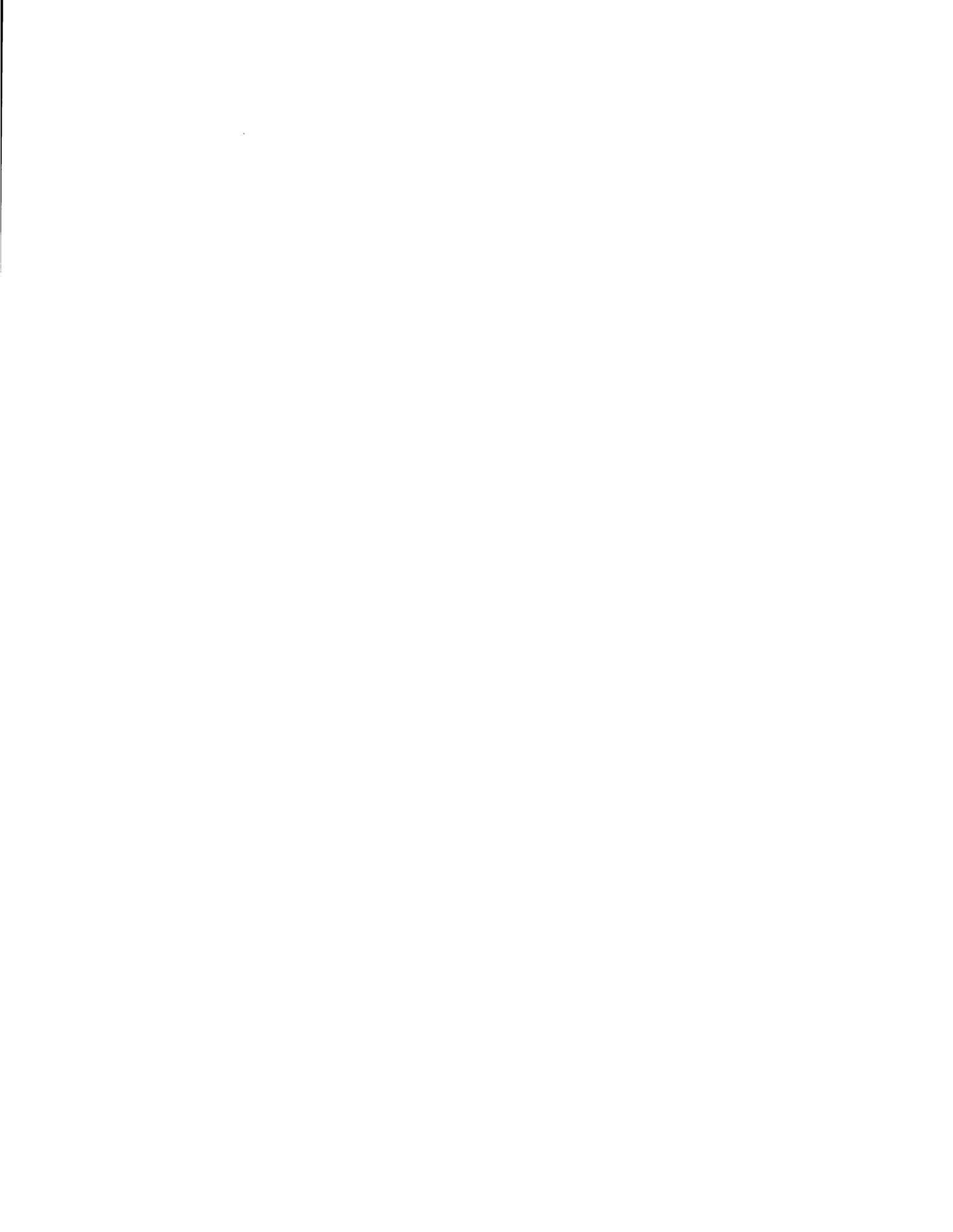
Judge Levi agreed to work with Mr. Ishida on a response from the committee to the long range planning group.

#### NEXT COMMITTEE MEETING

The next committee meeting of the committee will be held in Phoenix in January 2007. The exact date of the meeting was deferred to give the chair and members an opportunity to check their calendars and for the staff to explore the availability of accommodations.

Respectfully submitted,

Peter G. McCabe,  
Secretary



## MEMORANDUM

**To: Advisory Committee on Evidence Rules**

**From: Dan Capra, Reporter and Ken Broun, Consultant**

**Re: Congressional Direction: Advisability of Amending the Evidence Rule to Provide a  
“Harm to Child” Exception to the Marital Privileges**

**Date: October 15, 2006**

### *Introduction*

Pub.Law No. 109-248, the Adam Walsh Child Protection and Safety Act of 2006, was signed into law on July 27, 2006. Section 214 of the Act provides:

The Committee on Rules, Practice, Procedure, and Evidence of the Judicial Conference of the United States shall study the necessity and desirability of amending the Federal Rules of Evidence to provide that the confidential marital communications privilege and the adverse spousal privilege shall be inapplicable in any Federal proceeding in which a spouse is charged with a crime against--

- (1) a child of either spouse; or
- (2) a child under the custody or control of either spouse.

\* \* \*

The statute appears to envision a letter or a report to Congress on the question presented.

Our research indicates that there are few cases on what we will refer to as a “harm to child” exception to the marital privileges. The case law that does exist generally establishes an exception to both the adverse spousal privilege and the marital communications privilege inapplicable in cases involving harm to a child. A similar exception was included in Proposed Federal Rule 505, which provided for an adverse testimonial privilege. (The Proposed privilege rules did not include a privilege for marital confidential communications.) A broader exception is contained in Uniform Rule of Evidence 504, which deals with both marital privileges.

As discussed below, there is one recent federal case rejecting a harm to child exception as applied to the adverse testimonial privilege. It is probably reasonable to assume that Section 214 of the bill is a congressional reaction to that single case. The question for the Committee is whether a single contrary case among sparse case law would justify an amendment to the Federal Rules of Evidence.

Most states that have considered the question have provided, either by statute or common law rule, for a harm to child exception to both marital privileges. There are varying holdings with regard to the application of the exception of the privilege beyond the natural or adopted children of one of the spouses.

The adoption of a rule such as that suggested in § 214 would be consistent both with the overwhelming weight of law in this country and with existing federal authority. The only matter on which there is some significant disagreement in state law is the scope of the exception – to what children does it apply? But the real question posed by Congress is whether an amendment to the Evidence Rules is necessary and desirable given the fundamental uniformity in the law.

This memorandum is divided into six parts. Part I discusses the Federal case law on the harm to child exception to the marital privileges. Part II discusses evidence rules that deal with such an exception: Proposed Rule 504 of the privilege rules that the Advisory Committee submitted to Congress in the early 1970's, and the Uniform Rule of Evidence on the subject. Part III discusses pertinent state law. Part IV discusses the policy arguments supporting a harm to child exception to the marital privileges. Part V discusses whether an amendment to the Federal Rules of Evidence is, to use Congress's language, necessary and desirable. Part VI sets forth two drafts of what such an amendment might look like.

## ***I. Federal Cases***

### ***Case Rejecting the Harm to Child Exception to the Adverse Testimony Privilege***

There is only one case in which a federal court has rejected an exception to a marital privilege for cases involving a crime against a child under the care of one of the spouses. In *United States v. Jarvison*, 409 F.3d 1221 (10th Cir. 2005), the defendant was charged with sexually abusing his granddaughter. The principal issue in the case was the validity of the defendant's marriage to a witness who had refused to testify based upon the privilege protecting against adverse spousal testimony. After holding that the marriage was valid, the court refused to apply a harm to child exception to the marital testimony privilege, and upheld witness's privilege claim. The entirety of the court's analysis of the harm to child exception is as follows:

The government invites us to create a new exception to the spousal testimonial privilege akin to that we recognized in *United States v. Bahe*, 128 F.3d 1440 (10th Cir.1997). In *Bahe*, we recognized an exception to the marital communications privilege for voluntary spousal testimony relating to child abuse within the household. Federal courts recognize two marital privileges: the first is the testimonial privilege which permits one spouse to decline to testify against the other during marriage; the second is the marital confidential communications privilege, which either spouse may assert to prevent the other from testifying to confidential communications made during marriage. See *Trammel*, 445 U.S. at 44-46, 100 S.Ct. 906; *Bahe*, 128 F.3d at 1442; see also *Jaffee v. Redmond*, 518 U.S. 1, 11, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996) (recognizing justification of marital testimonial privilege as modified

by *Trammel* because it "furthers the important public interest in marital harmony). In order to accept the government's invitation, we would be required not only to create an exception to the spousal testimonial privilege in cases of child abuse, but also to create an exception--not currently recognized by any federal court--allowing a court to compel adverse spousal testimony."

409 F.3d at 1231.

The United States Supreme Court had held in *Trammel v. United States*, 445 U.S. 40 (1980), that there is a marital adverse testimony privilege in the federal courts as a matter of federal common law, but that it could be invoked only by the witness, the spouse of the person against whom the witness was testifying. Under *Trammel*, the witness spouse may be neither compelled to testify nor foreclosed from testifying.

The court in *Jarvison* notes that its circuit had recognized a harm to child exception to the marital communications privilege in *United States v. Bahe*, 128 F.3d 1440, 1445-46 (10th Cir. 1997). The court in *Bahe* applied that exception to allow admission of the defendant's confidential statements to his wife concerning the abuse of an eleven-year-old relative. The harm to child exception applied even though the child was simply visiting in the home and was the child of neither spouse. The *Jarvison* court makes no attempt to explain why a harm to child exception should apply to the marital confidential communications privilege, but not to the adverse testimonial privilege.

It is notable that the court in *Jarvison* ignored relatively recent authority from its own circuit for the existence of a harm to child exception to the privilege to the marital testimony privilege – the precise privilege involved in *Jarvison*. In *United States v. Castillo*, 140 F.3d 874 (10th Cir. 1998), the court, without discussing its reasons, applied *Bahe* to uphold a conviction in which the defendant's wife had testified against him in a case involving abuse of the couples' daughters. For purposes of the harm to child exception, the *Castillo* court made no distinction between the adverse testimonial privilege and the confidential communications privilege.

### ***Cases Recognizing Harm to Child Exception***

All of the other federal cases dealing with the harm to child exception — admittedly limited in number — have applied it to both the adverse marital testimony and the marital communications privilege.

#### ***Marital Communications Privilege***

In *United States v. White*, 974 F.2d 1135, 1137-38 (9th Cir. 1992) the court permitted the defendant's wife to testify to a threat made to her by the defendant that he would kill both her daughter and her. The defendant was accused of killing his two-year-old stepdaughter, his wife's natural daughter. The court found that the marital communications privilege did not apply. The court stated:

The public policy interests in protecting the integrity of marriages and ensuring that spouses freely communicate with one another underlie the marital communications privilege. *See United States v. Roberson*, 859 F.2d 1376, 1370 (9th Cir. 1988) (citation omitted). When balancing these interests we find that threats against spouses and a spouse's children do not further the purposes of the privilege and that the public interest in the administration of justice outweighs any possible purpose the privilege serve [sic] in such a case. . . . [T]he marital communications privilege should not apply to statements relating to a crime where a spouse of a spouse's children are the victims.

974 F.2d at 1138:

Returning to the *Bahe decision*, the court in *Bahe* recognized that *White* involved a situation in which the statement itself – the threat – was a crime against the wife and her daughter and that *White* involved the wife's natural daughter rather than a stepdaughter. The court nevertheless relied upon the reasoning in *White* to apply a harm to child exception to the marital communications privilege. It noted as follows:

Child abuse is a horrendous crime. It generally occurs in the home. . . and is often covered up by the innocence of small children and by threats against disclosure. It would be unconscionable to permit a privilege grounded on promoting communications of trust and love between marriage partners to prevent a properly outraged spouse with knowledge from testifying against the perpetrator of such a crime.

138 F.3d at 1446.

The court also noted the strong state court authority, both in case law and by statute, for a harm to child exception to both of the marital privileges.

Similarly, in *United States v. Martinez*, 44 F. Supp. 2d 835 (W.D. Tex. 1999), the court held that the marital communications privilege was not applicable in a prosecution against a mother charged with abusing her minor sons. The court stated:

Children, especially those of tender years who cannot defend themselves or complain, are vulnerable to abuse. Society has a stronger interest in protecting such children than in preserving marital autonomy and privacy. 25 Wright & Graham, Federal Practice and Procedure § 5593 at 762 (1989). "A contrary rule would make children a target population within the marital enclave." *Id.* at 761. *See also* 2 Louisell & Mueller, Federal Evidence, at 886 (1985). Society rightly values strong, trusting, and harmonious marriages. Yet, a strong marriage is more than the husband and wife, and it is more than merely an arrangement where spouses may communicate freely in confidence. A strong marriage also exists to nurture and protect its children. When children are abused at the hands of a parent, any rationale for protecting marital communications from disclosure must yield to those children who are the voiceless and powerless in any family unit.

The Court has made a thorough search of the law in this circuit and has found no authority that would preclude this exception to the communications privilege in the context of a child abuse case. Nor has the Court found any law in our nation's jurisprudence that would extend the privilege under these circumstances. Admittedly, the Court has not undertaken an historical review of the privilege or of the genesis of the concept that gave rise to the privilege. The Court has not searched the dark corners of the world, nor that era when mankind lived within the confines of a cave that might call for a contrary result.

The Court therefore concludes that in a case where one spouse is accused of abusing minor children, society's interest in the administration of justice far outweighs its interest in protecting whatever harmony or trust may at that point still remain in the marital relationship. "Reason and experience" dictate that the marital communications privilege should not apply to statements relating to a crime where the victim is a minor child.

44 F. Supp. 2d at 837.

#### ***Adverse Testimony Privilege***

The Eighth Circuit applied the harm to child exception in a case involving the adverse spousal testimonial privilege. *United States v. Allery*, 526 F.2d 1362 (8th Cir. 1975), was a prosecution of the defendant for the attempted rape of his twelve-year-old daughter. In *Allery*, decided pre-*Trammel*, the defendant alleged error in allowing his wife to testify against him. The court found that the privilege protecting the defendant from testimony by his wife was inapplicable in a case in which he was charged with harm to his child. The court relied, in part, on the existence of such an exception to the privilege in the privilege rules proposed by the Advisory Committee but rejected by Congress. In reaching its decision, the court stated:

We recognized that the general policy behind the husband-wife privilege of fostering family peace retains vitality today as it did when it was first created. But, we also note that a serious crime against a child is an offense against that family harmony and to society as well.

Second, we note the necessity for parental testimony in prosecutions for child abuse. It is estimated that over ninety percent of reported child abuse cases occurred in the home, with a parent or parent substitute the perpetrator in eighty-seven and one-tenth percent of these cases. *Evidentiary Problems in Criminal Child Abuse Prosecutions*, 63 Geo. L. J. 257, 258 (1974).

526 F.2d at 1366.

Judge Henley, dissenting in *Allery*, would not have extended the exception to this case where the victim was "not a child of tender years" and was competent and did testify. He believed that

there was no necessity for the wife's testimony under such circumstances and that any exception to the privilege should be confined to instances where "the alleged victim is an incompetent witness and no reliable witness other than a spouse of the accused is available." 526 F.2d at 1367.

### ***Summary***

The federal cases generally establish a harm to child exception for both marital privileges. The only case to the contrary refuses to apply the exception to the adverse testimonial privilege. But that case, *Jarvison*, is dubious on a number of grounds:

1. Its analysis is perfunctory.
2. It fails to draw any reasoned distinction between a harm to child exception to the marital communications privilege (which it recognizes) and a harm to child exception to the adverse testimonial privilege (which it does not recognize).
3. It is contrary to a prior case in its own circuit which recognized the exception as applied to the adverse testimonial privilege.
4. Its rationale for refusing to establish the exception to the adverse testimonial privilege is that no federal court had yet established it. But the court ignored the fact that the exception had already been established not only by a court in its own circuit but also by the Eighth Circuit in *Allery*.

It is for the Committee to determine whether such a poorly reasoned, outlier case justifies an amendment to the Evidence Rules to abrogate it.

### ***II. Proposed Federal Rule 505 and Uniform Rule 504***

The court in *United States v. Allery, supra*, in recognizing an exception to the marital testimonial privilege, relied in part upon Proposed Federal Rule 505. Proposed Rule 505 provided that an accused has a privilege to prevent his spouse from testifying against him. An exception to the proposed privilege would have made it inapplicable "in proceedings in which one spouse is charged with a crime against the person or property of the other or a child of either, or with a crime against the person or property of a third person committed in the course of committing a crime against the other." Proposed Rule 505 (c)(1).

The court in *Allery* noted that a "careful review of the legislative history behind the rejection of the changes proposed in Article V and the passage of Rule 501 does not indicate that Congress disapproved of the expansion of this exception but rather that any substantive changes should be done on a case-by-case basis." 526 F.2d at 1366.

The Uniform Rules of Evidence recognize a similar, although somewhat broader exception to both the marital communications and spousal testimony privileges contained in Uniform Rule 504. The most recent version of Part (d) (3) of the Uniform Rule 504 provides that there is no privilege under this rule

(3) in any proceeding in which one spouse is charged with a crime or tort against the person or property of the other, a minor child of either, an individual residing in the household of either, or a third person if the crime or tort is committed in the course of committing a crime or tort against the other spouse, a minor child of either spouse, or an individual residing in the household of either spouse. . .

### ***III. State Law***

More than half the states have some form of an exception for crimes against children in their privilege rules or statutes. Wright & Graham, Federal Practice and Procedure, § 5593 (2006 Supp.). Some others have read such an exception into their privileges through judicial decision, see *e.g.*, *State v. Kollenborn*, 304 S.W.2d 855 (Mo. 1957) (marital testimony privilege; common law exception created in case involved injury to child of both spouses). *See also* 1 McCormick, Evidence § 66 (adverse spousal testimony) at 316, n. 13; § 84 (marital communications) at 380, n. 6 (6th ed. 2006).

The differences occur in the extent of the exception.

States dealing with the issue seem to have uniformly applied the exception to a stepchild of the witness or the spouse charged with the crime. See, *e.g.*, *People v. Gomez*, 492 N.Y.S.2d 415 (A.D. 1985)(marital communications privilege; common law exception); *Wilson v. State*, 737 P.2d 1197 (Okla. Crim. App. 1987) (spousal testimony privilege; statutory exception for “child” of either interpreted to cover stepchild).

Most courts dealing with the issue apply the exception beyond the child or stepchild of the defendant or the witness spouse. See, *e.g.*, *Daniels v. State*, 681 P.2d 341 (Alaska 1984) (spousal testimony privilege; extended to foster child); *Stevens v. State*, 806 So.2d 1031 (Miss. 2001) (marital communication privilege; exception for crimes against children applied in case in which defendant charged with murder of unrelated children); *Meador v. State*, 711 P.2d 852 (1985) (statute providing exception to spousal testimony privilege for child in “custody or control” covered children spending the night with defendant’s daughters); *State v. Waleczek*, 585 P.2d 797 (Wash. 1978) (both marital privileges; term “guardian” in statute included situation in which couple voluntarily assumed care of child even though no legal appointment as guardian); *State v. Michaels*, 414 N.W. 2d 311 (Wis. App. 1987) (spousal testimony privilege; statutory exception for crime against a “child of either” encompasses foster children).

A few decisions have refused to extend the exception to children merely living in the household. See, e.g., *State v. Anderson*, 636 N.W. 2d 26 (Iowa 2001) (marital communications privilege; statutory exception for children limited to children within the care of the husband or wife); *People v. Clarke*, 114 N.W. 2d 338 (Mich. 1962) (spousal testimony privilege; exception did not apply to a child living in the household who was not the child of either the husband or the wife; Michigan subsequently enacted a statute expressly providing for an exception to the marital privilege for offenses committed against any person who is younger than 18 years of age. Mich. Comp. Law. Ann. § 600.2162).

Although most courts dealing with the issue extend the exception to adult children, e.g., *People v. Simpson*, 347 N.W.2d 215 (1984) (spousal testimony privilege; exception for children of either applied to 19-year-old daughter), at least one case has refused to apply its state exception to the spousal testimony privilege to a daughter over the age of 16, *Zamora v. State*, 692 S.W.2d 161 (Tex. App. 1985) (Texas statute specifically limited exception to children under 16).

#### ***IV. Policy Considerations Concerning the Scope of the Harm to Child Exception***

In Wright & Graham, Federal Practice and Procedure § 5593 (Supp. 2006), the authors support a harm to child exception to the adverse testimonial privilege, at least insofar as it covers minor children. However, they reject the commonly used rationale for the privilege that marital harmony has already broken down. The authors note that such a rationale collapses completely when the two spouses join in abusing the child.

A better ground is that a contrary rule would make children a target population within the marital enclave; ‘it is estimated that over ninety percent of reported child abuse cases occurred in the home with a parent or parent substitute the perpetrator in eighty-seven and one-tenth percent of the cases.’ [citing *United States v. Allery, supra*] In addition, children are more vulnerable to spousal abuse than the husband or wife so there is a stronger state interest in restricting marital autonomy and privacy in order to protect them, particularly in light of the experience of some experts that children of child-abusers grow up to abuse their own children. Finally, children are sometimes the victim of violence directed at a spouse and parents ought not to be able to condone injury to a child in order to further marital harmony.

§ 5593 at 761-62.

However, Wright and Graham find an extension of the exception to adult children less compelling in light of their reliance on the vulnerability of the victim as the primary rationale for the exception.

Professor Imwinkelried, in *Evidentiary Privileges* §6.13.5 (2002) argues against the extension of the exception beyond the child of either or at least a cohabitant in the household. He notes:

The core exception applies when the charged offense is a crime against the other spouse; and it is arguably justifiable to extend the exception to offenses to other family members such as children, because such offenses also imperil the family unit. However, the applicability of the policy argument becomes highly debatable when the named victim is a third-party stranger rather than a spouse, child or cohabitant. Offenses against the last three types of victims most strongly implicate the policy that justifies the creation of the exception. When the victim is not a member of the family unit but the offense occurs in the course of a crime against a family member, the latter offense seems to serve as only a pretext to circumvent the privilege; broadening the exception to reach offenses against third-party strangers bespeaks generalized hostility to the privilege rather than principled analysis of the limits of the underlying policy.

§6.13.5 at 1023-24.

Note that Congress is asking the Committee to a harm to child exception that is relatively broad. It would apply when the harm is to: (1) a child of either spouse; or (2) a child under the custody or control of either spouse. The exception would thus extend to stepchildren, foster children, adopted children, etc. It would extend to children not related to either spouse, so long as the spouse had custody or control of the child at the time of the harm. Moreover, the exception would appear to apply to adult children.

#### ***V. The “Necessity and Desirability” of Amending the Federal Rules of Evidence to Include a Harm to Child Exception to the Marital Privileges.***

##### **A. General Criteria for Proposing an Amendment to the Evidence Rules**

The Evidence Rules Committee and the Standing Committee have long taken the position that amendments to the Evidence Rules should not be proposed lightly. The reason is that Evidence Rules are based on a shared understanding, and are applied on the fly in a courtroom. Changes to the Evidence Rules upset settled expectations and can lead to inefficiency in proceedings, unintended consequences, and a trap for unwary lawyers who don’t keep track of amendments.

Generally speaking, amendments to the Evidence Rules have been proposed only when at least one of three criteria are found:

- 1) there is a split in the circuits about the meaning of the Rule, and that split has existed for such a long time that it appears that the Supreme Court will not rectify it;
- 2) the existing rule is simply unworkable for courts and litigants; or

3) the rule is subject to an unconstitutional application.

### **B. Application of Amendment Criteria to Proposed Harm to Child Exception**

We will assume that the Committee will be continuing with the premise that amendments should be proposed only when necessary to address serious problems — or put another way, if the current rule basically works and is uniformly applied, then the cost of marginal improvements is outweighed by the benefits. Under those criteria, there is only one reason that could even possibly support an amendment proposing a harm to child exception to the marital privileges: a split in the circuits. It is clear that the current common law rule is workable, in the sense of being fairly easily applied to any set of facts; if there is an exception, it applies fairly straightforwardly, and if there is no exception, there is no issue of application. Nor is the current state of the law subject to unconstitutional application. So the split in the courts is the only legitimate traditional basis for proposing an amendment to codify a harm to child exception to the marital privileges.

But this particular split in the courts is different from the usual split that supports a proposal to amend an Evidence Rule. Two recent amendments are instructive for comparison. The amendment to Rule 408 was necessitated because the circuits were split over the admissibility of civil compromise evidence in a subsequent criminal case. The circuits were basically evenly split, and ten circuits had weighed in; it was not just one outlying case creating the conflict. Moreover, the proper resolution of the question was one on which reasonable minds could differ — it was not the case that some circuits got it completely wrong, so that it could be anticipated that they might reconsider the error of their ways at some future point. The disagreement was close on the merits and as such was likely to be longstanding.

The amendment to Rule 609 was similar. The circuits disagreed on whether a trial court could go behind a conviction and review its underlying facts to determine whether the crime involved dishonesty or false statement, and thus was automatically admissible under Rule 609(a)(2). Every circuit had weighed in, and there was a reasonable disagreement on the question.

In contrast, the split among the circuits over the harm to child exception is not deep, it is not wide, and it is not a situation in which both sides have reached a considered resolution after reasonable argument. First, there is no disagreement at all about the applicability of the harm to child exception to the marital privilege for *confidential communications*. All of the reported federal court cases have agreed with and applied this exception. So the response to Congress about the necessity of an amendment to add the harm to child exception to the marital confidential communications privilege is easy: it is not necessary; there is no conflict at all to rectify, and accordingly no there is no need to undertake the costs of amendment on the subject.

Second, as to the adverse testimonial privilege, there is a conflict, but it is not a reasoned one. As discussed above, the court in *Jarvison* created this conflict without actually analyzing the issue; without proffering a reasonable distinction between the two marital privileges insofar as the harm

to child exception applies; and without citing or recognizing two previous cases with the opposite result, including a case in its own circuit. Indeed it can be argued that there is no conflict at all, because a court in the 10<sup>th</sup> circuit after *Jarvison* is bound to follow not *Jarvison* but its previous precedent, which applied a harm to child exception to the adverse testimonial privilege.

Third, it can be argued that any amendment should be deferred because the conflict, such as it is, is not widespread. Only a few circuits have weighed in on the harm to child exception for either marital privilege. Only one circuit could possibly be considered to be creating a conflict. In other circumstances, the Committee would probably wait to allow other circuits to consider the question. But it could be argued on the other hand that it is relatively unlikely that any of the other circuits will have an opportunity to discuss the harm to child exception to the marital privileges. This is because crimes involving harm to children are usually tried in state courts. Federal jurisdiction over such crimes is essentially limited to cases where the crime occurs on federal property or an Indian reservation. Virtually all of the child abuse prosecutions brought in the Federal courts arise in the Eighth and Tenth Circuits — and these are the courts that have already weighed in on the harm to child exception.

Fourth, because harm to child cases arise almost exclusively in the Eighth and Tenth Circuits, it could be argued that an amendment to the Evidence Rules is unwarranted given the relatively narrow application of that amendment. An amendment on a question that has been raised in less than five reported cases in 30 years seems like an unnecessary amendment.

It is of course for the Committee to determine whether an amendment is necessary or advisable. But it would appear that an amendment to add a harm to child exception to the marital privileges does not fall within the traditional and accepted justifications for proposing an amendment to the Evidence Rules.

### **C. Other Problems That Might Be Encountered In Proposing an Amendment Adding a Harm to Child Exception**

Beyond the fact that an amendment establishing a harm to child exception does not fit the ordinary criteria for Evidence Rule amendments, there are other problems that are likely to arise in the proposal of such an amendment. They are briefly described

#### ***Policy Questions in Drafting the Exception***

If the Committee decides to draft the exception, it will have to resolve a number of knotty questions concerning its scope. For example, should the exception cover harm to stepchildren? Fosterchildren? Children that are visiting the household and if so, for how long? Children who are adults? Grandchildren?

As discussed above, there are only a few federal cases on the subject of the existence of a

harm to child exception, much less on the questions of its scope. State statutes and cases are not uniform on the scope of the exception. So if the Committee were to draft an exception, it would be doing so without much background or support in the case law. It could be argued that the Committee (and ultimately Congress) would be making important policy decisions without a substantial empirical basis. While policy questions about the scope of the exception are not dispositive as to whether an amendment is necessary, they at least arguably counsel caution.

### ***A Freestanding Rule 503?***

Of course there is no federal code of privileges. If the harm to child exception were to be enacted, it would likely be a freestanding rule in Article 5 — essentially an exception to Rule 501 which provides a common law approach to the privileges.

It simply seems odd to have a freestanding rule govern such a narrow aspect of privilege law, when the basic law of privilege remains uncodified. (Of course, the same argument could be made proposed Rule 502 on waiver of privileges. But at least that is a rule that would have an effect on everyday practice, and one that will be applied on a daily basis; it is also a rule of importance to the bar.) Arguably, the adoption of such a narrow amendment could be seen as patchwork, rather than a systematic treatment of privileges. This patchwork effect does not preclude enactment of a harm to child exception, but it would again appear to counsel caution.

### ***Opening the Door to Demands for Broader Rulemaking?***

Given the oddity of enacting a narrow amendment for a harm to child exception, it is likely that the Committee will receive public comment suggesting that if it is going to propose this amendment, it should avoid a piecemeal approach to the privilege— i.e., the Committee should act more broadly. A critique of a piecemeal approach could lead to various suggestions of various scope: perhaps a rule on all of the exceptions to the marital privileges; perhaps a rule on marital privileges; perhaps rules on all the privileges and their exceptions.

It is clear that developing broader rules of privilege and exceptions will raise a host of thorny drafting, policy and political questions. That is the major reason the Committee has on a number of occasions decided, unanimously, not to propose a codification of federal privilege law. Yet it seems hard to provide a cogent explanation for why the Committee would propose a narrow exception to the marital privileges and yet not attempt to address privileges more broadly. The strongest argument for proposing a narrow exception is that the courts are in dispute about its existence or scope, whereas other areas of privilege law are relatively stable. (That could be a justification for proposing Rule 502, for example.). But as stated above, any dispute in the courts about the existence of a harm to child exception is essentially a false one, and at any rate the issue arises so infrequently that it can be argued that if a dispute exists, it does not justify this kind of special, piecemeal treatment.

Thus, if the Committee decides to recommend to Congress that a narrow exception for harm to children should be established, it should be prepared to address calls for amendments to the Evidence Rules to govern privilege law more broadly.

#### ***VI. Examples of a Harm to Child Exception to the Marital Privileges***

To assist the Committee in its response to Congress on the necessity of a harm to child exception, we include below some examples of what a harm to child exception might look like.

A concise version of the exception might read like this:

The spousal privileges established under Rule 501 do not apply in a prosecution for a crime committed against a child of either spouse.

This version is derived from the Michigan provision, though it is notable that the Michigan provision extends the exception to prosecutions for a crime against *any* individual under 18.

It should be noted that one of the problems of drafting a statutory exception to a common law rule is that the basic rule of privilege is somewhat difficult to reference. For example, if a privilege itself is codified, then the exception can be introduced in a separate subdivision of the privilege rule, labeled “exceptions,” and starting off something like “notwithstanding subdivision (a)” or “the privilege established in subdivision (a) does not apply to . . .” That is the drafting style of proposed Rule 505, which established an adverse testimonial privilege in subdivision (a), with exceptions in subdivision (c).

Subdivision (c) of the proposed Rule 505 provides as follows:

(c) Exceptions. There is no privilege under this rule (1) in proceedings in which one spouse is charged with a crime against the person or property of the other or of a child of either, or with a crime against the person or property of a third person committed in the course of committing a crime against the other, or (2) as to matters occurring prior to the marriage, or (3) in proceedings in which a spouse is charged with importing an alien for prostitution or other immoral purpose in violation of 8 U.S.C. § 1328, with transporting a female in interstate commerce for immoral purposes or other offense in violation of 18 U.S.C. §§ 2421-2424, or with violation of other similar statutes.

Note that the examples set forth above raise a number of difficult drafting questions. Those questions include:

1. Is it sufficiently clear to reference “the spousal privileges established under Rule 501?”

2. Should the exception be extended to harm to *spouse* (as does proposed Rule 505), and if not, why not?

3. Should the exception apply to injury to property (as does proposed Rule 505)?

4. Should the exception protect non-family members?

These and other thorny questions, some discussed earlier in this memorandum, will have to be addressed in any attempt to propose an amendment for a harm to child exception to the marital privileges.



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Memorandum To: Advisory Committee on Evidence Rules  
From: Dan Capra, Reporter and Ken Broun, Consultant  
Re: Proposed Rule 502, Released for Public Comment  
Date: October 15, 2006

At its last meeting, the Committee approved for release for public comment a rule that would provide exceptions to federal common law on waiver of privileges and work product. That rule — proposed Rule 502 — was approved for release for public comment by the Standing Committee. The public comment period began in August and runs until March 1, 2007.

At the date of this writing, no formal public comments have been received. This is not surprising; experience shows that comments ordinarily don't start coming in until January. Given the importance of the issues addressed by Rule 502, the Committee can anticipate receiving a large number of comments.

This memorandum is intended to bring to the Committee's attention five questions that have been raised about proposed Rule 502, outside the realm of formal public comment. It must be stressed that there is no reason for the Committee to make a decision at this meeting on any of these five issues. In fact it might be counterproductive to do so in light of the impending public comment. The memorandum simply seeks to raise these issues for the Committee's preliminary consideration. Given the fact that there will be so much to discuss at the Spring meeting, it might be useful to discuss, preliminarily, some of these issues in advance.

Two of the issues were raised briefly by members of the Standing Committee in private conversations with the Reporter. Two issues were raised at a panel discussion on Rule 502 at the Federal Bar Council on October 5. The fifth issue is raised by the Reporter and consultant, upon further reflection on one aspect of the rule as it was amended "on the floor" at the last Committee meeting.

The questions are as follows:

1. Should the Committee think about altering the provision on mistaken disclosures, insofar as it seeks to require a party to take prompt measures to retrieve the protected information?
2. The inadvertent waiver provision applies to “proceedings” whereas the selective waiver rule applies to “investigations.” Should these two provisions be made uniform or is there a reason for the difference in terminology? Put another way, should the inadvertent waiver proceeding be extended to regulatory investigations?
3. Should the rule protecting against inadvertent waiver extend to mistaken disclosures made in arbitration proceedings?
4. The provision on confidentiality orders applies only to orders that are based on agreements of the parties. Should the rule be extended to court orders on waiver that are not based on party agreements?
5. What law applies in federal court to disclosures of protected information that are made in state proceedings or to state regulators?

This memorandum is in six parts. Part One sets forth Rule 502, and its Committee Note, as it has been released for public comment.. Part Two discusses the provision in Rule 502 that regulates mistaken disclosure in part by whether a party acts promptly to retrieve the information. Part Three discusses the difference in terminology between the selective waiver provision and the inadvertent waiver provision. Part Four discusses the possible extension of Rule 502 to arbitrations Part Five discusses whether the provision on court orders should be extended to orders concerning waiver that are not based on agreement of the parties. Part Six discusses the possible problems of applicable law for state disclosures where information is sought in a subsequent federal court proceeding.

Finally, there is an addendum that briefly discusses legislation enacted on October 16, 2006, providing the protection of selective waiver to disclosures made to banking regulators.

Again we wish to stress that no final decision needs to be made at this meeting on any of the issues addressed in this memorandum.

## *I. Proposed Rule 502 As Released For Public Comment*

What follows is Rule 502 and the Committee Note, as released for public comment.

### **PROPOSED AMENDMENT TO THE FEDERAL RULES OF EVIDENCE**

#### **Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver**

1           (a) Scope of waiver. — In federal proceedings, the  
2           waiver by disclosure of an attorney-client privilege or work  
3           product protection extends to an undisclosed communication  
4           or information concerning the same subject matter only if that  
5           undisclosed communication or information ought in fairness  
6           to be considered with the disclosed communication or  
7           information.

8           (b) Inadvertent disclosure. — A disclosure of a  
9           communication or information covered by the attorney-client  
10          privilege or work product protection does not operate as a  
11          waiver in a state or federal proceeding if the disclosure is  
12          inadvertent and is made in connection with federal litigation  
13          or federal administrative proceedings — and if the holder of

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14 the privilege or work product protection took reasonable  
15 precautions to prevent disclosure and took reasonably prompt  
16 measures, once the holder knew or should have known of the  
17 disclosure, to rectify the error, including (if applicable)  
18 following the procedures in Fed. R. Civ. P. 26(b)(5)(B).

19 [( c ) Selective waiver. — In a federal or state  
20 proceeding, a disclosure of a communication or information  
21 covered by the attorney-client privilege or work product  
22 protection — when made to a federal public office or agency  
23 in the exercise of its regulatory, investigative, or enforcement  
24 authority — does not operate as a waiver of the privilege or  
25 protection in favor of non-governmental persons or entities.  
26 The effect of disclosure to a state or local government agency,  
27 with respect to non-governmental persons or entities, is  
28 governed by applicable state law. Nothing in this rule limits  
29 or expands the authority of a government agency to disclose

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30 communications or information to other government agencies  
31 or as otherwise authorized or required by law.]\*

32 (d) Controlling effect of court orders. — A federal  
33 court order that the attorney-client privilege or work product  
34 protection is not waived as a result of disclosure in connection  
35 with the litigation pending before the court governs all  
36 persons or entities in all state or federal proceedings, whether  
37 or not they were parties to the matter before the court, if the  
38 order incorporates the agreement of the parties before the  
39 court.

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\* The bracketing indicates that while the Committee is seeking public comment, it has not yet taken a position on the merits of this provision. Public comment on this “selective waiver” provision will be especially important to the Committee’s determination. The Committee is especially interested in any statistical or anecdotal evidence tending to show that limiting the scope of waiver will 1) promote cooperation with government regulators and/or 2) decrease the cost of government investigations and prosecutions.

As the Committee has taken no provision on the bracketed provision, it is obvious that there is nothing in the proposed rule that is intended either to promote or deter any attempt by government agencies to seek waiver of privilege or work product.

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40           (e) Controlling effect of party agreements. — An  
41           agreement on the effect of disclosure of a communication or  
42           information covered by the attorney-client privilege or work  
43           product protection is binding on the parties to the agreement,  
44           but not on other parties unless the agreement is incorporated  
45           into a court order.

46           (f) Included privilege and protection. — As used in  
47           this rule:

48           1) “attorney-client privilege” means the protection  
49           provided for confidential attorney-client communications,  
50           under applicable law; and

51           2) “work product protection” means the protection for  
52           materials prepared in anticipation of litigation or for trial,  
53           under applicable law.

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**Committee Note**

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This new rule has two major purposes:

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1) It resolves some longstanding disputes in the courts about the effect of certain disclosures of material protected by the attorney-client privilege or the work product doctrine— specifically those disputes involving inadvertent disclosure and selective waiver.

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2) It responds to the widespread complaint that litigation costs for review and protection of material that is privileged or work product have become prohibitive due to the concern that any disclosure of protected information in the course of discovery (however innocent or minimal) will operate as a subject matter waiver of all protected information. This concern is especially troubling in cases involving electronic discovery. *See, e.g., Rowe Entertainment, Inc. v. William Morris Agency*, 205 F.R.D. 421, 425-26 (S.D.N.Y. 2002) (finding that in a case involving the production of e-mail, the cost of pre-production review for privileged and work product material would cost one defendant \$120,000 and another defendant \$247,000, and that such review would take months). *See also Report to the Judicial Conference Standing Committee on Rules of Practice and Procedure by the Advisory Committee on the Federal Rules of Civil Procedure*, September 2005 at 27 (“The volume of information and the forms in which it is stored make privilege determinations more difficult and privilege review correspondingly more expensive and time-consuming yet less likely to detect all privileged information.”); *Hopson v. City of Baltimore*, 232 F.R.D. 228, 244 (D.Md. 2005) (electronic discovery may encompass “millions of documents” and to insist upon “record-by-record pre-production privilege review, on pain of subject matter waiver, would impose

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82 upon parties costs of production that bear no proportionality to what  
83 is at stake in the litigation”).

84 The rule seeks to provide a predictable, uniform set of  
85 standards under which parties can determine the consequences of a  
86 disclosure of communications or information covered by the  
87 attorney-client privilege or work product protection. Parties to  
88 litigation need to know, for example, that if they exchange privileged  
89 information pursuant to a confidentiality order, the court’s order will  
90 be enforceable. For example, if a federal court’s confidentiality order  
91 is not enforceable in a state court then the burdensome costs of  
92 privilege review and retention are unlikely to be reduced.

93 The Committee is well aware that a privilege rule proposed  
94 through the rulemaking process cannot bind state courts, and indeed  
95 that a rule of privilege cannot take effect through the ordinary  
96 rulemaking process. See 28 U.S.C § 2074(b). It is therefore  
97 anticipated that Congress must enact this rule directly, through its  
98 authority under the Commerce Clause. Cf. Class Action Fairness Act  
99 of 2005, 119 Stat. 4, PL 109-2 (relying on Commerce Clause power  
100 to regulate state class actions).

101 The rule makes no attempt to alter federal or state law on  
102 whether a communication or information is protected as attorney-  
103 client privilege or work product as an initial matter. Moreover, while  
104 establishing some exceptions to waiver, the rule does not purport to  
105 supplant applicable waiver doctrine generally.

106 The rule governs only certain waivers by disclosure. Other  
107 common-law waiver doctrines may result in a finding of waiver even  
108 where there is no disclosure of privileged information or work

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109 product. *See, e.g., Nguyen v. Excel Corp.*, 197 F.3d 200 (5<sup>th</sup> Cir.  
110 1999) (reliance on an advice of counsel defense waives the privilege  
111 with respect to attorney-client communications pertinent to that  
112 defense); *Ryers v. Burlison*, 100 F.R.D. 436 (D.D.C. 1983)  
113 (allegation of lawyer malpractice constituted a waiver of confidential  
114 communications under the circumstances). The rule is not intended  
115 to displace or modify federal common law concerning waiver of  
116 privilege or work product where no disclosure has been made.

117           **Subdivision (a).** The rule provides that a voluntary disclosure  
118 generally results in a waiver only of the communication or  
119 information disclosed; a subject matter waiver (of either privilege or  
120 work product) is reserved for those unusual situations in which  
121 fairness requires a further disclosure of related, protected information,  
122 in order to protect against a selective and misleading presentation of  
123 evidence to the disadvantage of the adversary. *See, e.g., In re von*  
124 *Bulow*, 828 F.2d 94 (2d Cir. 1987) (disclosure of privileged  
125 information in a book did not result in unfairness to the adversary in  
126 a litigation, therefore a subject matter waiver was not warranted); *In*  
127 *re United Mine Workers of America Employee Benefit Plans Litig.*,  
128 159 F.R.D. 307, 312 (D.D.C. 1994)(waiver of work product limited  
129 to materials actually disclosed, because the party did not deliberately  
130 disclose documents in an attempt to gain a tactical advantage). The  
131 language concerning subject matter waiver — “ought in fairness” —  
132 is taken from Rule 106, because the animating principle is the same.  
133 A party that makes a selective, misleading presentation that is unfair  
134 to the adversary opens itself to a more complete and accurate  
135 presentation. *See, e.g., United States v. Branch*, 91 F.3d 699 (5<sup>th</sup> Cir.  
136 1996) (under Rule 106, completing evidence was not admissible  
137 where the party’s presentation, while selective, was not misleading or  
138 unfair). The rule rejects the result in *In re Sealed Case*, 877 F.2d 976

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139 (D.C.Cir. 1989), which held that inadvertent disclosure of documents  
140 during discovery automatically constituted a subject matter waiver.

141           **Subdivision (b).** Courts are in conflict over whether an  
142 inadvertent disclosure of privileged information or work product  
143 constitutes a waiver. A few courts find that a disclosure must be  
144 intentional to be a waiver. Most courts find a waiver only if the  
145 disclosing party acted carelessly in disclosing the communication or  
146 information and failed to request its return in a timely manner. And  
147 a few courts hold that any mistaken disclosure of protected  
148 information constitutes waiver without regard to the protections taken  
149 to avoid such a disclosure. *See generally Hopson v. City of*  
150 *Baltimore*, 232 F.R.D. 228 (D.Md. 2005) for a discussion of this case  
151 law.

152           The rule opts for the middle ground: inadvertent disclosure  
153 of privileged or protected information in connection with a federal  
154 proceeding constitutes a waiver only if the party did not take  
155 reasonable precautions to prevent disclosure and did not make  
156 reasonable and prompt efforts to rectify the error. This position is in  
157 accord with the majority view on whether inadvertent disclosure is a  
158 waiver. See, e.g., *Zapata v. IBP, Inc.*, 175 F.R.D. 574, 576-77 (D.  
159 Kan. 1997) (work product); *Hydraflow, Inc. v. Enidine, Inc.*, 145  
160 F.R.D. 626, 637 (W.D.N.Y. 1993) (attorney-client privilege);  
161 *Edwards v. Whitaker*, 868 F.Supp. 226, 229 (M.D. Tenn. 1994)  
162 (attorney-client privilege). The rule establishes a compromise  
163 between two competing premises. On the one hand, information  
164 covered by the attorney-client privilege or work product protection  
165 should not be treated lightly. On the other hand, a rule imposing strict  
166 liability for an inadvertent disclosure threatens to impose prohibitive  
167 costs for privilege review and retention, especially in cases involving

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168 electronic discovery.

169           The rule refers to “inadvertent” disclosure, as opposed to  
170 using any other term, because the word “inadvertent” is widely used  
171 by courts and commentators to cover mistaken or unintentional  
172 disclosures of information covered by the attorney-client privilege or  
173 the work product protection. *See, e.g., Manual for Complex Litigation*  
174 *Fourth* § 11.44 (Federal Judicial Center 2004) (referring to the  
175 “consequences of inadvertent waiver”); *Alldread v. City of Grenada*,  
176 988 F.2d 1425, 1434 (5th Cir. 1993) (“There is no consensus,  
177 however, as to the effect of inadvertent disclosure of confidential  
178 communications.”).

179           [**Subdivision (c)**: Courts are in conflict over whether  
180 disclosure of privileged or protected information to a government  
181 agency conducting an investigation of the client constitutes a general  
182 waiver of the information disclosed. Most courts have rejected the  
183 concept of “selective waiver,” holding that waiver of privileged or  
184 protected information to a government agency constitutes a waiver for  
185 all purposes and to all parties. *See, e.g., Westinghouse Electric Corp.*  
186 *v. Republic of the Philippines*, 951 F.2d 1414 (3d Cir. 1991). Other  
187 courts have held that selective waiver is enforceable if the disclosure  
188 is made subject to a confidentiality agreement with the government  
189 agency. *See, e.g., Teachers Insurance & Annuity Association of*  
190 *America v. Shamrock Broadcasting Co.*, 521 F. Supp. 638 (S.D.N.Y.  
191 1981). And a few courts have held that disclosure of protected  
192 information to the government does not constitute a general waiver,  
193 so that the information remains shielded from use by other parties.  
194 *See, e.g., Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th  
195 Cir. 1977).

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196           The rule rectifies this conflict by providing that disclosure of  
197 protected information to a federal government agency exercising  
198 regulatory, investigative or enforcement authority does not constitute  
199 a waiver of attorney-client privilege or work product protection as to  
200 non-governmental persons or entities, whether in federal or state  
201 court. A rule protecting selective waiver in these circumstances  
202 furthers the important policy of cooperation with government  
203 agencies, and maximizes the effectiveness and efficiency of  
204 government investigations. *See In re Columbia/HCA Healthcare*  
205 *Corp. Billing Practices Litigation*, 293 F.3d 289, 314 (6th Cir. 2002)  
206 (Boggs, J., dissenting) (noting that the “public interest in easing  
207 government investigations” justifies a rule that disclosure to  
208 government agencies of information covered by the attorney-client  
209 privilege or work product protection does not constitute a waiver to  
210 private parties).

211           The Committee considered whether the shield of selective  
212 waiver should be conditioned on obtaining a confidentiality  
213 agreement from the government agency. It rejected that condition for  
214 a number of reasons. If a confidentiality agreement were a condition  
215 to protection, disputes would be likely to arise over whether a  
216 particular agreement was sufficiently air-tight to protect against a  
217 finding of a general waiver, thus destroying the predictability that is  
218 essential to proper administration of the attorney-client privilege and  
219 work product immunity. Moreover, a government agency might need  
220 or be required to use the information for some purpose and then  
221 would find it difficult or impossible to be bound by an air-tight  
222 confidentiality agreement, however drafted. If a confidentiality  
223 agreement were nonetheless required to trigger the protection of  
224 selective waiver, the policy of furthering cooperation with and  
225 efficiency in government investigations would be undermined.

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226 Ultimately, the obtaining of a confidentiality agreement has little to  
227 do with the underlying policy of furthering cooperation with  
228 government agencies that animates the rule.]

229           **Subdivision (d).** Confidentiality orders are becoming  
230 increasingly important in limiting the costs of privilege review and  
231 retention, especially in cases involving electronic discovery. *See*  
232 *Manual for Complex Litigation Fourth* § 11.446 (Federal Judicial  
233 Center 2004) (noting that fear of the consequences of waiver “may  
234 add cost and delay to the discovery process for all sides” and that  
235 courts have responded by encouraging counsel “to stipulate at the  
236 outset of discovery to a ‘nonwaiver’ agreement, which they can adopt  
237 as a case-management order.”). But the utility of a confidentiality  
238 order in reducing discovery costs is substantially diminished if it  
239 provides no protection outside the particular litigation in which the  
240 order is entered. Parties are unlikely to be able to reduce the costs of  
241 pre-production review for privilege and work product if the  
242 consequence of disclosure is that the information can be used by non-  
243 parties to the litigation.

244           There is some dispute on whether a confidentiality order  
245 entered in one case can bind non-parties from asserting waiver by  
246 disclosure in a separate litigation. *See generally Hopson v. City of*  
247 *Baltimore*, 232 F.R.D. 228 (D.Md. 2005) for a discussion of this case  
248 law. The rule provides that when a confidentiality order governing the  
249 consequences of disclosure in that case is entered in a federal  
250 proceeding, according to the terms agreed to by the parties, its terms  
251 are enforceable against non-parties in any federal or state proceeding.  
252 For example, the court order may provide for return of documents  
253 without waiver irrespective of the care taken by the disclosing party;  
254 the rule contemplates enforcement of “claw-back” and “quick peek”

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255 arrangements as a way to avoid the excessive costs of pre-production  
256 review for privilege and work product. As such, the rule provides a  
257 party with a predictable protection that is necessary to allow that party  
258 to limit the prohibitive costs of privilege and work product review  
259 and retention.

260           **Subdivision (e).** Subdivision (e) codifies the well-established  
261 proposition that parties can enter an agreement to limit the effect of  
262 waiver by disclosure between or among them. *See, e.g., Dowd v.*  
263 *Calabrese*, 101 F.R.D. 427, 439 (D.D.C. 1984) (no waiver where the  
264 parties stipulated in advance that certain testimony at a deposition  
265 “would not be deemed to constitute a waiver of the attorney-client or  
266 work product privileges”); *Zubulake v. UBS Warburg LLC*, 216  
267 F.R.D. 280, 290 (S.D.N.Y. 2003) (noting that parties may enter into  
268 “so-called ‘claw-back’ agreements that allow the parties to forego  
269 privilege review altogether in favor of an agreement to return  
270 inadvertently produced privilege documents”). Of course such an  
271 agreement can bind only the parties to the agreement. The rule makes  
272 clear that if parties want protection from a finding of waiver by  
273 disclosure in a separate litigation, the agreement must be made part  
274 of a court order.

275           **Subdivision (f).** The rule’s coverage is limited to attorney-  
276 client privilege and work product. The limitation in coverage is  
277 consistent with the goals of the rule, which are 1) to provide a  
278 reasonable limit on the costs of privilege and work product review  
279 and retention that are incurred by parties to litigation; and 2) to  
280 encourage cooperation with government investigations and reduce the  
281 costs of those investigations. These two interests arise mainly, if not  
282 exclusively, in the context of disclosure of attorney-client privilege  
283 and work product. The operation of waiver by disclosure, as applied

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284 to other evidentiary privileges, remains a question of federal common  
285 law. Nor does the rule purport to apply to the Fifth Amendment  
286 privilege against compelled self-incrimination.

### **II. Necessary Measures To Retrieve Mistakenly Disclosed Material: Rule 502(b)**

A member of the Standing Committee has privately expressed concern over the language in Rule 502(b) conditioning protection from waiver on whether the holder of the privilege took reasonably prompt measures, “once the holder knew or should have known of the disclosure,” to rectify the mistaken disclosure. The member believes that this language will lead to litigation about when the holder “knew or should have known” of the mistaken disclosure. He also argues that the language would be difficult to apply in electronic discovery cases. In such cases, mistaken disclosures of privileged information are all but inevitable; one could argue that the holder “should have known” about mistaken disclosure at the very time that *any* production was made.

The Standing Committee member suggests that the language “should have known” should be deleted. A response to this suggestion is that it could give rise to sloppiness: the holder could simply sit on his hands and wait to be told from the recipient about the disclosure, and then move to retrieve it, perhaps on the eve of or even during trial. There is possible room for gamesmanship in such a scenario. Moreover, the negligence-based standard for inadvertent disclosures is based on the fact that parties should act diligently in protecting the privilege. Waiting to retrieve the information until you “know” about disclosure, when you should have known about it much earlier, does not look like diligence. Finally, the reason given by the Standing Committee member for deleting the “should have known” language is that it would reduce the likelihood of factual inquiries. But in fact it could be argued that a benefit of the language is that it makes the test an objective rather than a subjective test and may end up eliminating factual issues.

It could be argued, though, that any delay between “knowing” and “should have known” is somewhat unlikely because at least in most jurisdictions, the receiving party has an ethical duty to promptly notify the sender of the receipt of the privileged materials. See Model Rule of Professional Conduct 4.4 (b): “A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.” And most of the cases seem to involve situations in which the receiving party does promptly notify the holder of the receipt of materials. See, e.g., *Hydraflow, Inc., v. Enidine*,

*Inc.*, 145 F.R.D. 626, 637 (W.D.N.Y. 1993) (noting that the receiving party “promptly, and commendably” notified the court and the holder of the mistaken disclosure). Thus, it may be questioned whether it is necessary to make a distinction between “known” and “should have known” in the Rule when those two points in time are very likely to be the same. If the two points in time are not much different, it would simplify the Rule to cut out the “should have known” factor.

It should be noted that the predominant case law, which Rule 502(b) seeks to track but not codify, is somewhat ambiguous on the “should have known” factor. The oft-stated negligence-based test in the case law lists as a factor “the time taken to rectify the error.” *Hartford Fire Insurance Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D. Cal. 1985). This language does not actually mandate an inquiry into when the holder “should have known” about the mistaken disclosure. It could arguably be read to focus on the time taken to rectify the error *once the holder actually knows about it*. On the other hand, the case law appears to focus on when the holder should have known of mistaken disclosure. For example, in *SEC v. Cassano*, 189 F.R.D. 83 (S.D.N.Y. 1999), an SEC lawyer allowed defense counsel to take a document from an examination room, and there were indications under the circumstances that the document was privileged. The SEC took twelve days to determine whether the document was actually privileged, and at that point the SEC promptly asked for its return. The court found a waiver under the circumstances because, among other things, “[a]lthough the SEC acted promptly once it determined that the document had been produced, a factor cutting in its favor, the time taken to rectify the error, in all the circumstances, was excessive. There was no excuse for waiting 12 days to find out what the document was.” *Cassano* is thus a clear application of the “should have known” standard.

It should also be noted that the ABA has recently approved a recommendation to establish a uniform rule on inadvertent waiver. Among other things, the proposal recommends that the party who makes an inadvertent disclosure:

should be required to raise the privileged status of inadvertently disclosed materials within a specified period of days of *actually discovering* the inadvertent disclosure by giving notice to the other parties and amending its discovery responses to identify the materials and the privileges. The period should commence *when the party actually discovers when the disclosure has been made*, not from when the material was produced. (Emphasis added.)

Thus, the ABA can be expected to support a change such as that suggested by the member of the Standing Committee, i.e., to delete the “should have known” language from the inadvertent disclosure provision of Rule 502.\*\*

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\*\* The other suggestion in the quoted material, that the requirement of seeking return of the material should be set forth in a specific number of days, is not found in the case law and arguably could lead to harsh results — perhaps requiring a “good cause” exception, that would end up pretty much in the same place where the proposed Rule starts: a case-by-case approach to whether the producing party was diligent in seeking return of the protected material. But on the other hand, it could be argued that it makes sense to have some bright-line rules in determining waiver. It is of course for the Committee to decide whether to change the proposed Rule 502 to include a specific day requirement.

It is for the Committee to determine whether the “should have known” language should be retained or deleted. The Standing Committee member is likely to express his concerns at the Spring meeting if the language is unchanged. It would be useful for the Committee, before that time, to discuss the issue and agree on a rationale for retaining the language if it decides to adhere to it.

### **III. Should the Inadvertent Disclosure Provision Be Extended to Regulatory Investigations?**

Greg Joseph points out what he thinks is an anomaly when the inadvertent disclosure provision is compared to the selective waiver provision. The inadvertent disclosure provision (Rule 502(b)) provides protection from waiver when the disclosure is “inadvertent and is made *in connection with federal litigation or federal administrative proceedings.*” In contrast, the selective waiver provision (Rule 502(c)) provides protection from waiver when the disclosure is “made *to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority.*”

Greg argues that the coverage in the two subsections is inconsistent—that is, there is no rationale for applying the protection of selective waiver to investigations, but not the protection of inadvertent disclosure to those same investigations. Greg concludes that when these two subdivisions are put together, a mistaken disclosure to a regulator during the course of an investigation — before any regulatory “proceeding” has begun — would be governed by the common law, not by Rule 502.

It can be argued that the difference in coverage in the two subdivisions is not anomalous at all. First, the Committee made a considered determination to limit the protections of subdivision (b) to mistaken disclosures made *during proceedings*. Clearly, mistaken disclosures can occur in other contexts — such as a letter mistakenly sent from counsel to a potential adversary, before litigation has even begun, or a privileged document mistakenly sent to a third party in the mail. But the Committee decided not to cover mistaken disclosures outside the context of a proceeding, for at least two reasons. First, a rule covering mistaken disclosures outside a proceeding risks overreaching, beyond the interests in limiting the costs of discovery that animate the rule. Second, a rule that would govern disclosures outside a federal proceeding could end up regulating disclosures that are not on a *federal* level, thus raising important concerns about federalism. Outside the context of a proceeding, how is it to be determined that a mistaken disclosure is made at the federal level? As Subdivision (b) is currently written, it clearly applies only to disclosures raising a legitimate federal interest. Extending its protection would raise questions about whether a particular disclosure raised a sufficient federal interest to warrant protection under the Rule.

It could be argued in response, however, that a federal interest could be retained by amending Subdivision (b) to cover mistaken disclosures in federal proceedings *and in response to investigations by federal regulators*. But then the question is whether such an extension is really necessary. Even without the change, a mistaken disclosure to a regulator (outside of a “proceeding”) would still get the benefit of the selective waiver rule. By the terms of Subdivision (c), a mistaken disclosure to a regulator would be a disclosure made “to a federal public office or agency in the

exercise of its regulatory, investigative, or enforcement authority.” This means that a mistaken disclosure would not operate as a waiver to private parties. Whether it would operate as a waiver to the *regulator* would, under the current Rule, be governed by federal common law — where the test for waiver employed at least by most federal courts is very similar to that set forth in Subdivision (b).

The question for the Committee, then, is whether it makes sense to extend Subdivision (b) to cover mistaken disclosures made to federal regulators, given the fact that the extension will, as a practical matter, be of fairly limited applicability or utility — and that the limited benefit might be outweighed by the risk of inviting calls to extend the protection of Subdivision (b) to other mistaken disclosures made outside the context of actual litigation. If the Committee decides such an extension might be useful, it might look something like this:

**Inadvertent disclosure.** — A disclosure of a communication or information covered by the attorney-client privilege or work product protection does not operate as a waiver in a state or federal proceeding if the disclosure is inadvertent and is made in connection with federal litigation or federal administrative proceedings, or to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority — and if the holder of the privilege or work product protection took reasonable precautions to prevent disclosure and took reasonably prompt measures, once the holder knew or should have known of the disclosure, to rectify the error, including (if applicable) following the procedures in Fed. R. Civ. P. 26(b)(5)(B).

#### **IV. Should the Inadvertent Disclosure Provision Be Extended to Arbitrations?**

Rule 502(b) provides that inadvertent disclosures “made in connection with federal litigation or federal administrative proceedings” are not waivers if the party took reasonable precautions and acted diligently in trying to get the material back. At the Standing Committee meeting, one member asked privately whether this rule would protect an inadvertent disclosure made in the context of a proceeding brought under the Federal Arbitration Act. The answer the Reporter gave was “no” because arbitration does not fall under the term “federal litigation.”

With respect to arbitration proceedings and inadvertent waiver, there might be two questions for the Committee to consider:

First, assuming there is no intent to cover arbitration proceedings, is it clear enough that “federal litigation” does not embrace federal arbitrations? We believe the answer is “yes” because litigation commonly means trial proceedings; but if the Committee believes that there is any ambiguity, it could be clarified by an addition to the Committee Note. That addition could be something like this:

“The protections against waiver afforded by Rule 502(b) do not apply to mistaken disclosures made during arbitration proceedings.”

Second, the substantive question is whether Rule 502(b) *should* extend to mistaken disclosures made during arbitration proceedings. It could be argued that because the Evidence Rules as a whole do not apply to arbitration proceedings, it would be unusual to extend a particular Evidence Rule to such proceedings — though the issue is not actually admissibility in the arbitration proceeding itself, but rather admissibility in a subsequent litigation with respect to a disclosure made in an arbitration proceeding. It could also be argued parties to arbitration might not even think to look to an Evidence Rule for guidance on waiver. Ultimately, though, it is for the Committee to decide whether to extend the protections of Rule 502(b) to federal arbitration proceedings. Under the current language, it seems pretty clear that disclosures in arbitration proceedings are not covered by the Rule.

## **V. Should the Provision on Court Orders be Extended to Confidentiality Orders Not Based on Agreement Between the Parties?**

At the Federal Bar Council presentation on Rule 502, Judge Laura Taylor Swain raised what she thought was an anomaly in Subdivision (d), concerning court orders. Subdivision (d) currently provides that confidentiality orders bind non-parties *if the order incorporates the agreement of the parties before the court*. So the Rule binds non-parties only as to confidentiality orders that incorporate an agreement of the parties.

Judge Swain posited a hypothetical. Assume 1) the parties have not entered into a confidentiality agreement; 2) a holder mistakenly discloses privileged information; 3) the court applies the standards of Rule 502(b) and finds that the disclosure was not negligent; and 4) the court enters an order that the disclosure did not constitute a waiver. Does this ruling bind a non-party who argues in a later case that the holder’s mistaken disclosure constituted a waiver?

Judge Swain noted that the current language of Rule 502(d) does not provide protection for such a court order. Whether such an order binds non-parties would be determined by existing law on full faith and credit and related doctrines, with all the uncertainty that currently exists about the enforceability of court orders that memorialize confidentiality agreements. Judge Swain thought it anomalous that a court order memorializing an agreement between the parties would be entitled to more respect than other court orders on waiver generally.

If the Committee thinks that Judge Swain’s comments have merit, and warrant a change in the language of subdivision (d), that change might look something like this:

(d) Controlling effect of court orders. — A federal court order – including but not limited to an order incorporating the agreement of the parties before the court — providing that the attorney-client privilege or work product protection is not waived as a result of disclosure

in connection with the litigation pending before the court governs all persons or entities in all state or federal proceedings, whether or not they were parties to the matter before the court, ~~if the order incorporates the agreement of the parties before the court.~~

Another alternative would be simply to strike the last clause, as above, and add no language. The risk of that alternative is that there could be uncertainty on whether the amended provision is intended to apply to orders incorporating confidentiality agreements between the parties. But perhaps any uncertainty could be rectified in the Committee Note.

## **VI. Choice of Law Questions Concerning Disclosures Made at the State Level**

At the last Committee meeting, the Committee unanimously determined that Rule 502 should not purport to regulate disclosures made at the state level, i.e., in state court proceedings or before state regulators. The only impact of the Rule on state courts is that those courts must adhere to the federal rule on waiver with respect to disclosures originally made in federal proceedings or before federal regulators.

It is clear enough, under the Rule, that the effect of state-level disclosures are controlled by state law when the information is sought to be used in a state proceeding. But upon closer inspection, it appears that thorny questions arise when a disclosure is made at the state level and then the parties argue in *federal* court about waiver. Should the effect of a state level disclosure *always* be governed by state law in a subsequent federal proceeding? And if so, does Rule 502 adequately capture that result?

The remainder of this section discusses the choice of law problems that arise when a state disclosure is sought to be used in a subsequent federal proceeding. Specifically, what happens if 1) a disclosure is made at the *state* level (in a state court proceeding or to a state regulator); 2) the state law of waiver is different from the result provided by Rule 502 ; and 3) a party seeks to rely on the state law of waiver in a subsequent *federal* proceeding?

The following examples can arise with a state-level disclosure offered in a subsequent federal proceeding: 1) state law provides for a subject matter waiver where, if the disclosure were made at the federal level, there would be no subject matter waiver; 2) state law provides for an automatic waiver for any mistaken disclosure, even though the holder in this case made an innocent mistake that in a federal proceeding would not constitute waiver; 3) state law does not enforce selective waiver for disclosure to state regulators, whereas if the disclosure were made at the federal level, it would be protected against disclosure to third parties; and 4) state law would not enforce a state court confidentiality order, and disclosures pursuant to the order are now offered in a federal court. Must the federal court apply the state law of waiver in any or all of these circumstances?

Under Rule 502 as written, the answer is somewhat complicated, but it appears to be as follows:

### ***1) Subject matter waiver (subdivision (a)):***

Rule 502 mandates subject matter waiver only where fairness requires a full disclosure. If the state law would find a subject matter waiver for a state disclosure where Rule 502 would not, a party could argue in federal court that subject matter waiver is mandated under the state law even though fairness does not require it.

If the subsequent federal case lies in diversity, then it would appear that state law would indeed apply. The federal court would have to find a subject matter waiver because state law provides the rule of decision on privileges under Rule 501. If it is a federal question case, then a finding on subject matter waiver would depend on federal common law, again under Rule 501. Rule 502 does not govern because it applies only to disclosures made at the federal level. Since there is nothing in Rule 502 governing the result, Rule 501 becomes the default rule.

The federal common law on subject matter waiver is not uniform. As discussed in a previous memo to the Committee, some courts apply subject matter waiver virtually automatically, and others apply it only if fairness demands it. (Indeed, this split in the federal courts is the reason that Rule 502 addresses subject matter waiver). Thus, under Rule 501, the federal court's ruling on subject matter waiver for disclosures initially made at the state level may well vary from court to court — though it might be hoped that the common law will fall into a uniform line by the persuasive effect of Rule 502.

### ***2) Inadvertent Disclosures:***

Assume that a mistaken disclosure is made in a state proceeding with a waiver rule different from that provided in Rule 502 — for example, that a mistaken disclosure is always a waiver. Will that state rule be enforced in a subsequent federal proceeding? The answer is yes if the action lies in diversity; as previously explained, Rule 501 provides that the state law of privilege applies in diversity, and the waiver standard in Rule 502 does not control because it applies only to disclosures made at the federal level. If it is a federal question case, the effect of the disclosure will be governed by federal common law, which is not uniform — as discussed in a previous memo to the Committee, some courts find that mistaken disclosure is automatically a waiver, while most courts determine waiver by applying a negligence standard such as that provided in Rule 502. Again, it can be hoped that the federal common law, as applicable in this narrow area, will over time come into line with the standard provided for federal disclosure in Rule 502.

### ***3) Selective Waiver:***

Rule 502 *would* end up having some effect on disclosures initially made to state regulators and offered by private parties in subsequent federal proceedings. The selective waiver provision of Rule 502 currently provides specific language indicating that the effect of a state disclosure to a regulator is governed by state law. (“The effect of disclosure to a state or local government agency, with respect to non-governmental persons or entities, is governed by applicable state law.”). If this

language is ultimately enacted, it would mean that as a matter of *federal law*, the effect in any federal proceeding of a disclosure made to a state regulator is governed by state law. Thus the proposed language incorporates the relevant state law on waiver and makes it federal law for the purpose; as such it overrides the federal common law that would otherwise apply. Rule 501 is no longer the default rule. The applicable law on waiver (state law) would thus apply in both diversity and federal federal question cases.

### ***Different Choice of Law Results for Different Subdivisions***

One might ask why state law is incorporated into federal law for purposes of selective waiver, but federal common law applies in federal question cases for the other matters addressed by proposed Rule 502 (specifically subject matter waiver and inadvertent disclosure). It appears that the Committee, in adding language to the selective waiver provision concerning the applicability of state law to disclosure to state regulators, did not consider in detail the choice of law questions that arise with respect to subject matter waiver and inadvertent disclosure.

In pursuing the choice of law questions further, the Committee might decide that special treatment is necessary for selective waiver, given the controversy over that doctrine. It might be thought too drastic (contrary to comity) to impose a federal law based on the premise of limiting the costs of government investigations, where the investigation is being pursued by a *state* entity in a state without a selective waiver provision. So the Committee might adhere to its position that state law on selective waiver should determine the consequences of waiver in federal court, even in federal question cases.

It is also possible that the Committee might decide that uniform choice-of-law treatment is necessary for subject-matter waiver, inadvertent waiver and selective waiver, as to disclosures made at the state level where use is sought in subsequent federal proceedings. A uniform result on choice of law can be reached in one of three ways:

1) The language in the selective waiver subdivision, providing that “[t]he effect of disclosure to a state or local government agency, with respect to non-governmental persons or entities, is governed by applicable state law”, could be deleted. This would mean that selective waiver would have the same choice of law rule as subject-matter waiver and inadvertent waiver, i.e., Rule 501: where the disclosure is made at the state level and the protected information is offered in a federal proceeding, the state waiver rule controls in diversity cases and the federal common law waiver rule controls in federal question cases.

2) The language in the selective waiver subdivision, providing that “[t]he effect of disclosure [at the state level] is governed by applicable state law”, could be replicated in the provisions governing subject matter waiver and inadvertent waiver. This would mean that the choice of law rule for all three provisions would be the same, but the actual law chosen would be different from option 1, above, for federal question cases. It would mean that where the disclosure occurs at the state level and the protected information is proffered in a federal proceeding, waiver would be determined by state law, even in federal question cases. This

result would give primacy to comity principles; but it might result in more uncertainty for counsel in determining whether to rely on Rule 502, as it would end up giving more primacy to less protective state law.

3) The proposed Rule could be changed to provide that if disclosure is made at the state level, its effect in a federal proceeding is governed by the substantive result reached by Rule 502. So for example, if a mistaken disclosure is made in a state proceeding in a state in which inadvertent disclosures are always waivers, the use of the disclosed information in a subsequent federal proceeding would not be automatic. It would depend on whether the standards of Rule 502 have or have not been met (i.e., whether the party reasonably guarded against disclosure and diligently sought return of the protected information). And selective waiver would be enforced in federal court even if it would not apply under state law in a state court action.

This third option would provide the greatest certainty for parties. They would know that they could rely on Rule 502 in federal court, in both diversity and federal question cases, no matter whether the disclosure of protected information was made at the federal or state level. (Though it must be remembered that Rule 502 will not apply to state disclosures later offered in *state* litigation.). This option, however, is the most offensive to comity principles because it overrides state law on privileges even where disclosures are made at the state level. The Judicial Conference Committee on Federal-State Jurisdiction is likely to have concerns over this option (given that the Committee has already expressed some concern over Rule 502 as it has been released for public comment).

It should be noted that allowing “state law” to govern the effect of disclosures in federal court will raise especially difficult questions if there are multiple disclosures in various states. For example, assume a corporation gives privileged documents to a regulator in State A and also another regulator in State B. Assume that State A enforces selective waiver and State B does not. If “state law” is allowed to control the effect of the disclosure in federal court, the question becomes, “which state’s law?” That thorny question is avoided if the effect of state disclosures is governed by Rule 502.

It should also be noted that if the Committee does adhere to the current choice of law language in Subdivision (c), a possible anomaly arises when disclosure is made to *multiple* regulators, *federal and state*, and the state disclosure is made in a state that does not recognize selective waiver. In a subsequent federal action brought by a private party, does the private party get access to the privileged material? The Rule as written provides that the effect of a state disclosure is governed by state law. So it appears that any disclosure to a state regulator, in a state without a selective waiver rule, will operate as a waiver to private parties even if the disclosure would be protected insofar as it was made to a federal regulator. The argument will surely be made that state law not only applies, but it overrides the federal policy when disclosures are made at the state and federal level. It is for the Committee to determine whether this possible result is so in conflict with the federal policy that the Rule should be changed to provide that federal law controls where disclosures are made at both the state and federal level.

#### **4) Confidentiality Orders:**

Proposed Rule 502 does not purport to determine the effect of a confidentiality order that is entered by a state court, when the information is sought in a subsequent federal proceeding. Nor does Rule 501 apply. The enforceability in federal court of the order of a state court is not a question of privilege at all, but rather is governed by law requiring that federal courts must respect state court determinations. *See, e.g.*, 28 U.S.C. § 1738 (the Full Faith and Credit Act), providing that state judicial proceedings “shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken.” *See also* 6 Moore's Federal Practice, § 26.106[1] n.5.2 (3d ed. 2006) (noting that “courts asked to modify another court's protective order are constrained by principles of comity, courtesy, and, when a court is asked to take action with regard to a previously issued state court protective order, federalism” , citing *Tucker v. Ohtsu Tire & Rubber Co., Ltd.*, 191 F.R.D. 495, 499 (D. Md. 2000)). Neither Rule 501 nor Rule 502 purports to, or should, alter the longstanding body of law on full faith and credit. So if the Committee decides to provide uniform treatment on choice of law questions for the other subdivisions, it should probably be mentioned in the Committee Note that the choice of law questions attendant to state confidentiality orders are governed by other law.

## **Addendum: Section 607 of the Regulatory Relief Bill**

As this memo was going to “press”, President Bush signed the Regulatory Relief Bill. Section 607 of that bill is a selective waiver provision for privileged material disclosed to a banking agency or credit union.

Section 607 amends Section 18 of the Federal Deposit Insurance Act (12 U.S.C. 1828) to provide as follows:

### **(x) Privileges Not Affected by Disclosure to Banking Agency or Supervisor.**

(1) In General – The submission by any person of any information to any Federal banking agency, State bank supervisor, or foreign banking authority for any purpose in the course of any supervisory or regulatory process of such agency, supervisor, or authority shall not be construed as waiving, destroying or otherwise affecting any privilege such person may claim with respect to such information under Federal or State law as to any person or entity other than such agency, supervisor, or authority.

(2) Rule of Construction – No provision of paragraph (1) may be construed as implying or establishing that –

(A) any person waives any privilege applicable to information that is submitted or transferred under any circumstance to which paragraph (1) does not apply; or

(B) any person would waive any privilege applicable to any information by submitting the information to any Federal banking agency, State bank supervisor, or foreign banking authority, but for this subsection.

Section 607 provides an identity amendment to Section 205 of the Federal Credit Union Act (12 U.S.C. 1785). The only difference is that the protection applies to disclosures to “the Administration, credit union supervisor, or foreign banking authority . . .”

### **Reporter’s Comment:**

The passage of the Regulatory Relief Bill does not require immediate action on the part of the Committee; nor need the Committee make a final decision about the selective waiver provision of Rule 502. The Committee can expect extensive public comment on that provision and it would be premature to make changes to the provision at this point.

It is notable, however, that the Regulatory Relief Bill is different from the Rule 502 provision on selective waiver in some important respects. Most importantly, the Bill provides the protection

of selective waiver to disclosures made to *state* regulators; in contrast, Rule 502 states that the effect of a disclosure to a state regulator is governed by state law. Arguably, the Bill's coverage of state disclosures might call for a similar extension in Rule 502 — after all, the Committee is essentially drafting for Congress in this matter, and it appears that Congress is willing to extend the protection of selective waiver to state-based disclosures. But it could be argued that congressional authority over banking is one thing, whereas extending coverage to protect disclosures to *every* state regulator is quite another. Congress might be interested, and justified, in covering disclosures to state banking regulators, without trying to cover other state-based disclosures. Obviously, the Committee will have to work through whether the policy animating the Regulatory Relief Bill is properly extended to regulating state-based disclosures to regulators across the board.

Second, the Regulatory Bill provides selective waiver protection to disclosures “in the course of any supervisory or regulatory process.” The language of Rule 502(c) is somewhat different. It protects disclosures “when made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority.” The coverage of the two provisions seems virtually identical, even though somewhat different language is used. And there is reason to retain the language of Rule 502(c) as it tracks the language found in the 2006 amendment to Rule 408. But thought must be given to whether Rule 502(c) should replicate the language of the Regulatory Relief Bill. Failure to do so might lead to litigation about whether the different language was intended to mean a difference in coverage.

It must be recalled that if Rule 502(c) is enacted, it will supersede the Regulatory Relief Bill to the extent there is an inconsistency. So any difference in the language between the two provisions must be reviewed to determine whether it will create an unnecessary conflict.

In the end, the major effect of the Regulatory Bill might be to give an indication that Congress is interested in, and favorably disposed toward, the protection provided by selective waiver. Congress requested the Committee to prepare Rule 502. It can be argued that it behooves the Committee to include a selective waiver provision for Congress's consideration, in light of the Regulatory Relief Bill. The argument would be that the drafters should take account of congressional intent, and therefore that Congress should at least have the option to consider a selective waiver provision that would apply beyond the banking area.



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Memorandum To: Advisory Committee on Evidence Rules  
From: Dan Capra, Reporter  
Re: Restylization of Evidence Rules  
Date: October 15, 2006

At its last meeting, the Committee approved a pilot project to restyle some selected Evidence Rules. The pilot project is designed to give the Committee information on what restyled Evidence Rules might look like; how they might improve the existing Rules; and the problems that might arise (and need to be solved) for restylization to be successful.

Professor Joseph Kimble graciously agreed to provide examples of how three Evidence Rules could be restylized. After some negotiation with the Reporter, it was agreed that the three exemplars would be Rules 103, 404 and 612. Time constraints did not permit restylization of more than three rules. Both the Reporter and Professor Kimble agreed that it would be too difficult under the time constraints to undertake restylization of any of the rules on hearsay.

What follows is Rules 103, 404 and 612, as they have been restylized by Professor Kimble. Professor Kimble did a first draft, and the Reporter reviewed that draft and provided comments, most of them directed to substantive changes that had been made in the draft. Professor Kimble considered the comments and provided a second draft, which is set out below. Reporter's comments are included after each restylized rule. Finally, the memo includes a side-by-side comparison of the current rule and the draft restylized rule.

It should be noted that if the Evidence Rules are in fact to be restylized, the process involves the further steps of submitting Professor Kimble's draft to the Style Subcommittee of the Standing Committee, and then further review by the Evidence Rules Committee.



## Restylized Rule 103

### Rule 103 — Rulings on Evidence

(a) Preserving a Claim of Error.

A party may claim error in a ruling to admit or exclude evidence only if the error affects the party's substantial right and:

(1) if the ruling admitted evidence, the party, on the record:

(A) timely objected or moved to strike; and

(B) stated the specific ground, unless it was apparent from the context; or

(2) if the ruling excluded evidence, the party informed the court of its substance by an offer of proof, unless the substance was apparent from the context of the questions.

(b) Not Needing to Renew an Objection or Offer of Proof.

Once the court rules definitively on the record — either before or at trial — a party need not renew an objection or offer of proof to preserve a claim of error.

(c) Court's Statements About the Ruling; Directing an Offer of Proof.

The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may also direct that an offer of proof be made in question-and-answer form.

(d) Preventing the Jury from Hearing Inadmissible Evidence.

In a jury trial, the court must, to the extent practicable, conduct the proceedings so that inadmissible evidence is not suggested to the jury by any means [, including statements, offers of proof, questions, or arguments? Professor Kimble would omit, Reporter would include these examples].

(e) Taking Notice of Plain Error.

An appellate court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved.

### **Reporter's Comments on Rule 103:**

1. Subdivision (b) on renewal of objections is derived from a hanging paragraph in the existing Subdivision (a). That paragraph was added in 2000. Current style conventions frown on hanging paragraphs. With the addition of subdivision (b), all of the existing subdivisions in the Rule get moved down accordingly.

The potential problem with creating a new subdivision and moving the others down is that what was, for example, Rule 104(b) is no longer Rule 104(b). This change to the lettering and sequencing of subdivisions is likely to upset settled expectations; it might make for incorrect specific objections (i.e., "I object under Rule 104(b) your honor"); and it definitely will create difficulty and uncertainty for electronic searches.

The restylization of the Civil Rules resulted in some additions of subdivisions and changes of numbering, but the intent was to keep such changes to a minimum. If the Evidence Committee undertakes restylization, it could provide suggestions on a less onerous alternative to an addition of new subdivisions. Other possibilities in Rule 104 include moving the new subdivision (b) to the end of the Rule (though this sacrifices logical sequencing).

2. Professor Kimble would cut the bracketed examples in subdivision (d). The Reporter would like to keep them as helpful illustrations. This is not a substantive argument. Rather, it is the kind of style question that will have to be confronted throughout a restylization process — are examples helpful, or balky?

## **Rule 404 — Character Evidence; Evidence of Crimes or Other Acts**

### **(a) Character Evidence.**

(1) ***In General.*** Evidence of a person's character trait is not admissible to prove that the person acted in accordance with the trait on a particular occasion.

(2) ***Exceptions.*** The following exceptions apply:

(A) a criminal defendant may offer evidence of the defendant's pertinent [relevant?] trait, and the prosecutor may offer evidence to rebut it;

(B) a criminal defendant may offer evidence of an alleged crime victim's pertinent [relevant?] trait, and if the evidence is admitted, the prosecutor may:

(i) offer evidence to rebut it; and

(ii) offer evidence of the defendant's same trait;

(C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor; and

(D) evidence of a witness's trait may be admitted under Rules 607, 608, and 609.

### **(b) Crimes or Other Acts.**

(1) ***In General.*** Evidence of a crime or other act is not admissible to prove a character trait that led the person to act in accordance with the trait on a particular occasion.

(2) ***Exceptions; Notice.*** Evidence of a crime or other act is admissible for other purposes, such as proving motive, opportunity, intent, plan, preparation, knowledge, identity, absence of mistake, or lack of accident. On request by a criminal defendant, the prosecutor must:

(A) provide reasonable notice of the general nature of that evidence if the prosecutor intends to use it at trial; and

(B) do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice.

## Reporter's Comment on Rule 404:

1. Rule 404(a) currently refers to “character or a trait of character”. Professor Kimble and the Reporter agreed that this was redundant language. The evidence that is admitted is that of a character trait. So the reference to “trait” is carried throughout the rule. The Reporter is of the opinion that the reference should always be to “character trait” rather than simply “trait.” That is the kind of question that the Evidence Committee can consider; and the Committee could recommend to the Style Committee that “character trait”, while a bit more cumbersome, is probably more clear and more in line with the way lawyers usually refer to this kind of evidence.

2. The bracket on “relevant” in 404(a)(2)(A) and (B) raises an interesting question. The word in the current rule is “pertinent.” It should probably have been “relevant” rather than “pertinent” in the beginning, as the term “relevant” is used throughout the Evidence Rules, and the term “pertinent” is used in only one other rule (Rule 803(4), statements “pertinent” to medical treatment or diagnosis). While the use of the word “pertinent” in Rule 404 might be unfortunate, the fact is that there is case law construing whether “pertinent” means “relevant.” In deciding whether to change the term to “relevant” the Committee would have to consider this case law thoroughly; any indication that “pertinent” means something other than “relevant” would mean that a change to “relevant” would be a substantive change.

3. Rule 404(b) is restyled into subdivisions. While this does not constitute renumbering per se, the fact is that Rule 404(b) has been employed in thousands of cases; if it is broken down into subdivisions there is sure to be some comment from practitioners that this will upset settled expectations.

4. What is set forth as Rule 404(b)(2) is an exceptions provision. It states that bad act evidence can be admitted for “other purposes.” To the question “other than what?”, reference needs to be made back to subdivision (b)(1), which sets forth the impermissible purpose for this evidence. Professor Kimble believes that in restyling within a single rule, explicit references to the language used in prior subdivisions is not necessary. That is, the rule can be read as a whole. Thus, in Professor Kimble’s view, it is not necessary to say in (b)(2) that the evidence is admissible “to prove a purpose other than an act in accordance with the character trait on a particular occasion.” Whether the Committee agrees with this assessment is one of the issues that would have to be addressed in a restyling project.

5. Rule 404(b) currently covers evidence of “other crimes, *wrongs* or acts.” The restylized rule covers evidence of “a crime or other act.” The word “wrongs” is dropped. Arguably the word “wrongs” is superfluous. But research would be necessary to determine whether “wrongs” has an independent meaning in the case law. If it does, it would have to be reinstated, otherwise the restylizing would end up making a substantive change.

## **Rule 612 — Writing Used to Refresh a Witness’s Memory.**

### **(a) General Application.**

This rule gives an adverse [opposing?] party certain rights when a witness uses a writing — including an electronic one — to refresh memory:

- (1) while testifying; or
- (2) before testifying, if the court decides that the party should have those rights.

### **(b) Adverse Party’s Rights; Deleting Unrelated Matter.**

Unless 18 U.S.C. § 3500 provides otherwise in a criminal case, the adverse [opposing?] party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness’s testimony. If the producing party claims that the writing includes an unrelated matter, the court must examine it in camera [in chambers?], delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over [either party’s?] objection must be preserved for the record.

### **(c) Failure to Produce or Deliver.**

If a writing is not produced or is not delivered as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness’s testimony or [may?] declare a mistrial.

### **Reporter’s Comment on Rule 612:**

1. This rule was hard to restylize. As currently written, the Rule uses poor terminology in focusing on a right of inspection. The current rule says that “if a witness uses a writing to refresh memory . . . before testifying, if the court in its discretion determines *it* is necessary in the interests of justice” then the adverse party can inspect the writing. The “it” seems to refer to the *use of the document to refresh recollection*. But that cannot be the case, because there is clearly no requirement that a party must get an order from the court to allow a witness to refresh recollection before trial. Rather, the “it” refers to the right to inspect that is set forth later on in the rule. Usually, the use of “it” refers to what has gone before, not to what will come in the future. This led Professor Kimble, in the first draft, to restyle the rule as granting a right to refresh recollection (subject to court order) as opposed to granting a right of inspection. This was changed on redraft, but Professor Kimble is not ecstatic with the result, as the introductory language seems kind of balky.

2. The bracketed language “[opposing?]” instead of “adverse” raises another question of a possible substantive change. The current rule uses “adverse.” Research would be required to determine whether that has a different meaning than “opposing.”

3. The new subdivision (c) drops a good deal of language from the existing rule, which states that if the prosecution does not comply, “the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.” The restyled provision cuts out the reference to interests of justice and treats a mistrial and striking the testimony as equally available options. But the existing rule seems to say that a mistrial is really a last resort, only when required in the interest of justice. An argument can be made that the deletion of the interests of justice language is a substantive change. But again, research would be needed to determine if the change is inconsistent with existing law.

4. The restyled rule specifically covers writings in electronic form. One of the major benefits of restyling will be the opportunity to update the Evidence Rules to accommodate electronic information. Research will be needed, however, to determine whether extending a rule to cover electronic evidence will effect a substantive change.

<b>Rule 103. Rulings on Evidence</b>	<b>Rule 103 — Rulings on Evidence</b>
<p><b>(a) Effect of Erroneous Ruling.</b> Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and</p> <p><b>(1) Objection.</b> In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or</p> <p><b>(2) Offer of Proof.</b> In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.</p>	<p><b>(a) Preserving a Claim of Error.</b> A party may claim error in a ruling to admit or exclude evidence only if the error affects the party's substantial right and:</p> <p><b>(1)</b> if the ruling admitted evidence, the party, on the record:</p> <p><b>(A)</b> timely objected or moved to strike; and</p> <p><b>(B)</b> stated the specific ground, unless it was apparent from the context; or</p> <p><b>(2)</b> if the ruling excluded evidence, the party informed the court of its substance by an offer of proof, unless the substance was apparent from the context of the questions.</p>
<p>Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.</p>	<p><b>(b) Not Needing to Renew an Objection or Offer of Proof.</b> Once the court rules definitively on the record — either before or at trial — a party need not renew an objection or offer of proof to preserve a claim of error.</p>
<p><b>(b) Record of Offer and Ruling.</b> The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.</p>	<p><b>(c) Court's Statements About the Ruling; Directing an Offer of Proof.</b> The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may also direct that an offer of proof be made in question-and-answer form.</p>
<p><b>(c) Hearing of Jury.</b> In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.</p>	<p><b>(d) Preventing the Jury from Hearing Inadmissible Evidence.</b> In a jury trial, the court must, to the extent practicable, conduct the proceedings so that inadmissible evidence is not suggested to the jury by any means [, including statements, offers of proof, questions, or arguments? I'd omit].</p>

**(d) Plain Error.** Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

**(e) Taking Notice of Plain Error.** An appellate court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved.

<p><b>Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes</b></p>	<p><b>Rule 404 — Character Evidence; Evidence of Crimes or Other Acts</b></p>
<p><b>(a) Character Evidence Generally.</b> Evidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:</p>	<p><b>(a) Character Evidence.</b></p> <p><b>(1) In General.</b> Evidence of a person’s character trait is not admissible to prove that the person acted in accordance with the trait on a particular occasion.</p>
<p><b>(1) Character of Accused.</b> Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;</p>	<p><b>(2) Exceptions.</b> The following exceptions apply:</p> <p><b>(A)</b> a criminal defendant may offer evidence of the defendant’s pertinent [relevant?] trait, and the prosecutor may offer evidence to rebut it;</p>
<p><b>(2) Character of Alleged Victim.</b> Evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;</p> <p><b>(3) Character of Witness.</b> Evidence of the character of a witness, as provided in Rules 607, 608, and 609.</p>	<p><b>(B)</b> a criminal defendant may offer evidence of an alleged crime victim’s pertinent [relevant?] trait, and if the evidence is admitted, the prosecutor may:</p> <p><b>(i)</b> offer evidence to rebut it; and</p> <p><b>(ii)</b> offer evidence of the defendant’s same trait;</p> <p><b>(C)</b> in a homicide case, the prosecutor may offer evidence of the alleged victim’s trait of peacefulness to rebut evidence that the victim was the first aggressor; and</p> <p><b>(D)</b> evidence of a witness’s trait may be admitted under Rules 607, 608, and 609.</p>

**(b) Other Crimes, Wrongs, or Acts.**

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

**(b) Crimes or Other Acts.**

**(1) In General.** Evidence of a crime or other act is not admissible to prove a character trait that led the person to act in accordance with the trait on a particular occasion.

**(2) Exceptions; Notice.** Evidence of a crime or other act is admissible for other purposes, such as proving motive, opportunity, intent, plan, preparation, knowledge, identity, absence of mistake, or lack of accident. On request by a criminal defendant, the prosecutor must:

**(A)** provide reasonable notice of the general nature of that evidence if the prosecutor intends to use it at trial; and

**(B)** do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice.

<p><b>Rule 612. Writing Used To Refresh Memory</b></p>	<p><b>Rule 612 — Writing Used to Refresh a Witness's Memory.</b></p>
<p>Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh memory for the purpose of testifying, either—</p> <p>(1) while testifying, or</p> <p>(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,</p> <p>an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.</p>	<p>(a) <b>General Application.</b> This rule gives an adverse [opposing?] party certain rights when a witness uses a writing — including an electronic one — to refresh memory:</p> <p>(1) while testifying; or</p> <p>(2) before testifying, if the court decides that the party should have those rights.</p> <p>(b) <b>Adverse Party's Rights; Deleting Unrelated Matter.</b> Unless 18 U.S.C. § 3500 provides otherwise in a criminal case, the adverse [opposing?] party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing includes an unrelated matter, the court must examine it in camera [in chambers?], delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over [either party's?] objection must be preserved for the record.</p> <p>(c) <b>Failure to Produce or Deliver.</b> If a writing is not produced or is not delivered as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or [may?] declare a mistrial.</p>

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Memorandum To: Advisory Committee on Evidence Rules  
From: Dan Capra, Reporter  
Re: Standing Committee Time-Counting Project  
Date: October 15, 2006

The Standing Committee has appointed a Subcommittee to prepare rules that would provide for uniform treatment for counting time-periods under the national rules. The Subcommittee is chaired by Judge Kravitz; the Evidence Rules Committee is represented by Trish Refo.

The Subcommittee has prepared a template and is seeking input from the Advisory Committees. The goal of the Subcommittee is to have amendments proposed by the relevant Advisory Committees for consideration in the Spring of 2007. Those amendments would include some version of the template, and also any changes that might be necessary to the existing time periods in the various rules in light of the template.

The impact of the time-counting project on the Evidence Rules appears to be minimal. There are only a few time periods in the Evidence Rules that are measured by days. They are: 1) Under Rule 412, a defendant must file written notice at least 14 days before trial of intent to use evidence offered under an exception to the rape shield; and 2) Under Rules 413-415, notice of intent to offer evidence of the defendant's prior sexual misconduct must be given at least 15 days before the scheduled date of trial. All of these four Rules allow for flexibility — the time periods are excused upon a showing of good cause. There are other time periods in the Evidence Rules that provide no specific time limit, e.g., Rule 404(b) and 807, which requires reasonable notice in advance of trial of the intent to use evidence of covered by the respective Rules. The time-counting project will have no effect on those open-ended time periods.<sup>1</sup>

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<sup>1</sup> There are a few periods expressed in terms of years, such as Rule 609(b) (10 year-old convictions) and ancient document rules (Rules 803(16) and 901(b)(8), documents in existence 20 years or more), but, as discussed below, there appears to be little need for a time-counting

This memorandum is in three parts. Part One sets forth the time-counting template in its current form. The time-counting Subcommittee is soliciting comments and suggestions on the template from all of the Advisory Committees. Part Two is a memo discussing the “last day” provision in the time-counting template. That memo was prepared by Professor Cathie Struve, who is the Reporter for the time-counting project. Part Three discusses whether the day-based time periods in the Evidence Rules need to be amended in light of the template, and also whether a time-counting rule needs to be added to the Evidence Rules to cover the few time-based periods in the Evidence Rules.

## I. Time-Counting Template

What follows is the time-counting template in its current form, together with a proposed Committee Note. The template would amend Civil Rule 6, which currently provides for different time-counting, depending on whether the specified amount of days is less or more than 11 days. Corresponding amendments would be made to the time-counting provisions in the other national rules, including Criminal Rule 45.

### Rule 6. Computing and Extending Time

- (a) **Computing Time.** The following rules apply in computing any time period specified in these rules or in any local rule, court order, or statute.
- (1) ***Period Stated in Days or Longer Unit.*** When the period is stated in days or a longer unit of time,
- (A) exclude the day of the event that triggers the period;
  - (B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and
  - (C) include the last day of the period unless it is a Saturday, Sunday, legal holiday, or — if the act to be done is a filing in court — a day on which the clerk’s office is inaccessible. When the last day is excluded, the period continues to run until the end of the next day that is not a Saturday, Sunday, legal holiday, or day when the clerk’s office is inaccessible.
- (2) ***Period Stated in Hours.*** When the period is stated in hours,
- (A) begin counting immediately on the occurrence of the event that triggers the

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rule for such periods.

- period;
- (B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and
  - (C) if the period would end on a Saturday, Sunday, legal holiday, or — if the act to be done is a filing in court — a time when the clerk’s office is inaccessible, then continue the period until the same time on the next day that is not a Saturday, Sunday, legal holiday, or day when the clerk’s office is inaccessible.
- (3) **“Next Day” Defined.** The “next day” for purposes of (a)(1)(C) and (a)(2)(C) is determined by continuing to count forward when the period is measured after an event and backward when the period is measured before an event.
- (4) **“Last Day” Defined.** The last day concludes:
- (A) (i) for electronic filing, at midnight in the court’s time zone; and (ii) for filing by other means, at the closing of the clerk’s office or the time designated by local rule, unless
  - (B) (i) the court by order in the case sets a different concluding time; or (ii) a paper filing made after the closing of the clerk’s office is personally delivered prior to midnight to an appropriate court official.
- (5) **“Legal Holiday” Defined.** “Legal holiday” means:
- (A) the day set aside by statute for observing New Year’s Day, Martin Luther King Jr.’s Birthday, Washington’s Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans’ Day, Thanksgiving Day, or Christmas Day; and
  - (B) any other day declared a holiday by the President, Congress, or the state where the district court is located.

### Committee Note

**Subdivision (a).** Subdivision (a) has been amended to simplify and clarify the provisions that describe how deadlines are computed. Subdivision (a) governs the computation of any time period found in a Federal Rule of Civil Procedure, a local rule, a court order, or a statute. A local rule may not direct that a deadline be computed in a manner inconsistent with subdivision (a). See Rule 83(a)(1).

The time-computation provisions of subdivision (a) apply only when a time period must be computed. They do not apply when a fixed time to act is set. If, for example, a filing is required to be made “no later than November 1, 2007,” then the filing is due on November 1, 2007. But if a filing is required to be made “within 10 days” or “within 72 hours,” subdivision (a) describes how that deadline is computed.

**Subdivision (a)(1).** New subdivision (a)(1) addresses the computation of time periods that are stated in days. It also applies to time periods that are stated in weeks, months, or years. See, e.g., Rule 60(b).

Under former Rule 6(a), a period of 11 days or more was computed differently than a period of less than 11 days. Intermediate Saturdays, Sundays, and legal holidays were included in computing the longer periods, but excluded in computing the shorter periods. Former Rule 6(a) thus made computing deadlines unnecessarily complicated and led to counterintuitive results. For example, a 10-day period and a 14-day period that started on the same day usually ended on the same day — and, not infrequently, the 10-day period actually ended later than the 14-day period. See *Miltimore Sales, Inc. v. Int’l Rectifier, Inc.*, 412 F.3d 685, 686 (6th Cir. 2005).

Under new subdivision (a)(1), all deadlines stated in days (no matter the length) are computed in the same way. The day of the event that triggers the deadline is not counted. All other days — including intermediate Saturdays, Sundays, and legal holidays — are counted, with only one exception: If the period ends on a Saturday, Sunday, or legal holiday, then the deadline falls on the next day that is not a Saturday, Sunday, or legal holiday. An illustration is provided below, in the discussion of subdivision (a)(3). Where present subdivision (a) refers to the “act, event, or default” that triggers the deadline, new subdivisions (a)(1), (a)(2) and (a)(3) refer simply to the “event” that triggers the deadline; this change in terminology is adopted for brevity and simplicity, and is not intended to change meaning.

Periods previously expressed as less than 11 days will be shortened as a practical matter by the decision to count intermediate Saturdays, Sundays, and legal holidays in computing all periods. Many of those periods have been lengthened to compensate for the change. See, e.g., [CITE].

When the act to be done is a filing in court, a day on which the clerk’s office is not accessible because of the weather or another reason is treated like a Saturday, Sunday, or legal holiday. The text of the rule no longer refers to “weather or other conditions” as the reason for the inaccessibility of the clerk’s office. The reference to “weather” was deleted from the text to underscore that inaccessibility can occur for reasons unrelated to weather, such as an outage of the electronic filing system. Weather can still be a reason for inaccessibility of the clerk’s office, and the deletion from the text is not meant to suggest otherwise.

**Subdivision (a)(2).** New subdivision (a)(2) addresses the computation of time periods that are stated in hours. No such deadline currently appears in the Federal Rules of Civil Procedure. But some statutes contain deadlines stated in hours, as do some court orders issued in expedited proceedings.

Under new subdivision (a)(2), a deadline stated in hours starts to run immediately on the occurrence of the event that triggers the deadline. The deadline generally ends when the time expires. If, however, the deadline ends at a specific time (say, 2:17 p.m.) on a Saturday, Sunday, or legal holiday, then the deadline is extended to the same time (2:17 p.m.) on the next day that is not a Saturday, Sunday, or legal holiday. Periods stated in hours are not to be “rounded up” to the next whole hour. When the act to be done is a filing in court, and inaccessibility of the clerk’s office occurs on the day the deadline ends and prior to the time the deadline ends, that day is treated like a Saturday, Sunday, or legal holiday.

Subdivision (a)(3). New subdivision (a)(3) defines the “next” day for purposes of subdivisions (a)(1)(C) and (a)(2)(C). The Federal Rules of Civil Procedure contain both forward-looking time periods and backward-looking time periods. A forward-looking time period requires something to be done within a period of time *after* an event. See, e.g., Rule 59(b) (motion for new trial “shall be filed no later than 10 days after entry of the judgment”). A backward-looking time period requires something to be done within a period of time *before* an event. See, e.g., Rule 56(c) (summary judgment motion “shall be served at least 10 days before the time fixed for the hearing”). In determining what is the “next” day for purposes of subdivision (a)(1)(C) (as well as for purposes of subdivision (a)(2)(C)), one should continue counting in the same direction — that is, forward when computing a forward-looking period and backward when computing a backward-looking period. If, for example, a filing is due within 10 days *after* an event, and the tenth day falls on Saturday, September 1, 2007, then the filing is due on Tuesday, September 4, 2007 (Monday, September 3, is Labor Day). But if a filing is due 10 days *before* an event, and the tenth day falls on Saturday, September 1, then the filing is due on Friday, August 31.

**Subdivision (a)(4).** New subdivision (a)(4) defines the end of the last day of a period for purposes of subdivision (a)(1). Subdivision (a)(4) does not apply to the computation of periods stated in hours under subdivision (a)(2).

28 U.S.C. § 452 provides that “[a]ll courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders.” A corresponding provision exists in Rule 77(a). Courts have held that these provisions permit after-hours filing so long as the filing is made by locating an appropriate official and handing the papers to that official. See, e.g., *Casaldue v. Diaz*, 117 F.2d 915, 917 (1st Cir. 1941) (after-hours filer “may seek out the clerk or deputy clerk, or perhaps the judge”). Subdivision (a)(4)(B)(ii) carries forward that view. Some courts have also held after-hours filing to be effective when, for example, the filing is time-stamped and placed in a depository maintained by the clerk’s office. See, e.g., *Greenwood v. State of N.Y., Office of Mental Health*, 842 F.2d 636, 639 (2d Cir. 1988). Under subdivision (a)(4)(A)(ii), methods such as time-stamped placement in a depository will be effective if a local rule so provides. Such local rules should take into account the difficulties that can arise if a drop box lacks a device to record the date and time when a filing is deposited. See, e.g., *In re Bryan*, 261 B.R. 240, 242 (9th Cir. BAP 2001).

**Subdivision (a)(5).** New subdivision (a)(5) defines “legal holiday” for purposes of the Federal Rules of Civil Procedure, including the time-computation provisions of subdivisions (a)(1) and (a)(2).

## II. Background Memorandum By Professor Struve on the “Last Day” Provision of the Time-Counting Template

### MEMORANDUM

**DATE:** August 9, 2006  
**TO:** Judge Mark R. Kravitz  
**FROM:** Catherine T. Struve  
**RE:** 28 U.S.C. § 452, cognate rules, and the definition of “last day”

28 U.S.C. § 452 provides that “[a]ll courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders.” Corresponding provisions exist in the Bankruptcy,<sup>2</sup> Civil<sup>3</sup>, Criminal<sup>4</sup> and Appellate<sup>5</sup> Rules. During the time-computation subcommittee’s July 31 conference call, the question was raised whether the “courts always open” provisions bear upon the time-computation definition of the end of the “last day.”

A quick survey of treatises and caselaw discloses divided authority concerning the effect of such provisions on whether a litigant can timely file after the closing of the clerk’s office, and if so, how. Cases that focus on this issue generally separate into two camps: those that require the after-hours filer to find a court official to whom to hand the papers, and those that permit the after-hours filer to place the papers in the court’s night depository or even in another location within the court’s

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<sup>2</sup> Bankruptcy Rule 5001(a) provides: “The courts shall be deemed always open for the purpose of filing any pleading or other proper paper, issuing and returning process, and filing, making, or entering motions, orders and rules.”

<sup>3</sup> Civil Rule 77(a) provides: “District Courts Always Open. The district courts shall be deemed always open for the purpose of filing any pleading or other proper paper, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, and rules.”

<sup>4</sup> Criminal Rule 56(a) provides: “In General. A district court is considered always open for any filing, and for issuing and returning process, making a motion, or entering an order.”

<sup>5</sup> Appellate Rule 45(a)(2) provides in relevant part: “When Court Is Open. The court of appeals is always open for filing any paper, issuing and returning process, making a motion, and entering an order.”

custody. The majority of treatises (including Federal Practice and Procedure) take the former view, though Moore's argues that putting the papers in a designated depository should work. It is notable that none of these discussions grounds its conclusions in an argument concerning the intent behind Section 452; this is unsurprising, since there is no indication that the statute or its predecessors was designed to address the issue. This brief survey of authorities indicates that a time-computation provision defining the end of the "last day" could bring clarity to this murky area and would not contravene a discernable statutory purpose.

The statutory and rules provisions. The predecessors of Section 452 date back to 1842.<sup>6</sup> In 19<sup>th</sup>-century treatises, predecessor provisions are mentioned sometimes in the course of discussions concerning the terms of court,<sup>7</sup> and sometimes during discussions of jurisdiction.<sup>8</sup> Both contexts suggest that the purpose of courts-always-open provisions was to address the power of the courts to act.<sup>9</sup> This was the view taken in the House Report concerning the 1948 legislation that codified the

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<sup>6</sup> Section 5 of the Act of August 23, 1842, 5 Stat. 517, 518, provided in part:

That the district courts as courts of admiralty, and the circuit courts as courts of equity, shall be deemed always open for the purpose of filing libels, bills, petitions, answers, pleas, and other pleadings, for issuing and returning mesne and final process and commissions, and for making and directing all interlocutory motions, orders, rules, and other proceedings whatever, preparatory to the hearing of all causes pending therein upon their merits.

This provision (a predecessor to Revised Statutes §§ 638 and 574) was mirrored in Equity Rule 1 of the Rules of Practice for the Courts of Equity of the United States, January Term 1842.

<sup>7</sup> See, e.g., Horace Andrews, *Manual of the Laws and Courts of the United States, and of the several States and Territories* 9 (1873) (in a section discussing the "terms of the courts of the United States," noting that "[t]he circuit courts, as courts of equity, are always open for the purpose of filing pleadings, issuing and returning process and commissions, and for interlocutory proceedings").

<sup>8</sup> See, e.g., Robert Desty, *A Manual of Practice in the Courts of the United States* 51 (5<sup>th</sup> issue 1881) (section on "Courts always open for certain purposes" listed under the topic heading "Circuit Courts – Jurisdiction"); George W. Field, *A Treatise on the Constitution and Jurisdiction of the Courts of the United States* 146 (1883) (discussing fact that "circuit courts . . . are always open" in chapter on jurisdiction).

<sup>9</sup> See John M. Gould and George F. Tucker, *Notes on the Revised Statutes of the United States* 89 (1889) (observing with respect to Rev. St. § 574 that "while common-law judges properly exercise their authority only when holding a court, and have no power to sit in vacation, yet courts of equity are always open, the chancellor's authority being personal . . . and capable of exercise equally in term time and in vacation"); cf. *Horn v. Pere Marquette R. Co.*, 151 F. 626,

present Section 452: “The phrase ‘always open’ means ‘never closed’ and signifies the time when a court can exercise its functions. With respect to matters enumerated by statute or rule as to which the court is ‘always open,’ there is no time when the court is without power to act.”<sup>10</sup>

The advisory committee notes to the relevant Rules generally do not indicate the purpose of the courts-always-open provisions, other than to say that the provisions correspond in substance to Section 452.<sup>11</sup>

The divided caselaw. Some caselaw indicates that “courts always open” provisions allow a litigant to file after the closing of the clerk’s office<sup>12</sup> so long as the litigant can find an appropriate court official<sup>13</sup> to receive the papers after hours.<sup>14</sup> Thus, for example, the First Circuit cited Civil

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635 (C.C. E.D. Mich. 1907) (“The power of a United States judge to do chamber business is in large part ascribable to the statutory provisions of section 638, Rev. St. . . . , whereby Circuit Courts are declared to be always open for the transaction of certain business . . .”).

<sup>10</sup> H. Rep. No. 308, 80<sup>th</sup> Cong., 1<sup>st</sup> Sess., A52 (1947). The legislative history of the 1963 amendments to Section 452 corroborates the view that the provision was designed to address the question of when courts have the power to act. See S. Rep. No. 88-547, 1963 U.S.C.C.A.N. 996, 997 (1963) (“[T]he requirement [of] holding formal periodic terms by the district courts no longer serves a useful purpose and . . . those statutory requirements should be eliminated.”).

<sup>11</sup> See Civil Rule 77, 1937 advisory committee note (rule states substance of Section 452); see also Bankruptcy Rule 5001, [1983] advisory committee note (rule is drawn from Civil Rule 77); Criminal Rule 56, 1944 advisory committee note (stating that relevant part of rule is drawn from Civil Rule 77, and noting “policy of avoiding the hardships consequent upon a closing of the court during vacations”).

<sup>12</sup> One district court, though, suggested that reliance on such an interpretation would be risky. Holding that Civil Rule 6(a) applied to the statute of limitations for a Jones Act claim (so that the last day of the period, falling on a Sunday, should be extended to the following Monday), the court rejected the argument that Civil Rule 77(a)’s “courts always open” provision would satisfactorily address such a situation: “Theoretically, the putative litigant might hunt up a Judge of this Court or the Clerk at his residence or elsewhere and file with one of them. But I think it unfair that substantial rights should depend upon the doubtful contingencies which may arise in the attempt to do so.” *Rutledge v. Sinclair Refining Co.*, 13 F.R.D. 477, 479 (S.D.N.Y. 1953).

<sup>13</sup> An early case indicated that the judge is not such an appropriate official: In *In re Gubelman*, 10 F.2d 926, 929 (2d Cir. 1925), *modified on other grounds*, *Latzko v. Equitable Trust Co. of New York*, 275 U.S. 254, 257 (1927), the Second Circuit interpreted “filing” (for purposes of a statutory provision concerning bankruptcy) to require presentation to the court clerk: “A paper is not filed by presenting it to the judge. He has no office in which papers are filed and permanently preserved. A paper in a case is not filed until it is deposited with the clerk

Rule 77(a) for the principle that “A person wishing to file a notice of appeal after closing hours on the last day may seek out the clerk or deputy clerk, or perhaps the judge . . . , and deliver the notice to him out of hours. The notice of appeal would then be filed within the statutory period.” *Casaldue v. Diaz*, 117 F.2d 915, 917 (1st Cir. 1941); see also *McIntosh v. Antonino*, 71 F.3d 29, 35 n.5 (1st Cir. 1995) (citing *Casaldue* for proposition that “[a]fter hours, papers can validly be filed by in-hand delivery to the clerk or other proper official”; noting that “some clerks’ offices reportedly have established so-called ‘night depositories’ to accommodate after-hours filings”; and declining to decide whether an item is filed at the time it is placed in such a depository after hours).<sup>15</sup>

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of the court, for the purpose of making it a part of the records of the case.” But see, e.g., Civil Rule 5(e) (“The filing of papers with the court as required by these rules shall be made by filing them with the clerk of court, except that the judge may permit the papers to be filed with the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. . . .”).

<sup>14</sup> At least one early case applied this principle to determine whether a diversity action was filed within the relevant state statute of limitations. See *Hagy v. Allen*, 153 F.Supp. 302, 305 (E.D. Ky. 1957) (citing Civil Rule 5(e) and rejecting defendants’ argument “that since the complaints we[re] filed [with the clerk at her home] and not at the office that they were not properly filed on December 31”). *Hagy*, of course, predates the Supreme Court’s holding that Civil Rule 3 (providing that an action is commenced by filing complaint) is not “intended to toll a state statute of limitations.” *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750 (1980).

<sup>15</sup> Likewise, a district court considering a case in which the statute of limitations ran out on a Sunday and the litigant’s representative “arrived at the office of the clerk of this court, as he says, at 12:15 P.M. [on Saturday] only to find it closed,” observed that the suit “could have been filed on [that] Saturday . . . , with any judge of the court.” *Rose v. United States*, 73 F. Supp. 759, 760 & n.1 (E.D.N.Y. 1947). See also *In re Asher Development III, Inc.*, 143 B.R. 788, 788-89 (D. Colo. 1992) (“Although there is no explicit local bankruptcy rule on point, custom allows an attorney to make prior arrangements to file tardy pleadings with the clerk of a court at a convenient location outside of normal business hours.”); *In re Peacock*, 129 B.R. 290, 291 (Bankr. M.D. Fla. 1991) (in rejecting argument that filing could not have been accomplished on a Sunday, citing Bankruptcy Rule 5001 for proposition that “that the clerk and the court are always available to accept filings, even at their homes”); *Greeson v. Sherman*, 265 F. Supp. 340, 342 (W.D. Va. 1967) (interpreting Civil Rules 3 and 5(e) and holding that filing was effective at the time that “plaintiff’s complaint was delivered to the home of the Deputy Clerk on the night of December 30, 1966 by plaintiff’s counsel”); *Muse v. Freeman*, 197 F. Supp. 67, 69-70 (E.D. Va. 1961) (“Irrespective of the validity of the order closing the Clerk’s Office to the public on Saturdays, the evidence is clear that deputy clerks, whenever called upon to do so, will accept legal documents for filing on Saturdays. Moreover, the Judge is generally available in his office on Saturdays due to the congested docket prevailing in this area. That the present action could have been filed on Saturday, April 23, 1960, cannot be denied.”).

Other cases are yet more liberal, and provide that the “courts always open” provisions mean that filing has been effected when litigants to leave the papers at the clerk’s office (or another place designated by the clerk’s office, such as a post office box) even if no one from the clerk’s office is there to receive it at that time.<sup>16</sup>

The treatises. Almost all the treatises that I surveyed take the view that if the clerk’s office is closed the litigant must find an appropriate court official and deliver the papers to that person. See, e.g., Wright, Miller & Marcus, 12 Fed. Prac. & Proc. Civ.2d § 3081 (as updated 2006) (courts-always-open provision “does not mean that the office of the clerk of the court must be physically open at all hours or that the filing of papers can be effected by leaving them in a closed or vacant office. Under Rule 5(e) papers may be filed out of business hours by delivering them to the clerk or deputy clerk or, in case of exceptional necessity, the judge”).<sup>17</sup> Moore’s Federal Practice notes that

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<sup>16</sup> See, e.g., *Greenwood v. State of N.Y., Office of Mental Health (OMH)*, 842 F.2d 636, 639 (2d Cir. 1988) (holding that time-stamped deposit of Section 1983 complaint in court’s night depository box constituted filing for purpose of statute of limitations); *Freeman v. Giacomo Costa Fu Andrea*, 282 F. Supp. 525, 527 (E.D. Pa. 1968) (reasoning “that if plaintiff’s messenger had deposited the complaint in the clerk’s mail-slot or slipped it under the door of the clerk’s office, as soon as he arrived at the courthouse, the action would have been ‘commenced’ during decedent’s lifetime”); see also *Johansson v. Towson*, 177 F. Supp. 729, 731 (M.D. Ga. 1959) (holding that “the receipt by the Deputy Clerk of these complaints in his Post Office Box in the early morning hours of Saturday, August 23, constituted a sufficient filing of these suits prior to midnight of the following day, notwithstanding the fact that the Clerk did not open the box until 8:30 a.m. on Monday, August 25”); *Johnson v. Esso Standard Oil Co.*, 181 F. Supp. 431, 433-34 (W.D. Pa. 1960) (finding that complaint “was . . . placed in the Clerk’s post office box on November 24, 1958, after 2:30 p.m. and before 5:00 p.m., and . . . picked up by the Clerk’s office the following day,” and holding that “the delivery of this complaint to the Clerk in his post office box on Monday, November 24, 1958, constituted a filing of the complaint and commencement of plaintiffs’ action on that day”). Another case relied on a “courts always open” provision to hold a 5:55 p.m. filing timely; since the court did not specify that the litigant sought out a court official at that hour, this may have been a case in which the litigant simply dropped off the papers at the clerk’s office. See *In re Warren*, 20 B.R. 900, 902 (Bankr. D. Me. 1982).

<sup>17</sup> See also David G. Knibb, *Federal Court of Appeals Manual* § 7.3 (4th ed., updated through 2006) (“The desperate appellant can still meet the deadline after the clerk’s office has closed on the last day by personally delivering the notice to the clerk, together with the prescribed filing fee.”); 8 *Federal Procedure, Lawyers’ Edition* § 20:330 (database updated through June 2006) (“There is some authority that, if a deadline is approaching and the clerk’s office is closed, a party wishing to file a paper must seek out the clerk and place the paper in his actual custody.”) (citing *Casaldue*); Lawrence R. Ahern, III & Nancy Fraas MacLean, *Bankruptcy Procedure Manual* § 5001:01 (2006 ed.) (citing Bankruptcy Rules 5001 and 5005(a) and stating that “[f]iling is accomplished during non-business hours by personal delivery to either the clerk or the judge of the court where the case under the Code is pending”); Suzanne L. Bailey

“[h]anding over papers to the clerk may take place at the clerk's office or home,” and warns that “[l]eaving papers under the door of the clerk's office after the office is closed has, in the past, been held to be insufficient to constitute filing.” Mary P. Squiers, 1-5 Moore's Federal Practice - Civil § 5.30. The treatise argues, however, that in light of Civil Rule 77(a), “the placement of papers in a night depository box maintained exclusively by the clerk” ought to be held “sufficient to constitute filing as of that date for statute of limitations purposes.” *Id.*<sup>18</sup>

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et al., 36 C.J.S. Federal Courts § 488 (database updated May 2006) (“A notice of appeal may be filed on the last day after the closing hours of the clerk's office by seeking out the clerk or deputy clerk and delivering the notice of appeal to him or her . . .”).

<sup>18</sup> One treatise seems to go further than Moore's, suggesting that when an official cannot be found to receive the papers in person, the “courts always open” provision permits the litigant to deliver the papers to the closed office:

The fact that the clerk's office is physically closed should not deter a party from taking steps to file papers either by slipping or sliding the papers under the door of the clerk's office, by leaving the papers in the clerk's mail slot or post office box, by delivering the papers to the clerk at his or her home, or by delivering the papers to the judge. And, if the clerk's office is open but there is no one present to receive the papers, the papers may be left in his or her office. . . . When papers are “filed” but are not physically handed over to the proper official, counsel should, at the earliest opportunity, call the clerk of court to inform him or her about such “filing” to insure that the papers are not lost or misplaced; otherwise the papers might not be considered “filed,” at least in those jurisdictions where “filing” requires delivery of the paper into the actual custody of the proper official.

8A Federal Procedure, Lawyers' Edition § 22:24 (database updated June 2006).

### **III. Do the Evidence Rules Need To Be Amended to Address Time-Counting?**

#### ***Do the Time Periods in Rules 412-415 Need To Be Changed If the Template Is Enacted?***

One aspect of the time-counting project is to ask the Advisory Committees to review each of the time-specific periods in the respective national rules, in order to integrate those periods with the time-counting rules established in the template. The bottom line is that, generally speaking, time periods counted in 11 days or less should be changed to multiples of seven, because weekend days and holidays are now counted toward the total (i.e., “days are days”). In this respect, no amendment to the Evidence Rules is required. Rule 412 provides for a 14-day period and Rules 413-415 each provide for a 15-day period for providing notice. The change provided by the template, to a days-are-days approach, will not alter the actual length of the period because even under current Civil Rule 6(a) and Criminal Rule 45, 14-day periods are counted on a days-are-days basis.

The Evidence Rules time-specific periods are all backward-counted deadlines, i.e., computed from a time in the future (the date scheduled for trial). The template has a rule for computing backward-counted time periods: If the end-point of the period falls on a weekend or holiday, the template makes clear one should continue counting in the same direction (i.e., backwards) to the next day that's not a weekend or holiday. It is at least possible that this new approach to backward-counted deadlines differs from current practice — assuming there is such a practice, as there is no case law on the subject. But even if the backward-counting rule would affect the application of the Evidence Rules deadlines (i.e. the notice requirement might fall on a different day), that possible change would not be a reason to change the length of the notice periods themselves. Note that as to the Evidence Rules, any general lengthening of the notice periods is likely to be opposed because it would mean that the party must file notice *sooner* than under current practice — it is not like lengthening the time period for filing a motion.

It should be noted that the 15 -day periods of Rules 413-415 are more likely to trigger the backward-counting template rule than is the 14-day period of Rule 412. Fourteen day periods only create a problem if the last day counted backward is a holiday. By definition there is no weekend problem because the time is counted back from the time of a trial date, and that would not be on a weekend. Fifteen day periods are more likely to trigger the rule that a backward date falling on a weekend or a holiday extends the period to the next week day that is not a holiday. But this would not appear to be a reason to propose an amendment to the length of the time periods of Rules 413-415, e.g., to shorten them to 14 days. It would simply mean that the proponent of the evidence would, in some rare situations, be required to provide notice a day or two earlier than otherwise.

In sum, it would appear that the current time periods in the Evidence Rules would function well within the template's time-counting rules. Thus, no change to the number of days set forth in any of those rules would seem to be necessary.

### *Should the Evidence Rules Be Amended To Include a Time-Counting Rule?*

Another question, however, is whether Rule 412 would even be governed by the time-counting template once it is enacted as an amendment to Civil Rule 6 and Criminal Rule 45; if not, it might be suggested that the Evidence Rules should be amended to provide for an independent rule on time-counting that would track the template. But it would appear to be that an independent time-counting rule is unnecessary, because the amendments to Civil Rule 6 and Criminal Rule 45 will indeed be applicable to the periods set forth in Rules 412-415. The template clearly applies to “any time period specified in these rules or in any local rule, court order, *or statute*.” Rules 412-415 were each enacted directly by Congress, rather than through rulemaking. Each is a statute. So the time-counting rules in the template will apply to the notice periods in Rules 412-15.

More importantly, even if the time-counting provisions in the Civil and Criminal Rules would not apply to Rules 412-415, there appears to be no reason to amend Rules 412-415 to provide for a specific counting rule (i.e., the “days are days” and backward-counting rules of the template). I found no reported case involving any dispute about the meaning or application of any of the time periods in Rules 412-415; no dispute over whether 14 days or 15 days means calendar days or business days; no dispute about when the counting begins; and no dispute about what happens when a backward-counted date falls on a weekend or holiday. Given that Rules 412-415 are only rarely applicable in federal courts anyway, there seems to be absolutely no problem in practice that warrants an amendment to the Evidence Rules along the lines of the template.<sup>19</sup>

In the unlikely event that a problem in counting under Rules 412-15 were ever to be encountered, a court that found the template inapplicable would probably solve the time-counting problem in one of two ways: 1) Use the template counting methods by analogy; or 2) apply the good cause language in the rules to excuse the counting problem. Because any time-counting problem is likely to be solved in practice by one of these methods — even assuming, contrary to the template’s language, that the template is not directly applicable — the case for amendment is that much weaker.

The language of the template does raise an interesting anomaly: the template provides a time-counting rule for statutory time periods such as those in Rules 412-415, but may not apply to Evidence Rules that were enacted through rulemaking. (Reference to “these rules” in the template at least arguably appears to refer only to the body of rules in which the time-counting rule is placed, as opposed to the national rules generally). This difference in coverage might be a problem if, in the Evidence Rules, there were indeed some time periods enacted through rulemaking that may give rise to a time-counting problem. But that is not the case. The *only* time periods expressed in an actual

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<sup>19</sup> It is notable that three years ago, the Committee decided not to amend Rule 412 to fix certain textual problems, on the ground that there was no dispute over the meaning of the Rule, and that to amend the Rule in any respect might result in calls for broader amendments to the Rule — amendments that would raise difficult and extremely sensitive policy questions.

amount of days are found in Rules 412-415, and all are statutorily-enacted. There is no day-based time period in any of the Evidence Rules enacted through rulemaking. The anomaly raised might give the Committee pause in the future should it decide to propose amendments with day or hour-based limits; the Committee would have to take account of the fact that there would be no rule in place to govern how the time is counted. But there is no reason at this point to amend the Evidence Rules to add a general time-counting rule as to days, because under the current Rules it would have absolutely no practical effect.

It is true that the Evidence Rules contain a 20-year time period for ancient documents and a 10-year time period affecting convictions offered for impeachment. The template's "days are days" approach is obviously inapplicable to counting by years; but other aspects of the template could affect the counting of year-based time periods. Specifically, the template also provides that in counting, 1) you exclude the day of the triggering event, and 2) if the period ends on a holiday or weekend, you keep counting in the same direction to the first day that is not a holiday or weekend. The Evidence Rules governing ancient documents and prior convictions are rules and not statutes, and so may not be governed if the template is enacted into the Civil and Criminal Rules in its current form. The current language of the template is that it covers "these rules" and "statutes." So an argument could be made that the Evidence Rules should be amended to include a free-standing time-counting rule that would apply to counting the year-based time periods in Rules 609, 803(16) and 901(b)(8).

But it would seem quite unnecessary to enact a rule to determine how those year-based time periods are counted. It is extremely unlikely that such a rule would ever be used. The circumstances in which a time-counting rule might be necessary for those year-based time periods would be exceedingly narrow. Here is a hypothetical: a party offers a newspaper published exactly 20 years ago on the day in which it is offered into evidence as an ancient document. Does the first day count? Under the template, the answer would appear to be no, because you exclude the day of the "event that triggers the period" (assuming that publication is indeed the event that triggers the period). To state the hypothetical show how unlikely it is to occur.

It should be noted that a court faced with this timing question, in the absence of a specific Evidence Rule on the subject, would not be at a complete loss. It would have several plausible options, including: 1) use the template by analogy; 2) construe the template to be applicable directly on the ground that "these rules" include the Evidence Rules; 3) wait a day to admit the evidence; or 4) reject the template and use discretion to decide admissibility. But fundamentally, the complete unlikelihood of such a problem arising in practice appears to cut against amending the Evidence Rules to add a free-standing time-counting rule. There is no current problem, and any problem that could conceivably arise in the future can be handled without undertaking the costs of an amendment.



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Memorandum To: Advisory Committee on Evidence Rules  
From: Dan Capra, Reporter  
Re: Federal Case Law Development After *Crawford v. Washington*  
Date: October 15, 2006

The Committee has directed the Reporter to keep it apprised of case law developments after *Crawford v. Washington*. This memo is intended to fulfill that function. The memo describes the federal case law that discusses the impact of *Crawford* on the Federal Rules of Evidence. The cases are divided along two topics, approximating the open questions left by *Crawford*. First, when is a hearsay statement “testimonial” within the meaning of *Crawford*? Second, if a hearsay statement is not testimonial, what requirements does the Confrontation Clause place on its admissibility? Within those topics, the cases are arranged by circuit.

## Summary

A quick summary of results on what has been held “testimonial” and what has not, so far, might be useful:

### ***Statements Found Testimonial:***

1. Confession of an accomplice made to a police officer.
2. Grand jury testimony.
3. Plea allocutions of accomplices, even if specific references to the defendant are redacted.
4. Statement of an incarcerated person, made to a police officer, identifying the defendant as taking part in a crime.

5. Report by a confidential informant to a police officer, identifying the defendant as involved in criminal activity.

6. 911 call accusing the defendant of criminal activity, and similar accusations made to officers responding to the call.

7. Statements by a child-victim to a forensic investigator, when the statements are referred as a matter of course by the investigator to law enforcement.

8. Statements made by an accomplice while placed under arrest, but before formal interrogation.

9. False alibi statements made by accomplices to the police (though while testimonial, they do not violate the defendant's right to confrontation because they are not offered for their truth).

***Statements Found Not Testimonial:***

1. Statement admissible under the state of mind exception, made to friends.

2. Statement made by the defendant to police officers before formal interrogation.

3. Declaration against penal interest implicating both the declarant and the defendant, made in informal circumstances to a friend or loved one (i.e., statements admissible under the Court's interpretation of Rule 804(b)(3) in *Williamson v. United States*).

4. Letter written to a friend admitting criminal activity by the writer and the defendant.

5. Surreptitiously recorded statements of conspirators.

6. Certificate of nonexistence of a record, prepared by government authorities in anticipation of litigation.

7. Statements by coconspirators during the course and in furtherance of the conspiracy, when not made to the police or during a litigation.

8. Statements made for purpose of medical treatment.

9. 911 calls reporting crimes.

10. Statements to law enforcement officers responding to the declarant's 911 call reporting a crime.

11. Accusatory statements in a private diary.
12. Warrants of deportation in immigration cases.
13. Odometer statements prepared before any crime of odometer-tampering occurred.
14. A present sense impression describing an event that took place months before a crime occurred.
15. Business records — including medical records prepared with a view to litigation, and certificates of authenticity prepared for trial.
16. Statements made by an accomplice to his lawyer, implicating the accomplice as well as the defendant.

### ***Conclusion as to Rulemaking:***

It is clear that some types of hearsay will always be testimonial, such as grand jury statements, plea allocutions, etc. It is also clear that some types of statements will never be testimonial, such as personal diaries, statements made before a crime takes place, and informal statements to friends without any contemplation that the statements will be used in a criminal prosecution.

Between these two poles there is a lot of uncertainty, and the Supreme Court's decision in *Davis* (discussed below) arguably created even more uncertainty. Questions remain about whether statements to a person who is not a law enforcement official can ever be testimonial; whether the *Crawford* test is intended to apply to ministerial law enforcement activities such as a search for public records or certifications of records; and whether and when statements made to law enforcement officials responding to an emergency become testimonial. Finally, there is still at least some question of whether the *Roberts* test continues to apply to non-testimonial hearsay.

Thus, it would appear that it is still too early to amend the hearsay exceptions to incorporate *Crawford*. At least it is still too early to try to cover all aspects of the impact that *Crawford* is having on the hearsay exceptions.

### ***Cases Defining “Testimonial” Hearsay After Crawford***

#### ***Supreme Court***

**911 calls and statements to responding officers may be testimonial, but only if the primary purpose is to establish or prove past events in a criminal prosecution: *Davis v.***

***Washington and Hammon v. Indiana***, 126 S.Ct. 2266 (2006): In companion cases, the Court decided whether reports of crime by victims of domestic abuse were testimonial under *Crawford*. In *Davis*, the victim's statements were made to a 911 operator while and shortly after the victim was being assaulted by the defendant. In *Hammon*, the statements were made to police, who were conducting an interview of the victim after being called to the scene. The Court held that the statements in *Davis* were not testimonial, but came to the opposite result with respect to the statements in *Hammon*. The Court set the dividing line for such statements as follows:

Without attempting to produce an exhaustive classification of all conceivable statements – or even all conceivable statements in response to police interrogation – as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

The Court emphasized the limited nature of its holding. It noted that it was not providing an “exhaustive classification of all conceivable statements-or even all conceivable statements in response to police interrogation, but rather a resolution of the cases before us and those like them.” Among other things, the Court stated that “our holding today makes it unnecessary to consider whether and when statements made to someone other than law enforcement personnel are testimonial.” Nor did the Court hold that statements made to 911 operators could never be testimonial; statements made to 911 after an emergency has ended might be testimonial under some circumstances. Finally, the Court refused to hold that statements to responding police officers would always be testimonial:

Although we necessarily reject the Indiana Supreme Court's implication that virtually any “initial inquiries” at the crime scene will not be testimonial, we do not hold the opposite – that *no* questions at the scene will yield nontestimonial answers. We have already observed of domestic disputes that “[o]fficers called to investigate ... need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim.” Such exigencies may *often* mean that “initial inquiries” produce nontestimonial statements.

### ***First Circuit***

**Statement admissible under the state of mind exception is not testimonial: *Horton v. Allen***, 370 F.3d 75 (1<sup>st</sup> Cir. 2004): Horton was convicted of drug-related murders. At his state trial, the government offered hearsay statements from Christian, Horton's accomplice. Christian had told a friend that he was broke; that he had asked a drug supplier to front him some drugs;

that the drug supplier declined; and that he thought the drug supplier had a large amount of cash on him. These statements were offered under the state of mind exception to show the intent to murder and the motivation for murdering the drug supplier. The Court held that Christian's statements were not "testimonial" within the meaning of *Crawford*. The Court explained that the statements "were not ex parte in-court testimony or its equivalent; were not contained in formalized documents such as affidavits, depositions, or prior testimony transcripts; and were not made as part of a confession resulting from custodial examination. . . . In short, Christian did not make the statements under circumstances in which an objective person would reasonably believe that the statement would be available for use at a later trial."

**911 call was not testimonial under the circumstances:** *United States v. Brito*, 427 F.3d 53 (1<sup>st</sup> Cir. 2005): The Court affirmed a conviction of firearm possession by an illegal alien. It held that statements made in a 911 call, indicating that the defendant was carrying and had fired a gun, were properly admitted as excited utterances, and that the admission of the 911 statements did not violate the defendant's right to confrontation. The statements were not "testimonial" within the meaning of *Crawford v. Washington*. The Court refused, however, to adopt a categorical rule that an excited utterance could never be testimonial under *Crawford*. The Court declared that the relevant question is whether the statement was made with an eye toward "legal ramifications." The Court noted that under this test, statements to police made while the declarant or others are still in personal danger are ordinarily not testimonial, because the declarant in these circumstances "usually speaks out of urgency and a desire to obtain a prompt response." Once the initial danger has dissipated, however, "a person who speaks while still under the stress of a startling event is more likely able to comprehend the larger significance of her words. If the record fairly supports a finding of comprehension, the fact that the statement also qualifies as an excited utterance will not alter its testimonial nature." In this case the 911 call was properly admitted because the caller stated that she had "just" heard gunshots and seen a man with a gun, that the man had pointed the gun at her, and that the man was still in her line of sight. Thus the declarant was in "imminent personal peril" when the call was made and therefore it was not testimonial. The Court also found that the 911 operator's questioning of the caller did not make the answers testimonial, because "it would blink reality to place under the rubric of interrogation the single off-handed question asked by the dispatcher — a question that only momentarily interrupted an otherwise continuous stream of consciousness."

**Note: While the *Brito* decision preceded the Supreme Court's decision in *Davis/Hammon*, the First Circuit's analysis appears to be completely consistent with the Supreme Court's application of *Crawford* to 911 calls.**

**Defendant's own hearsay statement was not testimonial:** *United States v. Lopez*, 380 F.3d 538 (1<sup>st</sup> Cir. 2004): The defendant blurted out an incriminating statement to police officers after they found drugs in his residence. The court held that this statement was not testimonial under *Crawford*. The court declared that "for reasons similar to our conclusion that appellant's statements were not the product of custodial interrogation, the statements were also not testimonial." That is, the statement was spontaneous and not in response to police interrogation.

The *Lopez* court probably had an easier way to dispose of the case. Both before and after *Crawford*, an accused has no right to confront himself. If the solution to confrontation is cross-examination, as the Court in *Crawford* states, then it is silly to argue that a defendant has the right to have his own statements excluded because he had no opportunity to cross-examine himself.

**Statements made to defendant in a conversation with the defendant were testimonial but were not barred by *Crawford*, as they were admitted to provide context for the defendant's own statements:** *United States v. Hansen*, 434 F.3d 92 (1<sup>st</sup> Cir. 2006): After a crime and as part of cooperation with the authorities, the father of an accomplice surreptitiously recorded his conversation with the defendant, in which the defendant admitted criminal activity. The Court found that the father's statements during the conversation were testimonial under *Crawford* – as they were made specifically for use in a criminal prosecution. But their admission did not violate the defendant's right to confrontation. The defendant's own side of the conversation was admissible as a party admission, and the father's side of the conversation was admissible not for truth but to provide context for the defendant's admissions. *Crawford* does not bar the admission of statements not offered for their truth. *Accord United States v. Walter*, 434 F.3d 30 (1<sup>st</sup> Cir. 2006) (*Crawford* “does not call into question this court's precedents holding that statements introduced solely to place a defendant's admissions into context are not hearsay and, as such, do not run afoul of the Confrontation Clause.”). *See also Furr v. Brady*, 440 F.3d 34 (1<sup>st</sup> Cir. 2006) (the defendant was charged with firearms offenses and intimidation of a government witness; an accomplice's confession to law enforcement did not implicate *Crawford* because it was not admitted for its truth; rather, it was admitted to show that the defendant knew about the confession and, in contacting the accomplice thereafter, intended to intimidate him). *United States v. Hansen*, 434 F.3d 92 (1<sup>st</sup> Cir. 2006) (admission of undercover informant's statements made in a conversation with the defendant did not violate the Confrontation Clause, because they were not offered for their truth but rather to provide context for the defendant's own statements).

**Statements by informant to police officers, offered to prove the “context” of the police investigation, probably violate *Crawford*, but admission is not plain error:** *United States v. Maher*, 454 F.3d 13 (1<sup>st</sup> Cir. 2006): At the defendant's drug trial, several accusatory statements from an informant (Johnson) were admitted ostensibly to explain why the police focused on the defendant as a possible drug dealer. The court found that these statements were testimonial under *Crawford*, because “the statements were made while the police were interrogating Johnson after Johnson's arrest for drugs; Johnson agreed to cooperate and he then identified Maher as the source of drugs. . . . In this context, it is clear that an objectively reasonable person in Johnson's shoes would understand that the statement would be used in prosecuting Maher at trial.” The court then addressed the government's argument that the Constitution was not violated because the informant's statements were not admitted for their truth, but to explain the context of the police investigation:

The government’s articulated justification — that any statement by an informant to police which sets context for the police investigation is not offered for the truth of the statements and thus not within *Crawford* — is impossibly overbroad [and] may be used not just to get around hearsay law, but to circumvent *Crawford*’s constitutional rule. . . . Here, Officer MacVane testified that the confidential informant had said Maher was a drug dealer, even though the prosecution easily could have structured its narrative to avoid such testimony. The . . . officer, for example, could merely say that he had acted upon “information received,” or words to that effect. It appears the testimony was primarily given exactly for the truth of the assertion that Maher was a drug dealer and should not have been admitted given the adequate alternative approach.

The court noted, however, that the defendant had not objected to the admission of the informant’s statements. It found no plain error, noting among other things, the strength of the evidence and the fact that the testimony “was followed immediately by a sua sponte instruction to the effect that any statements of the confidential informant should not be taken as standing for the truth of the matter asserted, i.e., that Maher was a drug dealer who supplied Johnson with drugs).”

**Co-conspirator statement not testimonial:** *United States v. Felton*, 417 F.3d 97 (1<sup>st</sup> Cir. 2005): The court held that a statement by the defendant’s coconspirator, made during the course and in furtherance of the conspiracy, was not testimonial under *Crawford*. **Accord** *United States v. Sanchez-Berrios*, 424 F.3d 65 (1<sup>st</sup> Cir. 2005) (noting that *Crawford* “explicitly recognized that statements made in furtherance of a conspiracy by their nature are not testimonial.”).

**Formal statement to police officer is testimonial:** *United States v. Rodriguez-Marrero*, 390 F.3d 1 (1<sup>st</sup> Cir. 2004): The defendant’s accomplice gave a signed confession under oath to a prosecutor in Puerto Rico. The Court held that any information in that confession that incriminated the defendant, directly or indirectly, could not be admitted against him after *Crawford*. Whatever the limits of the term “testimonial”, it clearly covers sworn statements by accomplices to police officers.

**Warrant of deportation is not testimonial:** *United States v. Garcia*, 452 F.3d 36 (1<sup>st</sup> Cir. 2006): In an illegal reentry case, the defendant argued that his confrontation rights were violated by the admission of a warrant of deportation. The court disagreed, finding that the warrant was not testimonial under *Crawford*. The court noted that every circuit considering the matter has held “that defendants have no right to confront and cross-examine the agents who routinely record warrants of deportation” because such officers have no motivation to do anything other than “mechanically register an unambiguous factual matter.” The court found no reason to disagree with the other circuits.

## *Second Circuit*

**Statement admissible as a declaration against penal interest, after *Williamson*, is not testimonial:** *United States v. Saget*, 377 F.3d 233 (2d Cir. 2004): The defendant's accomplice spoke to an undercover officer, trying to enlist him in the defendant's criminal scheme. The accomplice's statements were admitted at trial as declarations against penal interest under Rule 804(b)(3), as they tended to implicate the accomplice in a conspiracy. Under *Williamson v. United States*, statements made by an accomplice to a law enforcement officer while in custody are not admissible under Rule 804(b)(3), because the accomplice may be currying favor with law enforcement. But in the instant case, the accomplice's statement was not barred by *Williamson*, because it was made to an undercover officer—the accomplice didn't know he was talking to a law enforcement officer and therefore had no reason to curry favor by implicating the defendant. For similar reasons, the statement was not testimonial under *Crawford*—it was not the kind of formalized statement to law enforcement, prepared for trial, such as a "witness" would provide. The court elaborated on the *Crawford* test in the following passage:

*Crawford* at least suggests that the determinative factor in determining whether a declarant bears testimony is the declarant's awareness or expectation that his or her statements may later be used at a trial. The opinion lists several formulations of the types of statements that are included in the core class of testimonial statements, such as "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." All of these definitions provide that the statement must be such that the declarant reasonably expects that the statement might be used in future judicial proceedings. Although the Court did not adopt any one of these formulations, its statement that "[t]hese formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it" suggests that the Court would use the reasonable expectation of the declarant as the anchor of a more concrete definition of testimony. If this is the case, then Beckham's statements would not constitute testimony, as it is undisputed that he had no knowledge of the CI's connection to investigators and believed that he was having a casual conversation with a friend and potential co-conspirator.

We need not attempt to articulate a complete definition of testimonial statements in order to hold that Beckham's statements did not constitute testimony, however, because *Crawford* indicates that the specific type of statements at issue here are nontestimonial in nature. The decision cites *Bourjaily v. United States*, 483 U.S. 171 (1987), which involved a co-defendant's unwitting statements to an FBI informant, as an example of a case in which nontestimonial statements were correctly admitted against the defendant without a prior opportunity for cross-examination. In *Bourjaily*, the declarant's conversation with a confidential informant, in which he implicated the defendant, was recorded without the declarant's knowledge. The Court held that even though the defendant had no opportunity to cross-examine the declarant at the time that he made the

statements and the declarant was unavailable to testify at trial, the admission of the declarant's statements against the defendant did not violate the Confrontation Clause. *Crawford* approved of this holding, citing it as an example of an earlier case that was "consistent with" the principle that the Clause permits the admission of nontestimonial statements in the absence of a prior opportunity for cross-examination. Thus, we conclude that a declarant's statements to a confidential informant, whose true status is unknown to the declarant, do not constitute testimony within the meaning of *Crawford*. We therefore conclude that Beckham's statements to the CI were not testimonial, and *Crawford* does not bar their admission against Saget.

**False alibi statements made to police officers by accomplices are testimonial, but admission does not violate the Confrontation Clause because they are not offered for their truth: *United States v. Logan*, 419 F.3d 172 (2d Cir. 2005):** The defendant was convicted of conspiracy to commit arson. The trial court admitted statements made by his coconspirators to the police. These statements asserted an alibi, and the government presented other evidence indicating that the alibi was false. The court found no Confrontation Clause violation in admitting the alibi statements. The court relied on *Crawford* for the proposition that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than proving the truth of the matter asserted." The statements were not offered to prove that the alibi was true, but rather to corroborate the defendant's own account that the accomplices planned to use the alibi. Thus "the fact that Logan was aware of this alibi, and that [the accomplices] actually used it, was evidence of conspiracy among [the accomplices] and Logan."

The *Logan* court declared in dictum that the false alibi statements were testimonial within the meaning of *Crawford*. The statements were made during the course of and in furtherance of a conspiracy, and ordinarily such statements are not testimonial, as the Court stated in *Crawford*. But in this case, the accomplices "made their false alibi statements in the course of a police interrogation, and thus should reasonably have expected that their statements might be used in future proceedings." The court concluded that in light of *Crawford's* "explicit instruction" that statements made during police interrogation are testimonial "under even a narrow standard, the government's contention that these statements were non-testimonial is unconvincing."

**Note: The *Logan* court reviewed the defendant's Confrontation Clause argument under the plain error standard. This was because defense counsel at trial objected on grounds of hearsay, but did not make a specific Confrontation Clause objection. This again shows the need to provide congruence between the hearsay rule and the Confrontation Clause. Otherwise there is a trap for the unwary, possibly resulting in an inadvertent waiver of the protections of the Confrontation Clause. Preventing such a trap was the rationale for proposing the amendment to Rule 804(b)(3).**

**Statements made to defendant in a conversation with the defendant were testimonial but were not barred by *Crawford*, as they were admitted to provide context: *United States v. Paulino*, 445 F.3d 211 (2d Cir. 2006):** The Court stated: “It has long been the rule that so long as statements are not presented for the truth of the matter asserted, but only to establish a context, the defendant’s Sixth Amendment rights are not transgressed. Nothing in *Crawford v. Washington* is to the contrary.”

**Statement found reliable under the residual exception is not testimonial: *United States v. Morgan*, 385 F.3d 196 (2d Cir. 2004):** In a drug trial, a letter written by the co-defendant was admitted against the defendant. The letter was written to a boyfriend and implicated both the defendant and the co-defendant in a conspiracy to smuggle drugs. The court found that the letter was properly admitted under Rule 807, and that it was not testimonial under *Crawford*. The court noted the following circumstances indicating that the letter was not testimonial: 1) it was not written in a coercive atmosphere; 2) it was not addressed to law enforcement authorities; 3) it was written to an intimate acquaintance; 4) it was written in the privacy of the co-defendant’s hotel room; 4) the co-defendant had no reason to expect that the letter would ever find its way into the hands of the police; and 5) it was not written to curry favor with the authorities or with anyone else. These were the same factors that rendered the hearsay statement sufficiently reliable to qualify under Rule 807.

**Co-conspirator statements made to government officials to cover-up a crime (whether true or false) do not implicate *Crawford*: *United States v. Stewart*, 433 F.3d 273 (2d Cir. 2006):** In the prosecution of Martha Stewart, the government introduced statements made by each of the defendants during interviews with government investigators. Each defendant’s statement was offered against the other. The government offered these statements to prove that the story told to the investigators was a cover-up. The court held that the admission of these statements did not violate *Crawford*, even though they were “provided in a testimonial setting.” It noted first that to the extent the statements were false, they did not violate *Crawford* because “*Crawford* expressly confirmed that the categorical exclusion of out-of-court statements that were not subject to contemporaneous cross-examination does not extend to evidence offered for purposes other than to establish the truth of the matter asserted.” The defendants argued, however, that some of the statements made during the course of the obstruction were actually true, and as they were made to government investigators, they were testimonial. The court observed that there is some tension in *Crawford* between its treatment of co-conspirator statements (by definition not testimonial) and statements made to government investigators (by their nature testimonial), where truthful statements are made as part of a conspiracy to obstruct justice. It found, however, that the truthful statements did not violate *Crawford* because they were admitted not for their truth, but rather to provide context for the false statements. The court explained as follows:

It defies logic, human experience and even imagination to believe that a conspirator bent on impeding an investigation by providing false information to investigators would lace the totality of that presentation with falsehoods on every subject of inquiry. To do so would be to alert the investigators immediately that the conspirator is not to be believed, and the effort to obstruct would fail from the outset. . . . The truthful portions of statements in furtherance of the conspiracy, albeit spoken in a testimonial setting, are intended to make the false portions believable and the obstruction effective. Thus, the truthful portions are offered, not for the narrow purpose of proving merely the truth of those portions, but for the far more significant purpose of showing each conspirator's attempt to lend credence to the entire testimonial presentation and thereby obstruct justice.

**Grand jury testimony and plea allocution statement are both testimonial:** *United States v. Bruno*, 383 F.3d 65 (2d Cir. 2004): The court held that a plea allocution statement of an accomplice was testimonial, even though it was redacted to take out any direct reference to the defendant. It noted that the Court in *Crawford* had taken exception to previous cases decided by the Circuit that had admitted such statements as sufficiently reliable under *Roberts*. Those prior cases have been overruled by *Crawford*. The court also noted that the admission of grand jury testimony was error as it was clearly testimonial after *Crawford*. **See also** *United States v. Snype*, 441 F.3d 119 (2d Cir. 2006) (plea allocution of the defendant's accomplice was testimonial even though all direct references to the defendant were redacted); *United States v. Gotti*, 459 F.3d 296 (2d Cir. 2006) (redacted guilty pleas of accomplices, offered to show that a bookmaking business employed five or more people, were testimonial under *Crawford*); *United States v. Al-Sadawi*, 432 F.3d 419 (2d Cir. 2005) (*Crawford* violation where the trial court admitted portions of a cohort's plea allocution against the defendant, even though the statement was redacted to take out any direct reference to the defendant).

### *Third Circuit*

**Surreptitiously recorded statements of coconspirators are not testimonial:** *United States v. Hendricks*, 395 F.3d 173 (3d Cir. 2005): The court found that surreptitiously recorded statements of an ongoing criminal conspiracy were not testimonial within the meaning of *Crawford*. "First and foremost", such statements were not within the examples of statements found testimonial by the Court in *Crawford*—they were not grand jury testimony, prior testimony, plea allocutions or statements made during interrogations. Even under the broadest definition of "testimonial" discussed in *Crawford* — reasonable anticipation of use in a criminal trial or investigation — these statements were not testimonial, as they were informal statements among coconspirators.

**Accomplice statement to police officer was testimonial, but did not violate the Confrontation Clause because it was not admitted for its truth:** *United States v. Trala*, 386 F.3d 536 (3d Cir. 2004): An accomplice made statements to a police officer that misrepresented her identity and the source of the money in the defendant's car. While these were accomplice statements to law enforcement, and thus testimonial, their admission did not violate *Crawford*, as they were not admitted for their truth. In fact the statements were admitted because they were false. Under these circumstances, cross-examination of the accomplice would serve no purpose. *See also United States v. Lore*, 430 F.3d 190 (3d Cir. 2005) (relying on *Trala*, the court held that grand jury testimony was testimonial, but that its admission did not violate the Confrontation Clause because the self-exculpatory statements denying all wrongdoing "were admitted because they were so obviously false.").

### ***Fifth Circuit***

**Certificate prepared by government officials for purposes of litigation is NOT testimonial:** *United States v. Rueda-Rivera*, 396 F.3d 678 (5<sup>th</sup> Cir. 2005): The defendant was charged with being found in the United States after deportation, without having obtained the consent of the Attorney General or the Secretary of the Department of Homeland Security. To prove the lack of approval, the government offered a Certificate of Nonexistence of Record (CNR). The CNR was prepared by a government official specifically for this litigation. The court found that the record was not "testimonial" under *Crawford*, declaring as follows:

The CNR admitted into evidence in this case, reflecting the absence of a record that Rueda-Rivera had received consent to re-enter the United States, does not fall into the specific categories of testimonial statements referred to in *Crawford*. We decline to extend *Crawford* to reach such a document.

**Warrant of deportation not testimonial:** *United States v. Valdez-Matos*, 443 F.3d 910 (5<sup>th</sup> Cir. 2006): In an illegal reentry case, the court found that a warrant of deportation was not testimonial. The court relied on *Rueda-Rivera*, supra, and stated that "generally documents in a defendant's immigration file are analogous to non-testimonial business records." The court concluded that a warrant of deportation is non-testimonial because "the official preparing the warrant had no motivation other than mechanically register an unambiguous factual matter.").

**Statements made in a civil deposition might be testimonial, but admission does not violate the Confrontation Clause if they are offered to prove they are false:** *United States v. Holmes*, 406 F.3d 337 (5<sup>th</sup> Cir. 2005): The defendant was convicted of mail fraud and conspiracy, stemming from a scheme with a court clerk to file a backdated document in a civil action. The defendant argued that admitting the deposition testimony of the court clerk, given in the underlying civil action, violated his right to confrontation after *Crawford*. The clerk testified

that the clerk's office was prone to error and thus someone in that office could have mistakenly backdated the document at issue. The Court considered the possibility that the clerk's testimony was a statement in furtherance of a conspiracy, and noted that coconspirator statements ordinarily are not testimonial under *Crawford*. It also noted, however, that the clerk's statement "is not the run-of-the-mill co-conspirator's statement made unwittingly to a government informant or made casually to a partner in crime; rather, we have a co-conspirator's statement that is derived from a formalized testimonial source — recorded and sworn civil deposition testimony." Ultimately the court found it unnecessary to determine whether the deposition testimony was "testimonial" within the meaning of *Crawford* because it was not offered for its truth. Rather, the government offered the testimony "to establish its *falsity* through independent evidence." Statements that are offered for a non-hearsay purpose pose no Confrontation Clause concerns, whether or not they are testimonial, as the Court recognized in *Crawford*.

**Statement admissible as co-conspirator hearsay is not testimonial: *United States v. Robinson*, 367 F.3d 278 (5<sup>th</sup> Cir. 2004):** The Court affirmed a drug trafficker's murder convictions and death sentence. It held that coconspirator statements are not "testimonial" under *Crawford* as they are made under informal circumstances and not for the purpose of creating evidence. *Accord United States v. Delgado*, 401 F.3d 290 (5<sup>th</sup> Cir. 2005).

**Accomplice's statements to a friend, implicating both the accomplice and the defendant in the crime, are not testimonial: *Ramirez v. Dretke*, 398 F.3d 691 (5<sup>th</sup> Cir. 2005):** The defendant was convicted of murder. Hearsay statements of his accomplice were admitted against him. The accomplice made statements both before and after the murder that directly implicated the defendant. These statements were made to the accomplice's roommate. The court found that these statements were not testimonial under *Crawford*: "There is nothing in *Crawford* to suggest that 'testimonial evidence' includes spontaneous out-of-court statements made outside any arguably judicial or investigational context."

### *Sixth Circuit*

**Identification of a defendant, made to police by an incarcerated person, is testimonial: *United States v. Pugh*, 405 F.3d 390 (6<sup>th</sup> Cir. 2005):** In a bank robbery prosecution, the Court found a *Crawford* violation when the trial court admitted testimony from a police officer that he had brought a surveillance photo down to a person who was incarcerated, and that person identified the defendant as the man in the surveillance photo. This statement was testimonial under *Crawford* for the following reasons:

First, the statement was given during a police interrogation, which meets the requirement set forth in *Crawford* where the Court indicated that the term "testimonial" at a minimum applies to "police interrogations." Second, the statement is also considered testimony

under *Crawford's* reasoning that a person who “makes a formal statement to government officers bears testimony.” Third, we find that Shellee’s statement is testimonial under our broader analysis in *United States v. Cromer*, 389 F.3d 662 (6<sup>th</sup> Cir. 2004). . . [w]e think that any reasonable person would assume that a statement that positively identified possible suspects in the picture of a crime scene would be used against those suspects in either investigating or prosecuting the offense.

**Reporter’s Note: In *Cromer*, discussed in *Pugh*, the court held that a statement of a confidential informant to police officers, identifying the defendant as being a drug dealer, was testimonial, because it was made to the authorities with the reasonable anticipation that it would be used against the defendant.**

**Declaration against penal interest, made to a friend, is not testimonial: *United States v. Franklin***, 415 F.3d 537 (6<sup>th</sup> Cir. 2005): The defendant was charged with bank robbery. One of the defendant’s accomplices (Clarke), was speaking to a friend (Wright) some time after the robbery. Wright told Clarke that he looked “stressed out.” Clarke responded that he was indeed stressed out, because he and the defendant had robbed a bank and he thought the authorities were on their trail. The court found no error in admitting Clarke’s hearsay statement against the defendant as a declaration against penal interest, as it disserved Clark’s interest and was not made to law enforcement officers in any attempt to curry favor with the authorities. On the constitutional question, the court found that Clarke’s statement was not testimonial under *Crawford*:

Clarke made the statements to his friend by happenstance; Wright was not a police officer or a government informant seeking to elicit statements to further a prosecution against Clarke or Franklin. To the contrary, Wright was privy to Clarke’s statements only as his friend and confidant.

The court distinguished *Cromer, supra*, in which an informant’s statement to police officers was found testimonial: “Because the informant in *Cromer* implicated the defendant in statements to the police, the informant’s statements were akin to statements elicited during police interrogation, i.e., the informant could reasonably anticipate that the statements would be used to prosecute the defendant.”

**See also *United States v. Gibson***, 409 F.3d 325 (6<sup>th</sup> Cir. 2005) (describing statements as nontestimonial where “the statements were not made to the police or in the course of an official investigation, nor in an attempt to curry favor or shift the blame.”); ***United States v. Johnson***, 440 F.3d 832 (6<sup>th</sup> Cir. 2006) (statements by accomplice to an undercover informant he thought to be a cohort were properly admitted against the defendant; the statements were not testimonial because the declarant didn’t know he was speaking to law enforcement, and so a person in his

position “would not have anticipated that his statements would be used in a criminal investigation or prosecution of Johnson.”).

**Defendant’s own statements, reporting statements of another defendant, are not testimonial under the circumstances:** *United States v. Gibson*, 409 F.3d 325 (6<sup>th</sup> Cir. 2005): In a case involving fraud and false statements arising from a mining operation, the trial court admitted testimony from a witness that Gibson told him that another defendant was planning on doing something that would violate regulations applicable to mining. The court recognized that the testimony encompassed double hearsay, but held that each level of hearsay was admissible as an admission by a party-opponent. Gibson also argued that the testimony violated *Crawford*. But the court held that Gibson’s statement and the underlying statement of the other defendant were both casual remarks made to an acquaintance, and therefore were not testimonial.

***Crawford* inapplicable where hearsay statements are made by a declarant who testifies at trial:** *United States v. Kappell*, 418 F.3d 550 (6<sup>th</sup> Cir. 2005): In a child sex abuse prosecution, the victims testified and the trial court admitted a number of hearsay statements the victims made to social workers and others. The defendant claimed that the admission of hearsay violated his right to confrontation under *Crawford*. But the court held that *Crawford* by its terms is inapplicable if the hearsay declarant is subject to cross-examination at trial. The defendant complained that the victims were unresponsive or inarticulate at some points in their testimony, and therefore they were not subject to effective cross-examination. But the court found this claim foreclosed by *United States v. Owens*, 484 U.S. 554 (1988). Under *Owens*, the Constitution requires only an opportunity for cross-examination, not cross-examination in whatever way the defendant might wish. The defendant’s complaint was that his cross-examination would have been more effective if the victims had been older. “Under *Owens*, however, that is not enough to establish a Confrontation Clause violation.”

**Business records are not testimonial:** *United States v. Jamieson*, 427 F.3d 394 (6<sup>th</sup> Cir. 2005): In a prosecution involving fraudulent sale of insurance policies, the government admitted summary evidence under Rule 1006. The underlying records were essentially business records. The court found that admitting the summaries did not violate the defendant’s right to confrontation. The underlying records were not testimonial under *Crawford* because they did not “resemble the formal statement or solemn declaration identified as testimony by the Supreme Court.” *See also United States v. Baker*, 458 F.3d 513 (6<sup>th</sup> Cir. 2006) (“The government correctly points out that business records are not testimonial and therefore do not implicate the Confrontation Clause concerns of *Crawford*.”).

**Statement by an anonymous coconspirator is not testimonial:** *United States v. Martinez*, 430 F.3d 317 (6<sup>th</sup> Cir. 2005). The court held that a letter written by an anonymous

coconspirator during the course and in furtherance of a conspiracy was not testimonial under *Crawford*. The court stated that “a reasonable person in the position of a coconspirator making a statement in the course and furtherance of a conspiracy would not anticipate his statements being used against the accused in investigating and prosecuting the crime.”

### *Seventh Circuit*

**Drug test prepared by a hospital with knowledge of possible use in litigation is not testimonial; certification of that business record under Rule 902(11) is not testimonial:** *United States v. Ellis*, 460 F.3d 920 (7<sup>th</sup> Cir. 2006): In a trial for felon gun possession, the trial court admitted the results of a drug test conducted on the defendant’s blood and urine after he was arrested. The test was conducted by a hospital employee named Kristy, and indicated a positive result for methamphetamine. At trial, the hospital record was admitted without a qualifying witness; instead, a qualified witness prepared a certification of authenticity under Rule 902(11). The court held that neither the hospital record nor the certification were testimonial within the meaning of *Crawford* and *Davis* — despite the fact that both records were prepared with the knowledge that they were going to be used in a prosecution.

As to the medical report, the court reasoned as follows:

Given the focus of the courts of appeals and our own precedent on the declarant's reasonable expectations of whether a statement would be used prosecutorially, *Ellis* may appear to be on strong ground in arguing that the results of his medical tests were testimonial. It must have been obvious to Kristy (the laboratory technician at the local hospital) that her test results might end up as evidence against *Ellis* in some kind of trial. . .

Nevertheless, we do not think these circumstances transform what is otherwise a nontestimonial business record into a testimonial statement implicating the Confrontation Clause. There is no indication that the observations embodied in *Ellis*'s medical records were made in anything but the ordinary course of business. Such observations, the Court in *Crawford* made clear, are nontestimonial. And we do not think it matters that these observations were made with the knowledge that they might be used for criminal prosecution. Prior to the Court's decision in *Davis*, two other courts of appeals decided that certificates of nonexistence of record ("CNR"), admitted under Rule 803(10) and used to prove an alien did not receive permission from the Attorney General to reenter the country, were nontestimonial despite the fact they were prepared by the government in anticipation of a criminal prosecution. *See, e.g., United States v. Cervantes-Flores*, 421 F.3d 825, 833 (9th Cir. 2005); *United States v. Rueda-Rivera*, 396 F.3d 678, 680 (5th Cir. 2005). The focus of these decisions was that the preparation of these CNRs was routine, and the statements in them were simply too far removed from the examples of testimonial evidence provided by *Crawford*.

The *Ellis* court found that the Supreme Court's analysis in *Davis* supported its view that a statement is not testimonial simply because it is prepared with the knowledge that it is likely to be used in a prosecution:

In *Davis*, the Court addressed a statement made by a woman to a 911 operator reporting she had been assaulted. That recorded statement was later used at trial to prosecute Davis (the woman's former boyfriend) for a felony violation of a domestic no-contact order. The Court considered the 911 operator's questioning of the woman to be an interrogation, and the operators themselves to be at least "agents of law enforcement." In the face of Davis's objection that introduction of the statement violated the Sixth Amendment, the Court held that when the objective circumstances indicate the "primary purpose" of police interrogation is to meet an ongoing emergency, the statements elicited in response are nontestimonial. We believe this holding necessarily implies that consciousness on the part of the person reporting an emergency (or the police officer eliciting information about the emergency) that his or her statements might be used as evidence in a crime does not lead to the conclusion ipso facto that the statement is testimonial. A reasonable person reporting a domestic disturbance, which is what the declarant in *Davis* was doing, will be aware that the result is the arrest and possible prosecution of the perpetrator. . . . So it cannot be that a statement is testimonial in every case where a declarant reasonably expects that it might be used prosecutorially.

As to the medical reports, the *Ellis* court concluded as follows:

While the medical professionals in this case might have thought their observations would end up as evidence in a criminal prosecution, the objective circumstances of this case indicate that their observations and statements introduced at trial were made in nothing else but the ordinary course of business. Therefore, when these professionals made those observations, they--like the declarant reporting an emergency in *Davis*--were "not acting as . . . witness[es];" and were "not testifying." See *Davis*, 126 S. Ct. at 2277. They were employees simply recording observations which, because they were made in the ordinary course of business, are "statements that by their nature were not testimonial." *Crawford*, 541 U.S. at 56.

As to the certification of business record, prepared under Rule 902(11) specifically to qualify the medical records in this prosecution, the *Ellis* court similarly found that they were not testimonial because the records that were certified were prepared in the ordinary course, and the certifications were essentially ministerial. The court explained as follows:

As should be clear, we do not find as controlling the fact that a certification of authenticity under 902(11) is made in anticipation of litigation. What is compelling is that *Crawford* expressly identified business records as nontestimonial evidence. Given the records themselves do not fall within the constitutional guarantee provided by the Confrontation Clause, it would be odd to hold that the foundational evidence

authenticating the records do. We also find support in the decisions holding that a CNR is nontestimonial. A CNR is quite like a certification under 902(11); it is a signed affidavit attesting that the signatory had performed a diligent records search for any evidence that the defendant had been granted permission to enter the United States after deportation.

The certification at issue in this case is nothing more than the custodian of records at the local hospital attesting that the submitted documents are actually records kept in the ordinary course of business at the hospital. The statements do not purport to convey information about Ellis, but merely establish the existence of the procedures necessary to create a business record. They are made by the custodian of records, an employee of the business, as part of her job. As such, we hold that written certification entered into evidence pursuant to Rule 902(11) is nontestimonial just as the underlying business records are. Both of these pieces of evidence are too far removed from the "principal evil at which the Confrontation Clause was directed" to be considered testimonial.

**Odometer statements, prepared before any crime of odometer-tampering occurred, are not testimonial: *United States v. Gilbertson*, 435 F.3d 790 (7<sup>th</sup> Cir. 2006):** In a prosecution for odometer-tampering, the government proved its case by introducing the odometer statements prepared when the cars were sold to the defendant, and then calling the buyers to testify that the mileage on the odometers when they bought their cars was substantially less than the mileage set forth on the odometer statements. The defendant argued that introducing the odometer statements violated *Crawford*. He contended that the odometer statements were essentially formal affidavits, the very kind of evidence that most concerned the Court in *Crawford*. But the court held that the concern in *Crawford* was limited to affidavits prepared for trial as a testimonial substitute. This concern did not apply to the odometer statements. The court explained as follows:

The odometer statements in the instant case are not testimonial because they were not made with the respective declarants having an eye towards criminal prosecution. The statements were not initiated by the government in the hope of later using them against Gilbertson (or anyone else), nor could the declarants (or any reasonable person) have had such a belief. The reason is simple: each declaration was made *prior* to Gilbertson even engaging in the crime. Therefore, there is no way for the sellers to anticipate that their statements regarding the mileage on the individual cars would be used as evidence against Gilbertson for a crime he commits in the future.

**911 call is non-testimonial under *Davis/Hammon*: *United States v. Thomas*, 453 F.3d 838 (7<sup>th</sup> Cir. 2006):** The court held that statements made in a 911 call were non-testimonial under the analysis provided by the Supreme Court in *Davis/Hammon*. The anonymous caller reported a shooting, and the perpetrator was still at large. The court analyzed the statements in light of *Davis/Hammon* as follows:

When viewing the facts in light of *Davis*, we find that the anonymous caller's statement to the 911 operator was nontestimonial. In *Davis*, the caller contacted the police after being attacked, but while the defendant was fleeing the scene. There the Supreme Court stressed that, despite the immediate attack being over, the caller "was speaking about events as they were actually happening, rather than 'describ[ing] past events.'" Similarly, the caller here described an emergency as it happened. First, she directed the operator's attention to Brown's condition, stating "[t]here's a dude that just got shot . . .", and ". . . the guy who shot him is still out there." Later in the call, she reiterated her concern that ". . . [t]here is somebody shot outside, somebody needs to be sent over here, and there's somebody runnin' around with a gun, somewhere." Any reasonable listener would know from this exchange that the operator and caller were dealing with an ongoing emergency, the resolution of which was paramount in the operator's interrogation. This fact is evidenced by the operator's repeatedly questioning the caller to determine who had the gun and where Brown lay injured. Further, the caller ended the conversation immediately upon the arrival of the police, indicating a level of interrogation that was significantly less formal than the testimonial statement in *Crawford*. Because the tape-recording of the call is nontestimonial, it does not implicate Thomas's right to confrontation.

**Present sense impression, describing an event that occurred months before a crime, is not testimonial:** *United States v. Danford*, 435 F.3d 682 (7<sup>th</sup> Cir. 2005): The defendant was convicted of insurance fraud after staging a fake robbery of his jewelry store. At trial, one of the employees testified to a statement made by the store manager, indicating that the defendant had asked the manager how to disarm the store alarm. The defendant argued that the store manager's statement was testimonial under *Crawford*, but the court disagreed. The court stated that "the conversation between [the witness] and the store manager is more akin to a casual remark than it is to testimony in the *Crawford*-sense. Accordingly, we hold that the district court did not err in admitting this testimony under Fed.R.Evid. 803(1), the present-sense impression exception to the hearsay rule."

**Accomplice confession to law enforcement is testimonial:** *United States v. Jones*, 371 F.3d 363 (7<sup>th</sup> Cir. 2004): An accomplice's statement to law enforcement was offered against the defendant, though it was redacted to take out any direct reference to the defendant. The court found that even if the confession, as redacted, was admissible as a declaration against interest, its admission would violate the Confrontation Clause after *Crawford*. The court noted that even though redacted, the confession was testimonial, as it was made during interrogation by law enforcement. And since the defendant never had a chance to cross-examine the accomplice, "under *Crawford*, no part of Rock's confession should have been allowed into evidence."

**Police report offered for a purpose other than proving the truth of its contents is properly admitted even if it is testimonial:** *United States v. Price*, 418 F.3d 771 (7<sup>th</sup> Cir. 2005): In a drug conspiracy trial, the government offered a report prepared by the Gary Police Department. The report was an “intelligence alert” identifying some of the defendants as members of a street gang dealing drugs. The report was found in the home of one of the conspirators. The government offered the report at trial to prove that the conspirators were engaging in counter-surveillance, and the jury was instructed not to consider the accusations in the report as true, but only for the fact that the report had been intercepted and kept by one of the conspirators. The court found that even if the report was testimonial, there was no error in admitting the report as proof of awareness and counter-surveillance. It relied on *Crawford* for the proposition that the Confrontation Clause does not bar the use of out-of-court statements “for purposes other than proving the truth of the matter asserted.” *See also United States v. Tolliver*, 454 F.3d 660 (7<sup>th</sup> Cir. 2006) (statements of one party to a conversation with a conspirator were offered not for their truth but to provide context to the conspirator’s statements: “*Crawford* only covers testimonial statements proffered to establish the truth of the matter asserted. In this case, . . . Shye’s statements were admissible to put Dunklin’s admissions on the tapes into context, making the admissions intelligible for the jury. Statements providing context for other admissible statements are not hearsay because they are not offered for their truth. As a result, the admission of such context evidence does not offend the Confrontation Clause because the declarant is not a witness against the accused.”).

### ***Eighth Circuit***

**911 calls and statements made to officers responding to the calls are not testimonial:** *United States v. Brun*, 416 F.3d 703 (8<sup>th</sup> Cir. 2005): The defendant was charged with assault with a deadly weapon. The police received two 911 calls from the defendant’s home. One was from the defendant’s 12-year-old nephew, indicating that the defendant and his girlfriend were arguing, and requesting assistance. The other call came 20 minutes later, from the defendant’s girlfriend, indicating that the defendant was drunk and had a rifle, which he had fired in the house and then left. When officers responded to the calls, they found the girlfriend in the kitchen crying; she told the responding officers that the defendant had been drunk, and shot his rifle in the bathroom while she was in it. All three statements (the two 911 calls and the girlfriend’s statement to the police) were admitted as excited utterances, and the defendant was convicted. The court affirmed. The court had little problem in finding that all three statements were properly admitted as excited utterances, and addressed whether the admission of the statements violated the defendant’s right to confrontation after *Crawford v. Washington*. The court first found that the nephew’s 911 call was not “testimonial” within the meaning of *Crawford*, as it was not the kind of statement that was equivalent to courtroom testimony. It had “no doubt that the statements of an adolescent boy who has called 911 while witnessing an argument between his aunt and her partner escalate to an assault would be emotional and spontaneous rather than deliberate and calculated.” The court used similar reasoning to find that the girlfriend’s 911 call was not testimonial. The court also found that the girlfriend’s statement to the police was not

testimonial. It reasoned that the girlfriend's conversation with the officers "was unstructured, and not the product of police interrogation."

**Note: The court's decision in *Brun* preceded the Supreme Court's treatment of 911 calls and statements to responding officers in *Davis/Hammon*, but the analysis appears consistent with that of the Supreme Court. It is true that in *Hammon* the Court found statements by the victim to responding police officers to be testimonial, but that was largely because the police officers engaged in a structured interview about past criminal activity; in *Brun* the victim spoke spontaneously in response to an arguable emergency. And the Court in *Davis/Hammon* acknowledged that statements to responding officers could be non-testimonial if they were directed more toward dealing with an emergency than toward investigating or prosecuting a crime.**

**Statements made by a child-victim to a forensic investigator are testimonial: *United States v. Bordeaux*, 400 F.3d 548 (8<sup>th</sup> Cir. 2005):** In a child sex abuse prosecution, the trial court admitted hearsay statements made by the victim to a forensic investigator. The court reversed the conviction, finding among other things that the hearsay statements were testimonial under *Crawford*. The court likened the exchange between the victim and the investigator to a police interrogation. It elaborated as follows:

The formality of the questioning and the government involvement are undisputed in this case. The purpose of the interview (and by extension, the purpose of the statements) is disputed, but the evidence requires the conclusion that the purpose was to collect information for law enforcement. First, as a matter of course, the center made one copy of the videotape of this kind of interview for use by law enforcement. Second, at trial, the prosecutor repeatedly referred to the interview as a 'forensic' interview . . . That [the victim's] statements may have also had a medical purpose does not change the fact that they were testimonial, because *Crawford* does not indicate, and logic does not dictate, that multi-purpose statements cannot be testimonial.

**Compare *United States v. Peneaux*, 432 F.3d 882 (8<sup>th</sup> Cir. 2005)** (distinguishing *Bordeaux* where the child's statement was made to a treating physician rather than a forensic investigator, and there was no evidence that the interview resulted in any referral to law enforcement: "Where statements are made to a physician seeking to give medical aid in the form of a diagnosis or treatment, they are presumptively nontestimonial.").

**Accomplice confession to law enforcement is testimonial: *United States v. Rashid*, 383 F.3d 769 (8<sup>th</sup> Cir. 2004):** The court held that an accomplice's confession to law enforcement officers was testimonial and therefore inadmissible against the defendant, even though the confession did not specifically name the defendant and incriminated him only by inference.

**Statements of a victim's state of mind and statements made for medical treatment are not testimonial:** *Evans v. Luebbers*, 371 F.3d 438 (8<sup>th</sup> Cir. 2004): The defendant was tried for murdering his wife. The prosecution admitted hearsay statements of the victim, indicating that she feared that the defendant would hurt her or murder her. Most of these statements were admitted under the state of mind exception, to rebut the defendant's contention that the victim committed suicide. Others were admitted as made for medical treatment. The court found that none of the victim's hearsay statements were testimonial as they did not fit the specific kinds of hearsay statements listed as testimonial by the Court in *Crawford*, i.e., "to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."

**Statement admissible as a declaration against penal interest, after *Williamson*, is not testimonial:** *United States v. Manfre*, 368 F.3d 832 (8<sup>th</sup> Cir. 2004): An accomplice made a statement to his fiancée that he was going to burn down a nightclub for the defendant. The court held that this statement was properly admitted as a declaration against penal interest, as it was not a statement made to law enforcement to curry favor. Rather, it was a statement made to loved ones. For the same reason, the statement was not testimonial under *Crawford*; it was a statement made to a loved one and was "not the kind of memorialized, judicial-process-created evidence of which *Crawford* speaks."

**Statements by a coconspirator during the course and in furtherance of the conspiracy are not testimonial:** *United States v. Lee*, 374 F.3d 637 (8<sup>th</sup> Cir. 2004): The court held that statements admissible under the coconspirator exemption from the hearsay rule are by definition not testimonial. As those statements must be made during the course and in furtherance of the conspiracy, they are not the kind of formalized, litigation-oriented statements that the Court found to be testimonial in *Crawford*. The court reached the same result on co-conspirator hearsay in *United States v. Reyes*, 362 F.3d 536 (8<sup>th</sup> Cir. 2004).

### *Ninth Circuit*

**Certificate prepared by government officials prepared for purposes of litigation is NOT testimonial:** *United States v. Cervantes-Flores*, 421 F.3d 825 (9<sup>th</sup> Cir. 2005): The defendant was convicted of being found in the United States after deportation, without permission to re-enter. As evidence that he had not been permitted to re-enter, the government offered a Certificate of Nonexistence of Record, indicating that a search found no indication of permission in the pertinent records. The defendant argued that admitting the CNR violated his confrontation rights after *Crawford*, but the court disagreed and affirmed the conviction. The court recognized that the CNR was prepared for purposes of a prosecution, but nonetheless found the evidence to be non-testimonial. It explained that while the *certificate* was prepared for litigation, the underlying records were not. (Though this misses the point that while the underlying records are not testimonial, the certificate as to their existence or non-existence could

still be so because the certificate is prepared for purposes of litigation). The court concluded as follows:

Finally, we note the obvious—that the CNR does not resemble the examples of testimonial evidence given by the Court [in *Crawford*]. “Police interrogations” and “prior testimony at a preliminary hearing, before a grand jury, or at a former trial” all involve live out-of-court statements against a defendant elicited by a government officer with a clear eye to prosecution. Ruth Jones’ certification that a particular record does not exist in the INS’s files bears no resemblance to these types of evidence.

*See also United States v. Bahena-Cardenas*, 411 F.3d 1067 (9th Cir. 2005) (a warrant of deportation was non-testimonial "because it was not made in anticipation of litigation, and because it is simply a routine, objective, cataloging of an unambiguous factual matter."); *United States v. Weiland*, 420 F.3d 1062 (9<sup>th</sup> Cir. 2006) (certification of a record of conviction by a public official was not testimonial under *Crawford*: “Not only are such certifications a ‘routine cataloging of an unambiguous factual matter,’ but requiring the records custodians and other officials from the various states and municipalities to make themselves available for cross-examination in the countless criminal cases heard each day in our country would present a serious logistical challenge without any apparent gain in the truth-seeking process. We decline to so extend *Crawford*, or to interpret it to apply so broadly.”) (quoting *Bahena-Cardenas*).

**Note: The result and rationale of *Cervantes-Flores* (like *Rueda-Rivera* in the Fifth Circuit) indicate that hearsay statements offered under Rule 803(10), as well as affidavits authenticating business records under Rules 902(11) and (12), will be considered non-testimonial and therefore admissible even after *Crawford*.**

**Foreign business records are not testimonial: *United States v. Hagege***, 437 F.3d 943 (9<sup>th</sup> Cir. 2006): In a prosecution for bankruptcy fraud and related offenses, the trial court admitted foreign business records under 18 U.S.C. § 3505. Similar to Rule 803(6), section 3505 allows the foundation requirements for the business records exception to be established by certification. The defendant argued that admission of the foreign business records violated his right to confrontation after *Crawford*. The court rejected this argument and affirmed the convictions. It relied on the statement in *Crawford* that business records are an example of the kind of statements “which by their nature are not testimonial.” The court noted that “[t]he foreign certifications attesting to the authenticity of the business records were not admitted into evidence. Thus, we do not consider whether admission of the foreign certifications would have violated the Confrontation Clause under *Crawford*.”

**Statements in furtherance of a conspiracy are not testimonial; statements to police officers implicating the defendant in the conspiracy are testimonial: *United States v. Allen***, 425 F.3d 1231 (9<sup>th</sup> Cir. 2005): The court held that “co-conspirator statements are not testimonial

and therefore beyond the compass of *Crawford's* holding.” In contrast, a statement made by a former coconspirator to a police officer, after he was arrested, identifying the defendant as a person recruited for the conspiracy, was testimonial. There was no error in admitting this statement, however, because the declarant testified at trial and was cross-examined. *See also United States v. Larson*, 460 F.3d 1200 (9<sup>th</sup> Cir. 2006) (statement from one conspirator to another identifying the defendants as the source of some drugs was made in furtherance of the conspiracy; conspiratorial statements were not testimonial as there was no expectation that the statements would later be used at trial).

**Statements made by a child-victim to a detective are testimonial: *Bockting v. Bayer***, 399 F.3d 1010 (9<sup>th</sup> Cir. 2005): The court found that statements of a child-victim of sexual abuse, made in an interview with a police detective, were testimonial within the meaning of *Crawford*. The court also held that *Crawford* was retroactive to cases on habeas review — a ruling that is contrary to the results reached in every other circuit, and is currently being reviewed by the Supreme Court.

**Accomplice statement to law enforcement is testimonial: *United States v. Nielsen***, 371 F.3d 574 (9<sup>th</sup> Cir. 2004): Nielsen resided in a house with Volz. Police officers searched the house for drugs. Drugs were found in a floor safe. An officer asked Volz who had access to the floor safe. Volz said that she did not but that Nielsen did. This hearsay statement was admitted against Nielsen at trial. The court found this to be error, as the statement was testimonial under *Crawford*, because it was made to police officers during interrogation. The court noted that even the first part of Volz’s statement — that she did not have access to the floor safe — violated *Crawford* because it provided circumstantial evidence that Nielsen did have access.

**Excited utterance not testimonial under the circumstances, even though made to law enforcement: *Leavitt v. Arave***, 371 F.3d 663 (9<sup>th</sup> Cir. 2004): In a murder case, the government introduced the fact that the victim had called the police the night before her murder and stated that she had seen a prowler who she thought was the defendant. The court found that the victim’s statement was admissible as an excited utterance, as the victim was clearly upset and made the statement just after an attempted break-in. The court held that even if *Crawford* were retroactive, the statement was not testimonial under *Crawford*. The court explained as follows:

Although the question is close, we do not believe that Elg’s statements are of the kind with which *Crawford* was concerned, namely, testimonial statements. While the *Crawford* Court left “for another day any effort to spell out a comprehensive definition of ‘testimonial,’” it gave examples of the type of statements that are testimonial and with which the Sixth Amendment is concerned — namely, “prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and . . . police interrogations.” We do not think that Elg’s statements to the police she called to her home fall within the compass of

these examples. Elg, not the police, initiated their interaction. She was in no way being interrogated by them but instead sought their help in ending a frightening intrusion into her home. Thus, we do not believe that the admission of her hearsay statements against Leavitt implicate the principal evil at which the Confrontation Clause was directed: the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused.

**Note: The court's decision in *Leavitt* preceded the Supreme Court's treatment of 911 calls and statements to responding officers in *Davis/Hammon*, but the analysis appears consistent with that of the Supreme Court. It is true that in *Hammon* the Court found statements by the victim to responding police officers to be testimonial, but that was largely because the police officers engaged in a structured interview about past criminal activity; in *Leavitt* the victim spoke spontaneously in response to a possible continuing threat to her safety. And the Court in *Davis/Hammon* acknowledged that statements to responding officers could be non-testimonial if they were geared more toward dealing with an emergency than toward investigating or prosecuting a crime.**

**Statement of an accomplice made to his attorney is not testimonial: *Jensen v. Pfliler*, 439 F.3d 1086 (9<sup>th</sup> Cir. 2006):** Taylor was in custody for the murder of Kevin James. He confessed the murder to his attorney, and implicated others, including Jensen. After Taylor was released from jail, Jensen and others murdered him because they thought he talked to the authorities. Jensen was tried for the murder of both James and Taylor, and the trial court admitted the statements made by Taylor to his attorney (Taylor's next of kin having waived the privilege). The court found that the statements made by Taylor to his attorney were not testimonial, as they "were not made to a government officer with an eye toward trial, the primary abuse at which the Confrontation Clause was directed." Even under a broader definition of testimonial, Taylor could not have reasonably expected that his statements would be used in a later trial, as they were made under a promise of confidentiality. Finally, while Taylor's statements amounted to a confession, they were not given to a police officer in the course of interrogation.

**Grand jury testimony is testimonial: *United States v. Wilmore*, 381 F.3d 868 (9<sup>th</sup> Cir. 2004):** The court held, unsurprisingly, that grand jury testimony is testimonial under *Crawford*. It could hardly have held otherwise, because even under the narrowest definition of "testimonial" (i.e., the specific types of hearsay mentioned by the *Crawford* Court) grand jury testimony is covered within the definition.

**Accusatory statements in a victim's diary are not testimonial: *Parle v. Runnels*, 387 F.3d 1030 (9<sup>th</sup> Cir. 2004):** In a murder case, the government offered statements of the victim that she had entered in her diary. The statements recounted physical abuse that the victim received at the hand of the defendant. The defendant argued that the admission of the diary violated his right

to confrontation. The court held that even if *Crawford* were retroactive, it would not help the defendant. The victim's diary was not testimonial, as it was a private diary of daily events. There was no indication that it was prepared for use at a trial.

**Statement admitted against co-defendant only does not implicate *Crawford*: *Mason v. Yarborough*, 447 F.3d 693 (9<sup>th</sup> Cir. 2006):** A non-testifying codefendant confessed during police interrogation. At the trial of both defendants, the government introduced only the fact that the codefendant confessed, not the content of the statement. The court first found that there was no *Bruton* violation, because the defendant's name was never mentioned, and *Bruton* does not prohibit the admission of hearsay statements of a non-testifying codefendant if the statements implicate the defendant only by inference. For similar reasons, the court found no *Crawford* violation, because the codefendant was not a "witness against" the defendant. "Because Fenton's words were never admitted into evidence, he could not 'bear testimony' against Mason."

### ***Tenth Circuit***

**Statement made by an accomplice after arrest, but before formal interrogation, is testimonial: *United States v. Summers*, 414 F.3d 1287 (10<sup>th</sup> Cir. 2005):** The defendant's accomplice in a bank robbery was arrested by police officers. As he was walked over to the patrol car, he said to the officer, "How did you guys find us so fast?" The court found that the admission of this statement against the defendant violated his right to confrontation under *Crawford*. The court reviewed the *Crawford* opinion in detail, including the three proffered tests for the term "testimonial" that were discussed by the Court. It stated that "the common nucleus present in the formulations which the Court considered centers on the reasonable expectations of the defendant." It held that "a statement is testimonial if a reasonable person in the position of the declarant would objectively foresee that his statement might be used in the investigation or prosecution of a crime." Thus, the court rejected the view that the term "testimonial" should be limited to the specific examples set forth in *Crawford*, i.e., grand jury testimony, prior testimony, plea allocution, and statements made during police interrogation.

Applying its test to the facts, the Court found that the accomplice's statement, "How did you guys find us so fast?", was testimonial. It explained as follows:

Although Mohammed had not been read his *Miranda* rights and was not subject to formal interrogation, he had nevertheless been taken into physical custody by police officers. His question was directed at a law enforcement official. Moreover, Mohammed's statement . . . implicated himself and thus was loosely akin to a confession. Under these circumstances, we find that a reasonable person in Mohammed's position would objectively foresee that an inculpatory statement implicating himself and others might be used in a subsequent investigation or prosecution.

## *Eleventh Circuit*

**Warrant of deportation prepared by government officials is NOT testimonial:** *United States v. Cantellano*, 430 F.3d 1142 (11<sup>th</sup> Cir. 2005): In an illegal reentry case, the defendant argued that the warrant of deportation was testimonial under *Crawford* and therefore his right to confrontation was violated by its admission. The warrant was offered to prove that the defendant left the country. The Court held that the warrant was not testimonial. It reasoned as follows:

Although the Court in *Crawford* declined to give a comprehensive definition of "testimonial" evidence, non-testimonial evidence fails to raise the same concerns as testimonial evidence. Because non-testimonial evidence is not prepared in the shadow of criminal proceedings, it lacks the accusatory character of testimony. Non-testimonial evidence is not inherently adversarial. We are persuaded that a warrant of deportation does not implicate adversarial concerns in the same way or to the same degree as testimonial evidence. A warrant of deportation is recorded routinely and not in preparation for a criminal trial. It records facts about where, when, and how a deportee left the country. Because a warrant of deportation does not raise the concerns regarding testimonial evidence stated in *Crawford*, we conclude that a warrant of deportation is non-testimonial and therefore is not subject to confrontation.

The court also relied on the fact that the Fifth and the Ninth Circuits have held that certificates of no grant of entry (CNR's) are non-testimonial.

**Private conversation between mother and son is not testimonial:** *United States v. Brown*, 441 F.3d 1330 (11<sup>th</sup> Cir. 2006): The defendant was convicted of murder of a federal employee. At trial, the court admitted testimony that the defendant's mother received a phone call, apparently from the defendant; the mother asked whether the defendant had killed the victim, and then the mother started crying. The mother's reaction was admitted at trial as an excited utterance. The court found no violation of *Crawford*. The court reasoned as follows:

We need not divine any additional definition of "testimonial" evidence to conclude that the private conversation between mother and son, which occurred while Sadie Brown was sitting at her dining room table with only her family members present, was not testimonial. The phone conversation Davis overheard obviously was not made under examination, was not transcribed in a formal document, and was not made under circumstances leading an objective person to reasonably believe the statement would be available for use at a later trial. Thus, it is not testimonial and its admission is not barred by *Crawford*. (Citations omitted).

**Statements made by accomplice to police officers during a search are testimonial:** *United States v. Arbolaez*, 450 F.3d 1283 (11<sup>th</sup> Cir. 2006): In a marijuana prosecution, the Court found error in the admission of statements made by one of the defendant's accomplices to law enforcement officers during a search. The government argued that the statements were offered not for truth but to explain the officers' reactions to the statements. But the Court found that "testimony as to the details of statements received by a government agent . . . even when purportedly admitted not for the truthfulness of what the informant said but to show why the agent did what he did after he received that information constituted inadmissible hearsay." The Court also found that the accomplice's statements were testimonial under *Crawford v. Washington*, because they were made in response to questions from police officers.

**Statements made during the course and in furtherance of the conspiracy are not testimonial:** *United States v. Underwood*, 446 F.3d 1340 (11<sup>th</sup> Cir. 2006): In a drug case, the defendant argued that the admission of an intercepted conversation between his brother Darryl and an undercover informant violated *Crawford*. But the court found no error and affirmed. The court explained as follows:

In this case, the challenged evidence consisted of recorded conversations between the confidential informant and Darryl in which arrangements were made for the confidential informant to purchase cocaine. This evidence is neither testimony at a preliminary hearing, nor testimony before a grand jury, nor testimony at a former trial, nor a statement made during a police interrogation. Moreover, the challenged evidence does not fall within any of the formulations which *Crawford* suggested as potential candidates for "testimonial" status. Darryl, the declarant in the challenged evidence, made statements to Hopps in furtherance of the criminal conspiracy. His statements clearly were not made under circumstances which would have led him reasonably to believe that his statement would be available for use at a later trial. Had Darryl known that Hopps was a confidential informant, it is clear that he never would have spoken to her in the first place.

Although the foregoing discussion would probably support a holding that the evidence challenged here is not "testimonial," two additional aspects of the *Crawford* opinion seal our conclusion that Darryl's statements to the government informant were not "testimonial" evidence. First, the Court stated: "most of the hearsay exceptions covered statements that by their nature were not testimonial -- for example, business records or statements in furtherance of a conspiracy." Also, the Court cited *Bourjaily v. United States*, 483 U.S. 171 (1987) approvingly, indicating that it "hew[ed] closely to the traditional line" of cases that *Crawford* deemed to reflect the correct view of the Confrontation Clause. In approving *Bourjaily*, the *Crawford* opinion expressly noted that it involved statements unwittingly made to an FBI informant. *Bourjaily* held that a co-conspirator's unwitting statements to an FBI informant were properly admitted at trial against the defendant, despite the fact that the defendant had not had a prior opportunity for cross-examination and the declarant was not available at trial. The co-conspirator

statement in *Bourjaily* is indistinguishable from the challenged evidence in the instant case.

## ***Cases Discussing the Impact of the Confrontation Clause on Non-Testimonial Hearsay After Crawford***

### ***Supreme Court***

**Strong indication (albeit dicta) that the *Roberts* test no longer governs non-testimonial hearsay:** *Davis v. Washington and Hammon v. Indiana*, 126 S.Ct. 2266 (2006). In *Davis/Hammon*, the Court considered, in passing, “whether the Confrontation Clause applies only to testimonial hearsay.” The Court stated that the answer to this question “was suggested in *Crawford*, even if not explicitly held.” The Court then quoted a passage from *Crawford* indicating that the use of the term “witness” in the Sixth Amendment was intended to refer only to those who give “testimony” The Court then concluded that a “limitation so clearly reflected in the text of the constitutional provision must fairly be said to mark out not merely its core, but its perimeter.” Thus, the strong implication from *Davis/Hammon* is that if hearsay is not testimonial, then the Confrontation Clause provides no limitation on its admission. Put another way, if the hearsay is not testimonial, then whatever reliability guarantees must be met are provided by the hearsay rule and its exceptions — and perhaps by the Due Process Clause — but not by the Confrontation Clause.

But the language in *Davis/Hammon* does not rise to a holding, because there was no question in the case about application of the Confrontation Clause to any non-testimonial hearsay.

### ***Post-Davis/Hammon Cases on the Roberts Question***

***Roberts* test still applies to non-testimonial hearsay:** *United States v. Thomas*, 453 F.3d 838 (7<sup>th</sup> Cir. 2006): The court held that a 911 call was non-testimonial under *Crawford* and also admissible under the Evidence Rules as an excited utterance. It then applied the *Roberts* test and found that test satisfied because the hearsay exception for excited utterances is firmly-rooted. On the continued viability of the *Roberts* test as applied to non-testimonial hearsay after *Davis/Hammon*, the court had this to say:

While at first glance, *Davis* appears to speak of *Roberts* being overruled in general, a closer reading reveals that the discussion of *Roberts* occurs strictly within the context of statements implicating the Confrontation Clause. Where the Court addresses nontestimonial statements such language is conspicuously absent.

**Dictum that *Roberts* no longer regulates nontestimonial hearsay after**

***Davis/Hammon: United States v. Tolliver***, 454 F.3d 660 (7<sup>th</sup> Cir. 2006): This case involved statements admitted for a non-hearsay purpose. The court therefore found *Crawford* inapplicable. The court dropped a footnote which stated as follows:

*Crawford's* focus was testimonial hearsay. As for treatment of nontestimonial hearsay under the Confrontation Clause, *Crawford* left the issue unresolved, stating: "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law--as does *Roberts* and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." However, the Supreme Court's recent decision on the matter, *Davis v. Washington*, appears to have resolved the issue, holding that nontestimonial hearsay is not subject to the Confrontation Clause. 126 S. Ct. at 2273, 2274-76, 2277-78.

**Note: The following circuit court cases all hold that the *Roberts* reliability test still governs the admissibility of non-testimonial hearsay. But all of these cases were decided before the Supreme Court's decision in *Davis/Hammon*. As indicated above, the Supreme Court has in those cases drawn the continued viability of *Roberts* into substantial doubt.**

**Non-testimonial hearsay evaluated under the *Roberts* test: *Horton v. Allen***, 370 F.3d 75 (1<sup>st</sup> Cir. 2004): The court declared that hearsay statements offered under the state of mind exception were not testimonial. It further held that non-testimonial hearsay should be evaluated under the *Ohio v. Roberts* test to determine whether it violates the defendant's right to confrontation. The court found that the state of mind exception was "firmly-rooted" and therefore the admission of the statements under that exception satisfied the *Roberts* test. **See also *United States v. Felton***, 417 F.3d 97 (1<sup>st</sup> Cir. 2005) (statement made during the course and in furtherance of the conspiracy was not testimonial under *Crawford*; no violation of the Confrontation Clause because the statement fell within a firmly rooted exception under *Roberts*).

**Non-testimonial hearsay is governed by the *Roberts* test: *United States v. Saget***, 377 F.3d 233 (2d Cir. 2004): As discussed above, an accomplice's statement to an undercover agent was admitted as a declaration against penal interest, and the court found it to be non-testimonial. The court noted that the *Crawford* Court was critical of the *Roberts* reliability test as a way to evaluate hearsay under the Confrontation Clause, and that this critique might well be applicable to non-testimonial hearsay. In the end, however, the court observed that *Crawford* did not explicitly overrule *Roberts* insofar as non-testimonial hearsay was concerned. The court therefore evaluated the admissibility of the accomplice's statement under the *Roberts* test.

**The Roberts test remains applicable to non-testimonial hearsay: *United States v. Holmes*, 406 F.3d 337 (5<sup>th</sup> Cir. 2005):** The court stated that with respect to nontestimonial hearsay statements, “*Crawford* leaves in place the *Roberts* approach to determining admissibility.”

**Accomplice’s statements to a friend, implicating both the accomplice and the defendant in the crime, are admissible under the Roberts test : *Ramirez v. Dretke*, 398 F.3d 691 (5<sup>th</sup> Cir. 2005):** The defendant was convicted of murder. Hearsay statements of his accomplice were admitted against him. The accomplice made statements both before and after the murder that directly implicated the defendant. These statements were made to the accomplice’s roommate. The Court found that these statements were not testimonial under *Crawford* because they were “spontaneous out-of-court statements made outside any arguably judicial or investigatorial context.” The Court also noted that the statements were not barred under *Roberts* because, unlike the confession to police officers found infirm in *Lilly v. Virginia*, the accomplice’s statements in this case were made to a friend under informal circumstances. Thus, they bore particularized guarantees of trustworthiness.

**Declaration against penal interest, made to a friend, is admissible under the Roberts test as applied to a non-firmly-rooted hearsay exception : *United States v. Franklin*, 415 F.3d 537 (6<sup>th</sup> Cir. 2005):** The defendant was charged with bank robbery. One of the defendant’s accomplices (Clarke), was speaking to a friend (Wright) some time after the robbery. Wright told Clarke that he looked “stressed out.” Clarke responded that he was indeed stressed out, because he and the defendant had robbed a bank and he thought the authorities were on their trail. The court found no error in admitting Clarke’s hearsay statement against the defendant as a declaration against penal interest, as it disserved Clark’s interest and was not made to law enforcement officers in any attempt to curry favor with the authorities. On the constitutional question, the court found that Clarke’s statement was not testimonial under *Crawford*. But the court noted that “the Supreme Court did not explicitly overrule its prior Confrontation Clause jurisprudence with its holding in *Crawford*” insofar as it applied to nontestimonial hearsay. “Consequently, with respect to non-testimonial hearsay statements, *Roberts* and its progeny remain the controlling precedents.”

Applying *Roberts*, the court essentially rejected the government’s argument that Rule 804(b)(3) is a firmly-rooted hearsay exception. It found, however, that Clarke’s statements carried circumstantial guarantees of trustworthiness sufficient to satisfy the *Roberts* standards as applied to hearsay offered under an exception that is not firmly-rooted:

First, Clarke made the self-inculpatory statements not to investigators, but to his close friend. Consequently, to the extent the statements inculpated Franklin, there is no basis to conclude that Clarke intentionally did so to curry favor with law enforcement. Further, the context of Clarke’s admissions to Wright was not that of puffing or bragging

. . . . In contrast to cases in which a declarant confesses to law enforcement but additionally implicates his accomplice in the crime, this case involves statements the declarant (Clarke) made in confidential exchanges with a long-time friend — a friend he had no reason to conclude would reveal those statements to law enforcement. Moreover, in his statements to Wright, Clarke did not minimize his role in the robbery; the most plausible conclusion to draw from the content of the statements is that Clarke and Franklin each played substantial roles in the commission of the offense. . . . Accordingly, we conclude that Clarke’s statements to Wright— which implicated both Clarke and Franklin — bear particularized guarantees of trustworthiness and are therefore admissible under the confrontation clause . . .

**For a case similar to *Franklin*, see *United States v. Johnson*, 440 F.3d 832 (6<sup>th</sup> Cir. 2006)** (statements of an accomplice made to an undercover informant were not testimonial as there was no reason to think they would be used in a criminal prosecution or investigation of the defendant; constitutional admissibility was therefore determined by the *Roberts* test; the hearsay exception for declarations against penal interest is not firmly-rooted; but the statements carried particularized guarantees of trustworthiness, as the declarant made them to a long-time friend, he did not know that the friend was cooperating with law enforcement, and the declarant was not trying to shift blame to the defendant).

**Defendant’s own statements, reporting statements of another defendant, are not testimonial under the circumstances and bear particularized guarantees of trustworthiness: *United States v. Gibson*, 409 F.3d 325 (6<sup>th</sup> Cir. 2005):** In a case involving fraud and false statements arising from a mining operation, the trial court admitted testimony from a witness that Gibson told him that another defendant was planning on doing something that would violate regulations applicable to mining. The court recognized that the testimony encompassed double hearsay, but that each level of hearsay was admissible as an admission by a party-opponent. Gibson also argued that the testimony violated *Crawford*. Here, Gibson’s statement and the underlying statement of the other defendant were both casual remarks made to an acquaintance, and therefore were not testimonial. The court stated that *Crawford* dealt only with testimonial statements and did not disturb the rule that nontestimonial statements are constitutionally admissible if they bear independent and particularized guarantees of trustworthiness. The court found that particularized guarantees of trustworthiness existed in this case: the statements were not made in the course of an official investigation, and Gibson was not attempting to curry favor or shift blame.

**Excited utterances are governed by, and properly admitted under, *Roberts*: *United States v. Brun*, 416 F.3d 703 (8<sup>th</sup> Cir. 2005):** The court stated that the constitutional admissibility of non-testimonial hearsay continues to be governed by the *Roberts* reliability-based test, as the Supreme Court in *Crawford* had not abrogated that test insofar as it applies to non-testimonial

hearsay. Applying the *Roberts* test to 911 calls as well as statements to responding officers, the court found no constitutional error in admitting the statements, as they were excited utterances that fell within a firmly-rooted hearsay exception.

**Accusatory statements in a victim’s diary were properly admitted under the *Roberts* analysis: *Parle v. Runnels*, 387 F.3d 1030 (9<sup>th</sup> Cir. 2004):** In a murder case, the government offered statements of the victim that she had entered in her diary. The statements recounted physical abuse that the victim received at the hand of the defendant. The defendant argued that the admission of the diary violated his right to confrontation. As discussed above, the court held that the diary entries were not testimonial. The court applied the *Roberts* analysis to the diary entries. The diary was admitted under a hearsay exception that is something like a residual exception for statements made by victims—called colloquially the “O.J. exception.” The court found that the exception was not firmly rooted because it was based on a general trustworthiness standard rather than categorical admissibility requirements. The question therefore was whether the diary entries carried particularized guarantees of trustworthiness. The court found sufficient guarantees to exist. The diary entries were private, they discussed intensely personal and embarrassing information, and so there was no motive to falsify. The diary was regularly kept and recounted parts of the victim’s life other than her relationship with the defendant. The court found it “entirely reasonable for the state court to find that Mary’s diary was trustworthy because she kept it regularly and in it recorded the everyday experiences of her life.”

