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JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

September 18, 2007

Honorable Richard B. Cheney
President
United States Senate
S-212 United States Capitol Building
Washington, DC 20510

Dear Mr. President:

On behalf of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, I am pleased to transmit to you the *Report on the Necessity and Desirability of Amending the Federal Rules of Evidence to Codify a "Harm to Child" Exception to the Marital Privileges.*

The report is submitted to your committee consistent with § 214 of the Adam Walsh Child Protection and Safety Act of 2006 (Pub. L. No. 109-248). The legislation directed the rules committee to study the 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 a child. After extensive consideration and deliberation, the rules committee concluded that it is neither necessary nor desirable to amend the Evidence Rules to implement a harm to child exception to either of the marital privileges. The enclosed report contains the rules committee's findings and recommendations.

Sincerely,

James C. Duff
Secretary

Enclosure

cc: Honorable Harry Reid
Honorable Mitch McConnell
Honorable Patrick J. Leahy
Honorable Arlen Specter

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

September 18, 2007

Honorable Nancy Pelosi
Speaker
United States House of Representatives
H-232 United States Capitol Building
Washington, DC 20515

Dear Madam Speaker:

On behalf of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, I am pleased to transmit to you the *Report on the Necessity and Desirability of Amending the Federal Rules of Evidence to Codify a "Harm to Child" Exception to the Marital Privileges*.

The report is submitted to your committee consistent with § 214 of the Adam Walsh Child Protection and Safety Act of 2006 (Pub. L. No. 109-248). The legislation directed the rules committee to study the 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 a child. After extensive consideration and deliberation, the rules committee concluded that it is neither necessary nor desirable to amend the Evidence Rules to implement a harm to child exception to either of the marital privileges. The enclosed report contains the rules committee's findings and recommendations.

Sincerely,

James C. Duff
Secretary

Enclosure

cc: Honorable Steny H. Hoyer
Honorable John A. Boehner
Honorable John Conyers, Jr.
Honorable Lamar Smith

Report on the Necessity and Desirability of Amending the Federal Rules of Evidence to Codify a "Harm to Child" Exception to the Marital Privileges

PREPARED FOR THE
U.S. SENATE AND HOUSE OF REPRESENTATIVES

JUDICIAL CONFERENCE OF THE UNITED STATES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

June 2007

Report on the Necessity and Desirability of Amending the Federal Rules of Evidence to Codify a "Harm to Child" Exception to the Marital Privileges

Judicial Conference Committee on Rules of Practice and Procedure

June 15, 2007

Introduction

Public 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.
>
> * * *

This report of the Judicial Conference Committee on Rules of Practice and Procedure ("the Rules Committee") is in response to the Section 214 directive. The Advisory Committee on Evidence Rules ("the Advisory Committee") has conducted a thorough inquiry of the existing case law on the exceptions to the marital privileges that apply when a defendant is charged with harm to a child (the "harm to child" exception). The Advisory Committee has also reviewed the pertinent literature and considered the policy arguments both in favor and against a harm to child exception; and it has relied on its experience in preparing and proposing amendments to the Federal Rules of Evidence. The Advisory Committee has concluded — after extensive consideration and deliberation — that it is neither necessary nor desirable to amend the Evidence Rules to implement a harm to child exception to either of the marital privileges. The Rules Committee has reviewed the Advisory Committee's work on this subject and agrees with the Advisory Committee's conclusion.

This Report explains the conclusions reached by the Rules Committee and the Advisory Committee. It is divided into three parts. Part I discusses the Federal case law on the harm to child exception to the marital privileges. Part II discusses whether the costs of amending the Federal Rules of Evidence are justified by any benefits of codifying the harm to child exception; it concludes that the costs substantially outweigh the benefits. Part III sets forth suggested language for an amendment, should Congress nonetheless decide that it is necessary and desirable to amend the Federal Rules of Evidence to codify a harm to child exception to the marital privileges.

I. Federal Case Law on the Harm to Child Exception

Basic Principles

There are two separate marital privileges under Federal common law: 1) the adverse testimonial privilege, under which a witness has the right to refuse to provide testimony that is adverse to a spouse; and 2) the marital privilege for confidential communications, under which confidential communications between spouses are excluded from trial. The rationale for the adverse testimonial privilege is that it is necessary to preserve the harmony of marriages that exist at the time the testimony is demanded. The adverse testimonial privilege is held by the witness-spouse, not by the accused; the witness-spouse is free to testify against the accused but cannot be compelled to do so. *See Trammel v. United States,* 445 U.S. 40 (1980). The rationale of the confidential communications privilege is to promote the marital relationship at the time of the communication. The confidential communications privilege is held by both parties to the confidence. Thus, an accused can invoke the privilege to protect marital confidences even if the witness-spouse wishes to disclose them. *See United States v. Montgomery,* 384 F.3d 1050 (9th Cir. 2004).

These marital privileges are not codified in the Federal Rules of Evidence; they have been developed under the Federal common law, which establishes rules of privilege in cases in which Federal law provides the rule of decision. *See* Fed.R.Evid. 501.

The question posed by the Adam Walsh Child Protection Act is whether the Evidence Rules should be amended to codify an exception, under which information otherwise protected by either of the marital privileges would be admissible in a federal criminal case in which a spouse is charged with a crime against a child of either spouse or under the custody or control of either spouse. If such an exception were implemented, the following would occur in cases in which the defendant is charged with such a crime: 1) a spouse could be compelled, on pain of contempt, to testify against the defendant; and 2) a confidential communication made by an accused to a spouse would be disclosed by the witness over the accused's objection.

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

There is only one reported case in which a Federal court has upheld a claim of marital privilege in a prosecution 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 accused 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 a witness from being compelled to testify against a spouse. After holding that the marriage was valid, the court refused to apply a harm to child exception to the adverse testimonial privilege, and upheld the 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 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 *Jarvison* court made 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* did not cite relatively recent authority from its own circuit that applied the harm to child exception to the adverse testimonial 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* and found no error when the defendant's wife testified against him in a case involving abuse of the couples' daughters. The defendant argued that his wife should have been told she had a privilege not to testify against him. But the court found that no warning was required because the defendant was charged with harm to a child of the marriage, and therefore the spouse had no adverse testimonial privilege to assert. For purposes of the harm to child exception, the *Castillo* court made no distinction between the adverse testimonial privilege and the confidential communications privilege.

It should also be noted that the *Jarvison* court implied more broadly that no Federal court had ever applied an exception that would compel adverse spousal testimony. In fact at least one Federal court has upheld an order compelling a witness to provide adverse testimony against a spouse. *See, e.g., United States v. Clark,* 712 F.2d 299 (7th Cir. 1983) (affirming a judgment of criminal contempt against a witness for refusing to testify against his spouse; holding that privilege could not be invoked to prevent testimony about acts that occurred before the marriage).

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 testimonial privilege and the confidential 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 to the defendant's communication. 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 Untied States v. Roberson,* 859 F.2d 1376, 1370 (9th Cir. 1988). 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.

In *Bahe, supra,* the court 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. * * *
>
> 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 Testimonial Privilege

In *United States v. Allery,* 526 F.2d 1362 (8th Cir. 1975), the court held that the adverse testimonial privilege was not available because the defendant was charged with the attempted rape of his twelve-year-old daughter. The court declared as follows:

> We recognize 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.

In addition, as discussed above, the Tenth Circuit in *United States v. Castillo,* 140 F.3d 874 (10th Cir. 1998), found that the adverse testimonial privilege was not applicable in a prosecution against a defendant for the abuse of his children.

Summary on Federal Case Law

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 that applied the harm to child exception 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.*

5. Its assertion that no federal court had ever compelled a witness to testify against a spouse is incorrect.

II. 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 Rules Committee and the Advisory Committee have long taken the position that amendments to the Evidence Rules should not be proposed unless 1) there is a critical problem in the application of the existing rules, and 2) an amendment would correct that problem without creating others. Amendments to the Evidence Rules come with a cost. The Evidence Rules are based on a shared understanding of lawyers and judges; they are often applied on a moment's notice as a trial is progressing. Most of the Evidence Rules have been developed by a substantial body of case law. Changes to the Evidence Rules upset settled expectations and can lead to inefficiency and confusion in legal proceedings. Changes to the Evidence Rules may also create a trap for unwary lawyers who might not keep track of the latest amendments. Moreover, a change might result in unintended consequences that could lead to new problems, necessitating further amendments.

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

Under the accepted criteria for proposing an amendment to the Evidence Rules, set forth above, there is only one reason that could possibly support an amendment proposing a harm to child exception to the marital privileges: a split in the circuits. The current common law approach 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, because the privilege would apply. Nor is the current state of the common law subject to unconstitutional application, as there appears to be no constitutional issue at stake in the application of a harm to child exception to the marital privileges. 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 the split in the courts over the harm to child exception, discussed above, 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 Evidence Rule 408, effective December 1, 2006, was necessitated because the circuits were split over the admissibility of civil compromise evidence in a subsequent criminal case. The admissibility of civil compromise evidence in a subsequent criminal prosecution is a question that arises quite frequently, given the often parallel tracks of civil and criminal suits concerning the same misconduct. The circuits were basically evenly split on the question, and ten circuits had written decisions on the subject; it was not just one outlying case creating the conflict. Moreover, the proper resolution of the admissibility of compromise evidence in criminal prosecutions was one on which reasonable minds could differ. The disagreement was close on the merits and it was unlikely that any circuit would re-evaluate the question and reverse its course. Finally, the dispute among the circuits was at least 15 years old, so it appeared that the Supreme Court was unlikely to intervene as it had not already done so.

The amendment to Evidence Rule 609, effective December 1, 2006, 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. Again, the disputed question was one that arose frequently in federal litigation, and the dispute was at least 10 years old.

In contrast, the split among the circuits over the harm to child exception is not deep; it is not wide; it is not longstanding; the issue arises only rarely in Federal courts; and the dispute is not one in which courts on both sides have reached a considered resolution after reasonable argument.

It is notable that 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 there is no conflict to rectify, and accordingly there would appear to be no need to undertake the costs of amendment the Evidence Rules to codify a harm to child exception to the confidential communications privilege.

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 Tenth Circuit after *Jarvison* is bound to follow not *Jarvison* but its previous precedent, *Castillo*, which applied a harm to child exception to the adverse testimonial privilege.

In sum, an amendment providing for a harm to child exception to the marital privileges does not rise to the level of necessity that traditionally has justified 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 Rules amendments, there are other problems that are likely to arise in the enactment of such an amendment.

1. Questions of Scope of the Harm to Child Exception

Drafting a harm to child exception will raise a number of knotty questions concerning its scope. The most difficult question of scope is determining which children would trigger the exception. Questions include whether the exception should cover harm to stepchildren, foster-children, and grandchildren. Strong arguments can be made that the exception should cover harm to children who are not related to the defendant or the witness, but who are within the custody or control of either spouse. But the term "custody or control" may raise questions of application that need to be considered, because it can be argued that a child was by definition within the defendant's custody or control when victimized by the defendant.

Another difficult question of scope is whether the harm to child exception should cover crimes against children older than a certain age. If a judgment is made that the exception should not be so broad as to cover, say, a father defrauding his adult son in a business transaction, then the question will be where to draw the line — adulthood, 16 years of age, etc.

Another question of scope is whether the harm to child exception should apply to *any* crime against a child. Certainly some crimes are more serious than others and so consideration might need to be given to distinguishing between crimes that are serious enough to trigger the exception and crimes that are not. A possible dividing line would be between crimes of violence and crimes of a financial nature. But even if that distinction has merit, the dividing line would have to be drafted carefully.

As discussed above, there are only a few federal cases on the subject of the existence of a harm to child exception, and none of these decisions provide analysis of the scope of such an exception. State statutes and cases are not uniform on the scope of the exception; for example, some states do not apply the exception where the crime is against an adult, while others set the age at 16. Codifying the harm to child exception runs the risk that important policy decisions about the scope of the amendment will have to be made without substantial support in the case law, and without the benefit of empirical research. Without such foundations, it is possible that an amendment could create problems of application that could lead to the necessity of a further amendment and all its attendant costs.

2. Policy Questions in Adopting the Harm to Child Exception to the Adverse Testimonial Privilege

Besides these questions of scope, the harm to child exception raises difficult policy questions as applied to the adverse testimonial privilege. The adverse testimonial privilege is held by the witness-spouse; if there is an exception to that privilege, the spouse can be compelled to testify, and accordingly, can be imprisoned for refusing to testify. The harm to child exception would apply to cases in which the defendant-spouse is charged with intrafamilial abuse. In at least some cases, it is possible that the child is not the only victim of abuse at the hands of the defendant — the witness-spouse may be a victim as well. It is commonly estimated that such overlapping abuse occurs in 40-60% of domestic violence cases; for example, a national survey of 6,000 families revealed a 50% assault rate for children of battered mothers. M.A. Straus and R.J. Gelles, *Physical Violence in American Families* (1996). In such cases, if the victim of domestic abuse is compelled to testify, the witness may suffer a risk of further harm from the defendant for providing adverse testimony. Application of the harm to child exception could place the spouse in the difficult circumstances of choosing between physical harm at the hands of the accused and a jail sentence for contempt.

Another problem is that the witness-spouse may suffer a personal risk of incrimination in testifying, because the witness-spouse may be subject to criminal prosecution for neglect or complicity. See *State v. Burrell*, 160 S.W.3d 798 (Mo. 2005) (prosecution of mother for endangering her child by permitting the child to have contact with an abusive father). In such cases, the harm to child exception will not assure the witness's testimony, because the witness who is reluctant to testify can still invoke her Fifth Amendment privilege.

However these policy questions should be resolved, they raise difficult issues and would seem to counsel caution (and perhaps empirical research) before a harm to child exception to the

adverse testimonial privilege is codified. See generally Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions,* 109 Harv. L.Rev. 1849 (1996) (discussing the debate and research on whether forcing a victim of domestic abuse to testify against the abuser will be beneficial or detrimental to the victim).

3. Departure from the Common Law Approach to Privilege Development

Federal Rule of Evidence 501 provides that privileges "shall be governed by the principles of the common law as they may be interpreted in the light of reason and experience." The Rule gives the federal courts the primary responsibility for developing evidentiary privileges. When the Federal Rules were initially proposed, Congress rejected codification of the privileges, in favor of a common law, case-by-case approach. Given this background, it does not appear to be advisable to single out an exception to the marital privileges for legislative enactment. Amending the Federal Rules to codify such an exception would create an anomaly: that very specific, and rarely applicable, exception would be the only codified rule on privilege in the Federal Rules of Evidence. All of the other federally-recognized privileges would be grounded in the common law — including the very privilege to which there would be a codified exception. The Rules Committee and the Advisory Committee conclude that such an inconsistent, patchwork approach to federal privilege law is unnecessary and unwarranted, especially given the infrequency of cases involving a harm to child exception to the marital privileges. Granting special legislative treatment to one of the least-invoked exceptions in the federal courts is likely to result in confusion for both Bench and Bar.

The strongest argument for codifying an exception to a privilege is that the courts are in dispute about its existence or scope and this dispute is having a substantial effect on legal practice. But as stated above, any dispute in the courts about the existence of a harm to child exception is the result of a single case that is probably not controlling in its own circuit. Moreover, the application of the harm to child exception arises so infrequently that it can be argued that if a dispute exists, it does not justify this kind of special, piecemeal treatment.[1]

III. Draft Language for a Harm to Child Exception to the Marital Privileges

As stated above, the Rules Committee concludes that the benefits of codifying a harm to child exception to the marital privileges are substantially outweighed by the costs of such an amendment to the Federal Rules of Evidence. The Rules Committee recognizes, however, that there

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[1] The situation can be usefully contrasted with the proposed Rule 502 that has been approved by the Advisory Committee and is currently being considered by the Rules Committee. That rule is intended to protect litigants from some of the consequences of waiver of attorney-client privilege and work product that arise under federal common law. The Rules Committee has received widespread comment from the Bench and Bar that such protection is necessary in order to reduce the costs of pre-production privilege review in electronic discovery cases — dramatic costs that arise in almost every civil litigation. And federal courts are in dispute both on when waiver is to be found and on the scope of waiver.

are policy arguments supporting such an exception, and is sympathetic to the concern that the *Jarvison* case raises some doubt about whether there is a harm to child exception to the adverse testimonial privilege, at least in the Tenth Circuit. Accordingly, the Rules Committee has prepared language that could be used to codify a harm to child exception to the marital privileges, in the event that Congress determines that codification is necessary.

The draft language is as follows:

Rule 50_. Exception to Spousal Privileges When Accused is Charged With Harm to a Child

The spousal privileges recognized under Rule 501 do not apply in a prosecution for a crime [define crimes covered] committed against a [minor] child of either spouse, or a child under the custody or control of either spouse.

The draft language raises a number of questions on the scope of the harm to child exception. Those questions include:

1) Should the exception apply to harm to adult children? The draft puts the term "minor" in brackets as a drafting option. Another option is to provide a different age limit, such as 16. The Rules Committee notes that some state codifications limit the exception to harm to children of a certain age. *See, e.g.,* Mich. Comp. Law. Ann. § 600.2162 (18 years of age). Other states provide no specific age limitation. *See, e.g.,* Wash.Rev.Code § 5.60.060(1) (no age limit for harm to child exception).

2) Should the exception cover harm to children who are not family members but are present in the household at the time of the injury? The draft language covers, for example, harm to children who are visiting the household, so long as they are within the custody or control of either spouse. The draft language also covers harm to step-children, foster-children, etc. The Rules Committee notes that the states generally apply the harm to child exception to cover cases involving harm to a child within the custody or control of either spouse. See, *e.g., Daniels v. State,* 681 P.2d 341 (Alaska 1984) (harm to child exception applied to foster-child); *Stevens v. State,* 806 So.2d. 1031 (Miss. 2001) (exception for crimes against children applied in case in which defendant charged with murder of unrelated children); *Meador v. State,* 711 P.2d 852 (Nev. 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) (term "guardian" in statute included situation in which couple voluntarily assumed care of child even though no legal appointment as guardian). As discussed above, however, some consideration might be given to whether "custody or control" might be so broad as to cover harm to any child that is allegedly injured by an accused.

3) Should the exception be extended to crimes involving harm to the witness-spouse? The draft language does not cover such crimes, as the mandate from the Adam Walsh Child Protection and Safety Act was limited to the harm to child exception. The Rules Committee notes, however, that a number of states provide for statutory exceptions to the marital privileges that cover harm to spouses as well as harm to children. *See*, e.g., Colo. Rev. Stat. § 13-90-107 (exception to adverse testimonial privilege where the defendant is charged with a crime against the witness-spouse); Wis. Stat. § 905.05 (providing an exception to both marital privileges in proceedings in which "one spouse or former spouse is charged with a crime against the person or property of the other or of a child of either"). *See also United States v. White,* 974 F.2d 1135, 1137-38 (9th Cir. 1992) (confidential communications privilege did not apply because the defendant was charged with harming his spouse); Holmes, *Marital Privileges in the Criminal Context: The Need for a Victim-Spouse Exception in the Texas Rules of Criminal Evidence,* 28 Hous. L.Rev. 1095 (1991).

4) Should the exception cover all crimes against a child? The draft language contains a bracket if the decision is made to specify the crimes that trigger the exception.

Conclusion

The Rules Committee and the Advisory Committee conclude that it is neither necessary nor desirable to amend the Federal Rules of Evidence to codify a harm to child exception to the marital privileges. The substantial cost of promulgating an amendment to the Evidence Rules is not justified, given that Federal common law (which Congress has mandated as the basic source of Federal privilege law) already provides for a harm to child exception — but for a single decision that is probably not good authority within its own circuit. Codifying a harm to child exception would also raise difficult policy and drafting questions about the scope of such an exception — questions that will be difficult to answer without reference to the kind of particular fact situations that courts evaluate under a common-law approach.