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

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TO: **Honorable David F. Levi, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **Honorable Jerry E. Smith, Chair**
Advisory Committee on Evidence Rules

DATE: **December 1, 2005**

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

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on November 14, 2005, in Washington, D.C. At this meeting, the Committee continued its work on a rule to be submitted to Congress on waiver of privileges. It also continued to monitor developments in the law of confrontation after *Crawford v. Washington* and to consider whether any amendments to the Evidence Rules are necessary as a result of that decision. Finally, the Committee reviewed and approved in principle a proposed amendment that would make it plain that the Evidence Rules cover evidence presented in electronic form. None of these projects requires action by the Standing Committee at this time.

Part III of this Report provides a summary of the Committee's projects. A complete discussion of these matters can be found in the draft minutes of the Fall 2005 meeting, attached to this Report.

II. Action Items

No action items.

III. Information Items

A. Project To Develop a Rule on Waiver of Privileges

The Committee is addressing a number of problems arising from the current federal common law on the waiver of privilege. In complex litigation 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. Under current law, if a privileged document is produced in litigation there is a risk that a court will find a subject matter waiver; that is, there might be a finding that the waiver applies 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 to protect against the inadvertent disclosure of privileged information, because the producing party risks a ruling that even a mistaken disclosure can result in a subject matter waiver. The Committee has also found that counsel's understandable fear of waiver leads to extravagant claims of privilege. The Committee has concluded that the discovery process could be made less expensive if the law on waiver of privilege is modified to make it more predictable, more uniform, and less draconian.

Beyond the problems of the current waiver doctrine as applied to discovery, a serious concern arises if a corporation cooperates with a government investigation by turning over a privileged report. Most federal courts have held that this disclosure constitutes a complete waiver of the privilege, so that the report can be used against the corporation in subsequent litigation with a private party. The courts' refusal to protect a limited disclosure, made in cooperation with government regulator, can deter corporations from cooperating in the first place.

At its Fall 2005 meeting the Committee began its consideration of a rule governing waiver of privileges that would provide the following:

1. Inadvertent disclosures 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.

2. Disclosure of privileged information to a government agency would not constitute a waiver for all purposes, so long as the producing party and the government entered into a confidentiality agreement.

3. A waiver of privilege would cover only the information disclosed, unless fairness required a broader subject matter waiver.

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

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.

Of course, rules governing privilege must be enacted directly by Congress. Yet the Rules Enabling Act contemplates the use of the rulemaking process for privilege rules, so long as the rules are affirmatively enacted by Congress at the end of that process. The Committee has therefore resolved to prepare a proposed Rule 502 governing waiver of privileges. The precise language of such a rule raises many complicated issues that the Committee plans to address at its next meeting. The Committee has invited liaisons from the Civil and Criminal Rules Committees, and representatives of the Justice Department, to consult with it on this important project.

B. *Crawford v. Washington*

The Committee continues to monitor caselaw developments after the Supreme Court's decision in *Crawford v. Washington*. The Court in *Crawford* held that if hearsay is "testimonial," its admission against the 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 Committee is monitoring the caselaw to determine whether and when it might be necessary to propose amendments to bring the hearsay exceptions into compliance with constitutional requirements. The Supreme Court has granted certiorari in two state cases that present the issue of whether certain hearsay is testimonial, and the Committee will monitor those decisions to determine their effect on the hearsay exceptions in the Federal Rules.

C. Rule 804(b)(3)

At its Fall 2005 meeting the Committee considered whether to revive its proposal to amend Evidence Rule 804(b)(3), the hearsay exception for declarations against penal interest. The Committee's previous proposal was approved by the Judicial Conference, but the Supreme Court remanded it for reconsideration in light of the intervening decision in *Crawford*. The Committee's Reporter suggested revisions to the previously proposed amendment to address some of the concerns about testimonial evidence raised in *Crawford*. The Committee determined that the proposal should

not be adopted at this point, because further time is necessary to determine the meaning and application of *Crawford.* Deferring the proposal was considered especially prudent because of the Supreme Court's recent grant of certiorari in two cases to determine the correct scope of the term "testimonial," the definition of which was left open in *Crawford.*

D. Constitutional Limitations on Hearsay Admitted Under the Federal Rules Exceptions

Although the Committee decided not to propose an amendment to Rule 804(b)(3) at this time, it remains concerned that hearsay statements admitted under some of the Federal Rules exceptions would violate the right to confrontation after *Crawford.* The Committee has long taken the position that rules should be amended if they are subject to unconstitutional application; otherwise the rules become a trap for the unwary, because counsel may not make a constitutional objection under the assumption that the rules would never allow admission of evidence that violates a party's constitutional rights.

The Committee will therefore consider at its next meeting a proposal to amend either the hearsay rule, or its exceptions, to provide that admissibility of hearsay must be consistent with the constitutional rights of an accused. A generic reference to the constitutional rights of the accused does not run the risk of being inconsistent with the Supreme Court's subsequent interpretations of the Confrontation Clause. Moreover, there is precedent for generic constitutional language in the Evidence Rules: Rule 412 provides that evidence must be admitted (despite the exclusionary language in the Rule) where exclusion would violate the constitutional rights of the accused.

E. Electronic Evidence

At its Fall 2005 meeting the Committee considered a possible amendment that would make it plain that the Evidence Rules cover evidence presented in electronic form. The amendment would add a new Rule 107 that would provide as follows:

> *Evidence in Electronic Form.* As used in these rules, the terms "written," "writing," "record," "recording," "report," "document," "memorandum," "certificate," "data compilation," "publication," "printed material," and "material that is published" include information in electronic form. Any "certification" or "signature" required by these rules may be made electronically.

The Committee determined that the courts are not having much trouble in applying the existing, paper-based Evidence Rules to all forms of electronic evidence. Courts have been using basic evidentiary standards—relevance, reliability, prejudice, accuracy, authenticity—to determine the admissibility of electronic evidence. The goal of the proposed amendment would not be change or

affect any of the current evidentiary standards being applied to electronic evidence; rather, the goal would be to bring the language of the Evidence Rules up to date with technological changes.

After discussion, the Committee agreed that the amendment would be a good addition to the Evidence Rules, but it also determined that there is no pressing need to proceed immediately on the amendment. The Committee resolved to adhere to its practice of proposing amendments as a package where possible, thus avoiding yearly changes to the Evidence Rules. The proposed amendment was tentatively approved as part of any package of amendments that the Committee might propose in the future.

IV. Minutes of the Fall 2005 Meeting

The Reporter's draft of the minutes of the Committee's Fall 2005 meeting is attached to this report. These minutes have not yet been approved by the Committee.