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, 2006

RE: Report of the Advisory Committee on Evidence Rules

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on November 16, 2006, 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 considered the following matters:

1) a direction from Congress to report on the necessity and desirability of an amendment to the Evidence Rules to codify an exception to the marital privileges where a defendant is charged with harming a child;

2) the possibility of restyling the Evidence Rules;

3) the Standing Committee's time-counting project, and whether the Evidence Rules should be amended to include a rule on time-counting; and

4) developments in the law of confrontation after *Crawford v. Washington,* in order to consider whether any amendments to the Evidence Rules are necessary as a result of that decision.

The above matters do not require 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 2006 meeting, attached to this Report.

II. Action Items

No action items.

III. Information Items

A. Proposed Rule 502 on Waiver of Attorney-Client Privilege and Work Product

The Standing Committee has released Proposed Evidence Rule 502 for a period of public comment that ends in Spring 2007. Proposed Rule 502 was drafted in response to a request from the Chair of the House Judiciary Committee, to address two major concerns about the current law on waiver of privilege and work product. First, some courts have held that all disclosures in the course of litigation constitute waiver for all purposes, to parties and non-parties — a rule that requires the parties to spend enormous amounts of time and effort in pre-production privilege review, and to make claims of privilege that they would not otherwise make in order to avoid a finding of waiver. Second, most federal courts hold that if a corporation cooperates with a government investigation by turning over a privileged report, the privilege is waived even as against private parties in subsequent litigation. The expressed concern is that the courts' refusal to provide the protection of "selective waiver" may deter cooperation with the government and lead to increased costs of government investigations.

The Committee drafted Proposed Rule 502 at the suggestion of Congress and with full knowledge that the Rule must be enacted directly by Congress. To the extent that the Committee cannot resolve some of the difficult substantive questions on the merits, the Committee plans to refer these questions to Congress, with suggested language for Congress to use depending on its resolution of the merits.

At its Fall 2006 meeting the Committee tentatively considered some comments and suggestions concerning Proposed Rule 502, recognizing that any final decisions about changing the Rule were to be deferred until public comment was completed. The Committee discussed the following comments concerning Proposed Rule 502 as it was released for public comment:

1. Suggestion to delete the "should have known" language in the selective waiver provision:

Rule 502(b) conditions protection from inadvertent 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. A suggestion has been made that the words "or should have known" be deleted. The stated ground for deletion is that the "should have known" language could give rise to litigation about when, exactly, the producing party should have known about the mistaken disclosure. The suggestion was discussed by the Committee; the sense of the Committee was that the "should have known" language had substantial merit and should be retained pending public comment. Committee members noted that an "actual knowledge" standard would also give rise to litigation, and that if litigation did arise, the "should have known" standard would be easier to apply than a standard based on the producing party's actual knowledge. Committee members also stated that the actual knowledge standard could give rise to gamesmanship, because producing parties might demand the return of the privileged material on the eve of trial, arguing that they did not "know" until then about the mistaken disclosure.

2. Suggestion to extend the inadvertent disclosure provision to regulatory investigations:

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 to third parties when the disclosure is "made *to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority*." The Committee considered a suggestion that the language of the two provisions be made identical by extending the protection for mistaken disclosures to those made during investigations by regulators.

In discussion of this suggestion, most Committee members concluded that the difference in coverage in the two subdivisions is justified. The Committee made a considered determination to limit the protections of Rule 502(b) to mistaken disclosures made *during proceedings*. 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 interest in limiting the costs of discovery that animates 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. As Subdivision (b) is currently written, it applies only to disclosures raising a legitimate federal interest. The Committee discussed whether 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*. The Committee agreed to consider at its next meeting language that would amend subdivision (b) to cover mistaken disclosures made "to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority."

3. Selective waiver:

The Committee has not decided whether to propose a selective waiver provision in Rule 502, under which disclosure of privileged information to a regulator would not constitute a waiver in favor of third parties. The selective waiver provision in the Rule released for public comment is bracketed, indicating that the Committee is undecided about the merits of a selective waiver provision and is seeking public comment (and especially empirical data) on the merits of such a provision before making a decision.

Selective waiver has raised objections from plaintiffs' counsel, from certain members of the ABA, and from state court judges concerned that a state's waiver rules would be subsumed by a federal provision on selective waiver. Committee members at the Fall meeting suggested that given the controversy (both within and outside the Committee) it might be appropriate for the Committee to draft a rule in which the selective waiver provision remained in brackets if and when it went to Congress. Including a selective waiver provision as a drafting option for Congress (without a suggestion on its merits) may be useful given that in essence the Committee is drafting the rule for Congress and so may wish to provide Congress with all sensible drafting alternatives. Moreover, Congress has shown interest in enacting a selective waiver provision, having done so in the Regulatory Relief Act of 2006, which provides selective waiver protection for disclosures to banking regulators.

Rule 502(c) as released for public comment states that a disclosure to a federal regulator does not operate as a waiver "in favor of non-governmental persons or entities." The Committee tentatively agreed with the proposition that if a selective waiver provision is to be implemented, then a disclosure to a federal regulator should not constitute a waiver to a state regulator. At its next meeting, the Committee will consider a drafting alternative providing that disclosure to a federal regulator does not operate as a waiver in favor of a state regulator.

4. Extending the inadvertent disclosure protection to disclosures made in arbitration proceedings:

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 to prevent disclosure and acted diligently in trying to get the material back. The Committee considered a suggestion that the protections against inadvertent waiver should apply to arbitration proceedings. The sense of the Committee was that arbitration proceedings generally should not be covered by the rule, because the rationale for Rule 502(b) is to decrease the cost of pre-production privilege review in federal litigation, so providing for more efficiency in arbitration proceedings is beyond the scope of the rule..

The Committee noted, however, that parties are sometimes required by federal courts to go to arbitration. Committee members agreed that court-annexed or court-mandated arbitration should

receive the protection of the rule, but noted that such protection was already *granted* in Rule 502(b) because it covered "federal litigation." The Committee tentatively agreed to add a sentence to the Committee Note to specify that the term "federal litigation" is intended to cover court-annexed or court-mandated arbitration proceedings.

5. Extending Rule 502(d) to confidentiality orders not based upon the agreement of the parties:

Subdivision (d) of Rule 502 currently provides that confidentiality orders bind non-parties "if the order incorporates the agreement of the parties before the court." The Committee considered whether the protection of the Rule should be extended to *any* confidentiality order entered by the court. If a court finds, for example, that a disclosure of privileged information during discovery was not a waiver, the question is whether that order should be enforceable against third parties even though the parties before the court did not enter into a confidentiality agreement. The Committee tentatively agreed to delete the language of Rule 502(d) that limited its protection to court orders based on agreements by the parties. The Committee determined that a court order on waiver is entitled to the same respect whether it memorializes an agreement between the parties or not. The tentative amendment would provide as follows:

> (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~~.

6. Choice of law questions when disclosures are made at the state level and the disclosed information is sought to be used in federal court:

Rule 502 as released for public comment does 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. Choice of law questions are raised, however, when a disclosure of privileged information is made at the state level and then the information is offered in a subsequent federal proceeding.

At its Fall 2006 meeting the Committee discussed the complex choice of law questions raised by Rule 502. There are three possible outcomes when a state disclosure is offered in a subsequent federal proceeding, and the question is whether there has been a waiver: 1) waiver could be governed by the substantive standards of Rule 502; 2) waiver could be governed by the substantive standards of the state law in the state in which disclosure was made; or 3) waiver could be governed by federal common law that would be applicable under Rule 501 — which would mean

that the state law of waiver would govern in diversity cases and the federal common law of waiver (distinct from Rule 502) would govern in federal question cases. At the Spring 2007 meeting the Committee will review drafting alternatives that could be added to Rule 502 to cover the three choice of law possibilities.

B. Harm-to-Child Exception to the Marital Privileges

Public Law 109-248, the Adam Walsh Child Protection and Safety Act of 2006, directs the Evidence Rules Committee and the Standing 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."

At its Fall 2006 meeting, the Committee began an assessment of the necessity and desirability of amending the Evidence Rules to provide a "harm-to-child" exception to the marital privileges. The Committee has determined that almost all courts have adopted an exception to the protections provided by the marital privileges for cases in which the defendant is charged with harm to a child in the household. One recent federal case, however, refused to adopt a harm to child exception to the adverse testimonial privilege; that court allowed the defendant's wife to refuse to testify even though the defendant was charged with harming a child in the household. The Committee has concluded that this recent case is dubious authority, because its sole expressed rationale is that no court had yet established a harm-to-child exception, even though reported cases do in fact apply a harm-to-child exception in identical circumstances — including a case in the court's own circuit.

The Committee determined that it would not itself propose an amendment to the Evidence Rules solely to respond to a recent aberrational decision that is not even controlling authority in its own circuit. The Committee also noted that an amendment to establish a harm to child exception would raise at least two other anomalies: 1) piecemeal codification of privilege law; and 2) the codification of an exception to a rule of privilege that is not itself codified. The Committee unanimously agreed, however, that the request from Congress must be given serious consideration and that even if the Committee would not propose an amendment to implement a harm to child exception, its report to Congress should suggest language for an amendment should Congress decide to proceed. The Committee also agreed that any language to be suggested to Congress should cover cases involving harm to any child within the custody or control of either spouse; it should not be limited to cases involving harm to biological children of one or both spouses. At its next meeting the Committee will prepare a report to Congress on the harm-to-child exception, for review by the Standing Committee.

C. Possible Restyling Project

At its Fall 2006 meeting the Committee reviewed examples of what three restyled rules of evidence would look like — Rules 103, 404(b) and 612. The rules were picked as representative of the types of challenges and questions that would be presented by a restyling project. Professor Joseph Kimble, the Standing Committee's consultant on Style, prepared the rules to assist the Committee in determining whether to undertake a project to restyle all of the Evidence Rules. Interest in restyling arose when the Committee considered the possibility of amending the Evidence Rules to take account of technological developments in the presentation of evidence. The Committee is determining whether a restyling project might be used to update the paper-based language currently used throughout the Evidence Rules, and more broadly is considering whether restyling is needed to make the Evidence Rules more user-friendly.

The Committee engaged in an extensive discussion of the costs and benefits of restyling the Evidence Rules. Some reservations were noted. Among other concerns, the Committee does not have its full complement of members, so it might be difficult to complete the project in a timely fashion. But the general sense of the Committee is that a restyling project has merit and is worthy of further consideration, because the Evidence Rules in current form are often hard to read and apply, and a more user-friendly version could especially aid those lawyers who do not use the rules on an everyday basis. The Committee recognizes that before any more work is done on a restyling project, it must be determined whether the Chief Justice would support a restyling of the Evidence Rules. The sense of the Committee was that it would be most helpful if the Standing Committee could inquire into the Chief Justice's views on restyling of the Evidence Rules.

D. Uniform Time-Counting Rules

The Committee reviewed the Time-Counting template prepared by the Standing Committee's Subcommittee, and unanimously approved of the uniform time-counting rules established in the template. The Committee also discussed whether the Evidence Rules should be amended to implement the uniform time-counting rules provided in the template. There are only a handful of Evidence Rules that are subject to time-counting. None of the time periods need to be changed to accommodate the uniform time-counting rule, because all are 14 days or longer; the time-counting template takes a "days are days" approach, and that is the approach currently taken in the rules for time periods of 14 days or longer. Research by the Committee found no reported case, nor any report from any other source, to indicate that there has been any controversy or problem in counting the time periods in the Evidence Rules.

The Committee unanimously determined that there is no need for an amendment to the Evidence Rules that would specify how time is to be counted, because there is no existing problem that would be addressed by such an amendment. The Committee noted, however, that because the Civil and Criminal Rules are going to be amended to change the existing time-counting rules, it would be useful for those new rules to govern any time-counting questions that could possibly arise

under the Evidence Rules in the future. The Committee voted unanimously to request the Time-Counting Subcommittee to consider adding language to the template, stating that the Civil and Criminal time-counting rules would govern time-counting under the Evidence Rules.

E. *Crawford v. Washington* and the Hearsay Exceptions in the Evidence Rules

The Committee continues to monitor case law developments after the Supreme Court's decision in *Crawford v. Washington,* in which the Court held that the admission of "testimonial" hearsay violates the accused's right to confrontation unless the accused has an opportunity to cross-examine the declarant. The Court in *Crawford* declined to define the term "testimonial." It also implied, but did not decide, that the Confrontation Clause imposes no limitations on hearsay that is not testimonial. Subsequently the Court in *Davis v. Washington* held that hearsay statements are not testimonial, even when made to law enforcement personnel, if the primary motivation for making the statements was for some purpose other than for use in a criminal prosecution. The Court in *Davis* also declared, but did not hold, that non-testimonial hearsay is unregulated by the Confrontation Clause.

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 case law to determine whether and when it might be necessary to propose amendments to bring the hearsay exceptions into compliance with constitutional requirements. At its Fall 2006 meeting the Committee unanimously resolved that it is not advisable to propose an amendment in response to *Crawford* at this time. It is likely that no amendment will be necessary because the case law is reaching the result that any hearsay statement admissible under a Federal Rules exception is by that fact non-testimonial. The admissibility requirements of the Federal Rules hearsay exceptions are being held to screen out "testimonial" hearsay as that term has been construed in *Davis* and the lower courts. Even if the Federal Rules hearsay exceptions are not coextensive with the Confrontation Clause, an attempt to to codify *Crawford* is unwise at this point, because the Supreme Court's opinion in *Davis* is less than a year old and has not yet been applied or construed by many of the lower courts. The Committee will continue to monitor case law developments under *Crawford* and *Davis.*

IV. Minutes of the Fall 2006 Meeting

The Reporter's draft of the minutes of the Committee's Fall 2006 meeting is attached to this report. These minutes have not yet been approved by the Committee.