Advisory Committee on Evidence Rules

Minutes of the Meeting of April 12-13, 2007

Rancho Santa Fe, California

The Advisory Committee on the Federal Rules of Evidence (the "Committee") met on April 12-13, 2007 in Rancho Santa Fe, California.

The following members of the Committee were present:

Hon. Jerry E. Smith, Chair
Hon. Joan N. Ericksen.
Hon. Robert L. Hinkle
Hon. Andrew D. Hurwitz
William W. Taylor, III, Esq.
William T. Hangley, Esq.
Marjorie A. Meyers, Esq.,
Elizabeth Shapiro, Esq., Department of Justice

Also present were:

Hon. Thomas W. Thrash, Jr., Liaison from the Standing Committee on Rules of Practice and Procedure
Hon. Michael M. Baylson, Liaison from the Civil Rules Committee
Hon. Christopher M. Klein, Liaison from the Bankruptcy Rules Committee
Timothy Reagan, Esq., Federal Judicial Center
John K. Rabiej, Esq., Chief, Rules Committee Support Office
James Ishida, Esq., Rules Committee Support Office
Peter McCabe, Secretary to the Standing Committee on Rules of Practice and Procedure.
Professor Daniel J. Capra, Reporter to the Evidence Rules Committee
Professor Kenneth S. Broun, Consultant to the Evidence Rules Committee
Matthew Hall, Esq., Law Clerk to Hon. David Levi, Chair of the Standing Committee on Rules of Practice and Procedure

Opening Business

Judge Smith asked for approval of the minutes of the Fall 2006 Committee meeting. The minutes were approved with minor amendments suggested by the Department of Justice representative. Judge Smith also reported on the January 2007 meeting of the Standing Committee.

Waiver of Attorney-Client Privilege and Work Product: Proposed Evidence Rule 502

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, or even a waiver of the document disclosed, then the discovery process could be made less expensive.

Another concern considered by the Committee 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. The Committee sought to determine whether the protection of selective waiver is necessary to encourage cooperation with government investigations.

Concerns about the common law of waiver of privilege and work product have been voiced in Congress as well. The Chair of the House Committee on the Judiciary, by letter dated January 23, 2006, requested the Judicial Conference to initiate a 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 Evidence Rules Committee complied with this request and prepared a draft rule to address waiver of privilege and work product — a proposed Rule 502. The Committee recognized that unlike other evidence rules, a rule governing privilege would eventually have to be enacted directly by Congress. See 28 U.S.C. § 2074(b). The first draft of Rule 502 was the subject of a hearing conducted at Fordham Law School in April 2006. In response to comments at that hearing and discussion at the subsequent Committee meeting, the draft rule was substantially revised. The Committee unanimously approved the redrafted proposal for release for public comment, and the Standing Committee voted unanimously to issue the revised proposed Rule 502 for public comment.

For the Fall 2007 meeting, the Reporter prepared a discussion memorandum that highlighted the public comments and other suggestions concerning possible changes to the draft of Rule 502 that was released for public comment. The Committee discussed these comments and suggestions at the meeting, and voted to implement a number of changes.

The comments considered by the Committee, and the Committee's discussion and vote, were as follows:

1. Recommendations by the Style Subcommittee of the Standing Committee:

The Style Subcommittee of the Standing Committee proposed a number of changes to the Proposed Rule 502 as it was released for public comment. The most important change was to add an introductory sentence describing the disclosures that were covered by the Rule. Under the protocol established by the Standing Committee, recommendations for style changes by the Style Subcommittee are dispositive unless the Advisory Committee determines that the recommendation would change the substance of the rule.

In advance of the Committee meeting the Reporter discussed a number of the style suggestions made by Professor Kimble, the consultant the Style Subcommittee. Some of Professor Kimble's recommendations were dropped as possibly affecting the substance of the Rule. At the Committee meeting, members discussed the suggested style changes that had not been dropped. The Committee focused mainly on whether the description in the initial sentence, added by the Style Subcommittee, was sufficiently comprehensive to cover all disclosures intended to be covered by the Rule. After discussion, the Committee determined that none of the suggested style changes would have any effect on the substance of the rule. The restyled version then became the template upon which to evaluate all other suggested changes made in the public comment.

The restyled template reads as follows:

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

The following provisions apply, under the circumstances set out, to disclosure of a communication or information protected by an attorney-client privilege or as work product.

(a) Scope of a waiver. — In a federal proceeding, when the disclosure waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information only if it (1) concerns the same subject matter; and (2) ought in fairness to be considered with the disclosed communication or information.

(b) Inadvertent disclosure. — In a federal or state proceeding, the disclosure does not operate as a waiver if:

(1)the disclosure is inadvertent and is made in connection with federal litigation or federal administrative proceedings;

(2) the holder of the privilege or work-product protection took reasonable precautions to prevent disclosure; and

(3) the holder took reasonably prompt measures, once the holder knew or should have known of the disclosure, to rectify the error, including (if applicable) following Fed. R. Civ. P. 26(b)(5)(B).

[**(c) Selective waiver.** — In a federal or state proceeding, the disclosure — when made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority — does not waive the privilege or work-product protection in favor of non-governmental persons or entities. State law governs the effect of disclosure to a state or local-government agency; with respect to non-governmental persons or entities. This rule does not limit or expand a government agency's authority 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 may order that the privilege or work-product protection is not waived by disclosure connected with the litigation pending before the court. The order governs all persons or entities in all federal or state proceedings, whether or not they were parties to the litigation.

(e) Controlling effect of party agreements. — An agreement on the effect of disclosure is binding on the parties to the agreement, but not on other parties unless it is incorporated into a court order.

(f) Definitions. — In this rule:

1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and

2) "work-product protection" means the protection that applicable law provides for materials prepared in anticipation of litigation or for trial.

2. Application to Diversity and Pendent Jurisdiction Cases: A number of public comments suggested that there was an ambiguity on whether Rule 502 as issued for public comment applies to diversity and pendent jurisdiction cases. They noted a possible tension between Rule 502, which provides a federal law of privilege for a "federal proceeding" (without distinguishing between federal question and diversity or pendent jurisdiction cases) and Rule 501, which provides that the state law of privilege applies when state law provides the rule of decision. Committee members reviewed these public comments and noted that any tension between the two Rules could be resolved by concluding that Rule 502 supersedes Rule 501 because it is later in time. But it would also be plausible to argue that Rule 502 is not applicable to diversity or pendent jurisdiction cases, because supersession on such an important question should not be inferred, but rather should be found only if the supersession is express.

After discussion, the Committee resolved to clarify that Rule 502 is applicable to diversity and pendent jurisdiction cases. The Committee voted unanimously to add a subdivision to Rule 502 to provide that:

"Notwithstanding Rule 501, this rule applies even if State law supplies the rule of decision."

The Committee also unanimously approved a Committee Note providing as follows:

The costs of discovery can be equally high for state and federal causes of action, and the rule seeks to limit those costs in all federal proceedings, regardless of whether the claim arises under state or federal law. Accordingly, the rule applies to state causes of action brought in federal court.

3. Relationship to Rules 101 and 1101: Rule 502 as issued for public comment would have an effect on state court proceedings. If a disclosure of privilege or work product is made at the

federal level, the existence and extent of the waiver is governed by Rule 502, even if the protected information is offered in a state court proceeding. Some public comment suggested that Rule 502's impact on state court proceedings creates some tension with Evidence Rules 101 and 1101. Rule 101 provides that the Evidence Rules "govern proceedings in the courts of the United States . . . to the extent and with the exceptions stated in rule 1101." Rule 1101 provides that the Evidence Rules apply to "the United States district courts" and other federal courts in all proceedings, with the exceptions stated in Rule 1101(d) (which exceptions include grand jury proceedings, sentencing proceedings, etc.). Thus, it can be argued that Rule 502 cannot extend to state proceedings because the applicability of the Evidence Rules is limited to federal proceedings by Rules 101 and 1101.

The Committee began its consideration of the relationship between Rule 502 and Rules 101 and 1101 by discussing whether Rule 502 should in fact apply to state proceedings. A Committee member expressed concern that Congress may react negatively to any perceived encroachment on state law objectives. Another member suggested that any applicability to state proceedings should be muted — that a direct statement that Rule 502 applies to state proceedings would constitute a red flag. But after extensive discussion, the Committee unanimously resolved that Rule 502, in order to be effective, must have some effect on state proceedings — at least where the disclosure of protected information occurred at the federal level — and that there was no reason to hide that fact. Rule 502 must govern state proceedings with respect to disclosures initially made at the federal level, or else lawyers in *federal* court would not be able to rely on the protections of Rule 502, for fear that a waiver will be found in a subsequent state court proceeding under a less protective state law. Thus, binding state courts to the federal law of waiver as to disclosures made at the federal level promotes a legitimate federal interest. Members noted that Rule 502 makes no attempt to regulate state court determination of waiver when disclosures are initially made at the state level; it is thus limited to situations in which there is a substantial federal interest at stake.

After determining that Rule 502 properly governs the consequences of disclosures at the federal level when the protected information is later offered in a state proceeding, the Committee next considered whether it was necessary to clarify that Rule 502 would apply in such circumstances despite the limitations on the applicability of the Evidence Rules set forth in Rules 101 and 1101. The Committee determined unanimously that the tension between Rules 502 and 101/1101 should be addressed, because otherwise litigation could arise in state court proceedings where a disclosure of relevant privileged information had been made at the federal level. A litigant could argue that the state court is not bound by the federal waiver rule, despite its specific language, because Rule 502 was subject to a jurisdictional limitation imposed by Rules 101 and 1101. The Committee concluded that clarification was necessary to forestall that threat of litigation; it voted unanimously to add the following language to the Rule:

> "Notwithstanding Rules 101 and 1101, this rule applies to state proceedings in the circumstances set out in the rule."

The Committee also unanimously approved an addition to the Committee Note to correspond to the added text. The addition to the Committee Note is as follows:

The protections against waiver provided by Rule 502 must be applicable when disclosures of protected communications or information in federal proceedings are subsequently offered in state proceedings. Otherwise the holders of protected communications and information, and their lawyers, could not rely on the protections provided by the Rule, and the goal of limiting costs in discovery would be substantially undermined. Rule 502(g) is intended to resolve any potential tension between the provisions of Rule 502 that apply to state proceedings and the possible limitations on the applicability of the Federal Rules of Evidence otherwise provided by Rules 101 and 1101.

3. Applicable Law When State Disclosures Are Offered In Federal Proceedings: Rule 502 as released for public comment did not (with one exception) specify which law of waiver applies when a disclosure is made in a state proceeding and the disclosed information is subsequently offered in a federal proceeding. (The exception was the provision on selective waiver, which specifically provided that state law would govern the effect of disclosure made to a state office or agency). The Reporter's memo to the Committee indicated that if Rule 502 was not changed to cover the question of applicable law in a federal proceeding as to disclosures made in state proceedings, then the applicable law would be provided by Rule 501 — meaning that the state law of waiver would apply in diversity and pendent jurisdiction cases, and the federal law of waiver would apply in federal question cases. The Reporter suggested that Rule 502 as issued for public comment should be changed to provide a specific rule on applicable law in federal proceedings for disclosures initially made at the state level — otherwise the choice of law questions would be extremely complicated and difficult for the parties and the court to navigate.

After extensive consideration, the Committee determined unanimously that the best rule on applicable law (state or federal) would be to apply the law of waiver that is the most protective of privilege. That is, if state law would find no waiver but Rule 502 would, then the state law of waiver would apply; conversely, if Rule 502 would find no waiver but state law would, then Rule 502 would apply. The Committee determined that this result made the most sense for both state and federal interests. Parties in state court should be able to rely on a more protective state law of waiver, without fear that it will be undermined subsequently by a less protective federal rule. And if Rule 502 were more protective under the circumstances, the federal interest in applying that rule and protecting the privilege outweighs any state interest, given that the information is being offered in a federal court.

The Committee voted unanimously to add the following language to the text of Rule 502:

Disclosure made in a state proceeding. — When the disclosure is made in a state proceeding and is not the subject of a state-court order, the disclosure does not operate as a waiver in a federal proceeding if the disclosure:

(1) would not be a waiver under this rule if it had been made in a federal proceeding; or

(2) is not a waiver under the law of the state where the disclosure occurred.

The Committee also agreed to a Committee Note to the new provision, stating as follows:

> Difficult questions can arise when 1) a disclosure of a communication or information protected by the attorney-client privilege or as work product is made in a state proceeding, 2) the communication or information is offered in a subsequent federal proceeding on the ground that the disclosure waived the privilege or protection, and 3) the state and federal laws are in conflict on the question of waiver. The Committee determined that the proper solution for the federal court is to apply the law that is most protective of privilege and work product. Where the state law is more protective (such as where the state law is that an inadvertent disclosure can never be a waiver), the holder of the privilege or protection may well have relied on that law when making the disclosure in the state proceeding. Moreover, applying a more restrictive federal law of waiver could impair the state objective of preserving the privilege or work-product protection for disclosures made in state proceedings. On the other hand, where the federal law is more protective, applying the state law of waiver to determine admissibility in federal court is likely to undermine the federal objective of limiting the costs of discovery.
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> The rule does not address the enforceability of a state court confidentiality order in a federal proceeding, as that question is covered both by statutory law and principles of federalism and comity. *See* 28 U.S.C. § 1738 (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), citing *Tucker v. Ohtsu Tire & Rubber Co.,* 191 F.R.D. 495, 499 (D.Md. 2000) (noting that a federal court considering the enforceability of a state confidentiality order is "constrained by principles of comity, courtesy, and . . . federalism"). Thus, a state court order finding no waiver in connection with a disclosure made in a state court proceeding is enforceable under existing law in subsequent federal proceedings.

The Committee then considered a proposal from a Committee member to expand the above subdivision to treat not only state disclosures offered in federal proceedings, but also to treat the effect of federal disclosures later offered in state proceedings. The Committee member proposed the following subdivision:

> Application to federal and state proceedings.
>
> (A) When the disclosure is made in a federal proceeding or to a federal public office or agency, the disclosure is not a waiver in any federal or state proceeding, if it is not a waiver under this rule.
>
> (B) When the disclosure is made in a state proceeding or to a state or local government

office or agency, the disclosure is not a waiver in any federal proceeding if:

(1) it would not be a waiver under this rule if it had been made in a federal proceeding or to a federal public office or agency;

(2) it is not a waiver under the law of the state where the disclosure occurred; or

(3) it is subject to an order of the state court finding that the disclosure was not a waiver.

After extensive discussion, the Committee determined that the proposal would create a number of problems and should not be added to the Rule. One problem was that subdivision (A) refers to "the disclosure" as "not a waiver", but this language would not cover Rule 502's provision on subject matter waiver, where the question is not whether disclosure is a waiver but whether a waiver extends to other privileged information that has not yet been disclosed. The Committee also concluded that any reference in the text of the rule to the enforceability of state court orders on waiver would be problematic, because such enforceability is already governed by the Full Faith and Credit Act and extensive case law.

4. Consideration of Suggested Changes to Rule 502(a) on Subject Matter Waiver: The Committee considered several suggestions made during the public comment for change to Rule 502(a), the provision on subject matter waiver.

Limiting Subject Matter Waiver to Intentional Disclosures:

The first suggestion was that the text should be changed to clarify that a subject matter waiver can never be found unless the waiver is intentional. The purpose behind this change would be to make it clear that an inadvertent disclosure of privileged information during discovery would never lead to the drastic consequences of a subject matter waiver. In response to this suggestion, one Committee member posited that there may not need to be a need for protection against subject matter waiver for mistaken disclosures, because the provision on inadvertent disclosure (Rule 502(b)) would grant protection against any finding of waiver so long as the producing party acted with reasonable care and took prompt and reasonable steps to get the mistakenly disclosed information returned. But other members noted that protection against subject matter waiver was necessary even with the protections provided by Rule 502(b) — otherwise parties will be likely to increase the costs of preproduction privilege review in order to avoid even the remote possibility of a drastic subject matter waiver.

Committee members also considered whether the language on intentionality should refer to the intent to disclose the information or to the intent to waive the privilege. After discussion, the Committee determined that subject matter waiver should not be found unless it could be shown that the party specifically intended to waive the privilege by disclosing the protected information. The Committee voted unanimously to amend proposed Rule 502(a) to provide that subject matter waiver could only be found if "the waiver is intentional."

Applying the Subject Matter Waiver Provision to Subsequent State Court Proceedings:

Some public comments suggested that Rule 502(a) should be changed to clarify that its subject matter waiver rule binds state courts reviewing disclosures of protected information made in federal court. After discussion, the Committee unanimously determined that Rule 502(a) should expressly bar a state court from finding a subject matter waiver with respect to a disclosure made at the federal level. The Committee concluded that without such a change, Rule 502(a) would be inconsistent with the other effective subdivisions of the Rule, all of which bind state courts to respect federal law on waiver when the disclosure is made at the federal level. The Committee reasoned that binding state courts to Rule 502(a) as to disclosures made at the federal level was necessary, otherwise parties could not rely on the protections of the rule for fear that a disclosure would be found to be a subject matter waiver under some state's law.

5. Consideration of Suggested Changes to the Inadvertent Disclosure Provision, Rule 502(b): The Committee considered several suggestions made during the public comment for change to Rule 502(a) on subject matter waiver.

Concerns expressed in public comment about the "reasonable precautions" standard, necessary for a finding that an inadvertent disclosure is not a waiver:

1. Public comments suggested that the "reasonable precautions" standard is subject to being interpreted to require the producing party to take such strenuous efforts to avoid waiver that there will be no cost-savings, and thus the goal of the rule would be undermined. Those expressing this concern argued that the textual language should be softened, and that the note should clarify that herculean efforts in pre-production privilege review are not required, allowing for the use of such procedures as scanning software can be found to be reasonable precautions. Other suggestions included clarification that the court should take into account factors such as the scope of discovery and the discovery schedule.

2. Public comments noted that the reasonable precautions standard provides a single factor test, whereas the predominant test in the federal courts is to employ a multi-factor test.

3. One public comment noted that the reasonable precautions standard does not take into account the burdens of retrieval on the party receiving the protected information.

The Committee considered and discussed each of these concerns. It made the following determinations:

1. The standard in the Rule should be changed from "reasonable precautions" to "reasonable steps" in accordance with a number of public comments.

2. Language should be added to the Committee Note to indicate that the standard of "reasonable steps" is not intended to require multiple levels of eyes-on privilege review, and takes into account the scope of discovery, the time for production, and other relevant factors.

3. Language should be added to the Committee Note to indicate that the multi-factor test of federal common law is not explicitly codified in the text of the rule, because it is not really a test of admissibility but more akin to a grab bag of factors that are not properly placed in the text of a codified evidence rule. The language in the Committee Note should emphasize, however, that the standard of "reasonable steps" is flexible enough to accommodate a variety of factors that are discussed in the federal case law.

4. Language concerning burdens on receiving parties should not be added to the Rule or the Note, as the burden on a receiving party cannot be predicted by the producing party, and it is important for the Rule to provide criteria that can be relied on by the producing party in deciding the extent of preproduction privilege review that is reasonable.

Two suggestions in the public comment for change to the language in Rule 502(a) requiring "reasonably prompt measures" to retrieve the mistakenly disclosed information from the time that the holder "knew or should have known" about the mistaken disclosure:

1. The ABA expressed concern that "reasonably prompt" does not give enough guidance and so will be the subject of litigation. The ABA suggested that the duty to seek return should be expressed in terms of a specific time period, e.g., the producing party must ask for return within [14] days of the time the duty is triggered.

The Committee considered this suggestion and unanimously rejected it. A specific time period for seeking return would create a number of problems, including: 1) how to count days; 2) the anomaly of a specific time period that cannot by definition start at any specific time, but only at the time that it is reasonable under the circumstances; and 3) the difficulty of picking a specific time period that would not be too short for some circumstances and too long for others.

2. A number of comments expressed concern about the duty to seek return being triggered at the time that the holder "should have known" about the mistaken disclosure. At its last meeting, held before receipt of any public comments, the Committee tentatively decided to retain the "should have known" language in Rule 502(b) — as issued for public comment, the producing party must take reasonably prompt measures from the time it knew or should have known of the mistaken disclosure. The Committee considered the argument, expressed by a member of the Standing Committee, that the "should have known" language was subjective and malleable, and could lead to a finding that a party in an electronic discovery case should have known about the mistaken disclosure at the time it was made, given the likelihood that mistakes will occur during electronic discovery. The Committee tentatively decided that the "should have known" standard is probably less subjective and less malleable than a standard based on the producing party's actual knowledge.

In public comment and at the New York hearing, however, a different argument was made

against the "should have known" requirement. Commenters noted that the term "should have known" implies that the producing party must take reasonable steps *after production*, to determine whether a mistaken disclosure has been made. If the language could be construed to impose that kind of duty on the producing party, that party may be required to do another privilege review for all information *that it has already produced.* And if that is the case, then the goal of the Rule — to reduce the costs of discovery — would be undermined, because post-production review would clearly add to discovery costs.

After extensive discussion the Committee determined that the comments on the "should have known" language had merit. The Committee voted unanimously to delete that language from the text of the Rule, and also to amend the Committee Note to emphasize that the producing party is not required to conduct a post-production review to determine whether any mistaken disclosures have been made.

Extending the protections of Rule 502(b) to disclosures made to federal offices and agencies:

A number of public comments asked the Committee to consider extending the protections of Rule 502(b) beyond disclosures in federal proceedings, to disclosures made to federal offices and agencies. They noted that the cost of pre-production privilege review can be as great with respect to a production to the government as it is in litigation; in the public comment, the Committee received information that a single production to a government regulator cost a corporation more than $5,000,000 in costs of pre-production privilege review.

Most Committee members agreed that extending the protections of Rule 502(b) to productions to federal offices and agencies was a sensible means of limiting the costs of privilege review, which is the basic goal of proposed Rule 502. These members further argued that the protection against mistaken disclosure should apply to any production made to a federal office or agency. They contended that there was no reason to limit the protection to disclosures made in the course of regulatory investigations or enforcement. They reasoned that any limitation in the rule — such as that the production must be made "to a federal office or agency in the exercise of its regulatory, investigative, or enforcement authority" — might give rise to questions about when the office or agency is in fact exercising that authority, a question that would often be difficult for the producing party to determine.

The Department of Justice representative expressed the Department's opposition to extending inadvertent disclosure protections to disclosures made to a federal office or agency, and then further extending that protection by removing the limitation of the disclosure being made in the exercise of regulatory, investigative or enforcement authority. The Department agreed that there may be some benefits to this extension in limiting the costs of production of information, but it argued that extending the protection beyond litigation might lead to negative ramifications that were not considered or raised in the public comment period. The Department representative argued that extending the inadvertent disclosure protections would require actions by people well downstream

of any "proceeding" in which the inadvertent disclosure would be judged. For example, where the government is reviewing a proposed take-over of two companies, or a company proposing to take over a government function, and the company inadvertently submits privileged material to the government, the parties may disagree over whether there is a waiver, and there is no proceeding at that point in which to adjudicate the issue. The government might rely on the document to make an administrative decision, which, if challenged, raises the question of whether a court could overturn a decision if it found that there was an inadvertent disclosure. And once out of the investigatory or regulatory context, Rule 502 could reach so far as to require government contractors to consult the Rules of Evidence in their negotiations with the government, even though no proceeding is contemplated, and may never occur. The cautious party may believe that "reasonably prompt steps" to recover an inadvertently produced document might include bringing a proceeding where none existed. Otherwise, if nothing is done other than a demand, there could be the concern that down the road, the party will be found not to have taken reasonably prompt steps to rectify the mistaken disclosure.

The Committee discussed and considered the Department's concerns. Members responded that the examples raised by the Justice Department could arise under the existing federal common law of waiver. As that is so, it made sense to have that law of waiver in one place, i.e., Rule 502, rather than having parties (including the government) search the non-uniform federal common law to determine whether a mistaken disclosure constitutes a waiver when disclosures are made to federal offices or agencies. Committee members also argued that disclosures to federal offices or agencies, in any context, raise a sufficient federal interest to justify extending the protection of Rule 502(b).

The Committee voted to extend the protection of Rule 502(b) to all mistaken disclosures made to federal offices or agencies. The Department of Justice representative was the only dissenter.

Finally, the Committee discussed briefly whether it made sense to extend the protection of Rule 502(b) to *any* mistaken disclosure or privilege or work product, where the information is later offered in a federal proceeding. The example given was that of a privileged letter mistakenly sent to a friend or employee, completely outside the context of a federal proceeding or production to a federal office or agency. Committee members resolved that there would not be a sufficient federal interest in protecting these disclosures, and that extending the protections of Rule 502 to such disclosures could create conflicts with legitimate state interests. Such an extension was found especially unwarranted in the absence of public comment.

The revised version of Rule 502(b), as approved by the Committee, reads as follows:

(b) Inadvertent disclosure. — When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:

(1) the disclosure is inadvertent;

(2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and

(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Fed. R. Civ. P. 26(b)(5)(B).

The Committee Note to Rule 502(b), as approved by the Committee, reads as follows:

Subdivision (b). Courts are in conflict over whether an inadvertent disclosure of a communication or information protected as privileged 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 inadvertent disclosure of a communication or information protected under the attorney-client privilege or as work product constitutes a 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 protected communications or information in connection with a federal proceeding or to a federal office or agency does not constitute a waiver if the holder took reasonable steps to prevent disclosure and also promptly took reasonable steps 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, a communication or 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 applies to inadvertent disclosures made to a federal office or agency, including but not limited to an agency that is acting in the course of its regulatory, investigative or enforcement authority. The consequences of waiver, and the concomitant costs of pre-production privilege review, can be as great with respect to such disclosures as they are in litigation.

Cases such as *Lois Sportswear, U.S.A., Inc. v. Levi Strauss &* Co., 104 F.R.D. 103, 105 (S.D.N.Y. 1985) and *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D.Cal. 1985), set out a multi-factor test for determining whether inadvertent disclosure is a waiver– the reasonableness of precautions taken, the time taken to rectify the error, the scope of discovery, the extent of disclosure and the overriding issue of fairness. The rule does not explicitly codify that test, because it is really a set of non-determinative guidelines that vary from case to case. The rule is flexible enough to accommodate any of those factors. Other relevant considerations include the number of documents to be reviewed and the time

constraints for production. Depending on the circumstances, a holder that uses advanced analytical software applications and linguistic tools may be found to have taken "reasonable steps" to prevent disclosure of protected communications or information. Efficient systems of records management implemented before litigation will also be relevant.

The rule does not require the producing party to engage in a post-production review to determine whether any protected communication or information has been produced by mistake. But the rule does require the producing party to follow up on any obvious indications that a protected communication or information has been produced inadvertently.

The rule is intended to apply in all federal court proceedings, including court-annexed and court-ordered arbitrations.

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 communications or 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.").

6. Selective Waiver: Rule 502(c) as issued for public comment stated that a waiver by disclosure to federal offices or agencies exercising investigatory or prosecutorial authority would not constitute a waiver in favor of private parties. The Committee did not approve this "selective waiver" provision on the merits. Rather, it placed the language in brackets in order to elicit public comment on the subject of selective waiver — a subject that the Committee had been asked to address.

During the public comment period, the selective waiver provision was without question the most controversial part of proposed Rule 502. It was adamantly opposed by bar groups and private lawyers; it was enthusiastically favored by government offices and agencies. The basic arguments expressed in favor of selective waiver were 1) it is a necessary tool for corporations to be able to cooperate with government investigations when they would not otherwise do so for fear that the information disclosed to the government could be used by private parties; and 2) it will decrease the costs of government investigations. The basic arguments expressed against selective waiver were 1) it would add more pressure on corporations to waive the privilege— pressure that would only feed into the alleged "culture of waiver" already established by federal agencies; and 2) it would deprive private parties of relevant information that may be necessary for private recovery. (Other arguments for and against selective waiver are described in the summary of public comment attached to proposed Rule 502, as submitted to the Standing Committee as an action item).

At the Spring meeting Committee members discussed whether the selective waiver provision

should be retained in proposed Rule 502. The discussion (and the public comment) indicated that selective waiver raised empirical questions that the Committee was not in a position to determine — most specifically whether selective waiver protection is necessary to encourage corporations to cooperate with government investigations, or instead whether corporations are sufficiently incentivized to cooperate so that selective waiver would be an unjustified protection. Committee members also noted that much of the debate on selective waiver was in essence political. For example, most of those opposed to selective waiver argued that it would only aggravate the "culture of waiver" that currently exists when public agencies seek privileged information from corporations. And most of those in favor denied the existence of a "culture of waiver". But the Committee determined that 1) whether a culture of waiver was a good or bad thing was essentially a political question, and 2) whether such a culture existed was an empirical question. Neither question could be determined by the Committee during the rulemaking process.

Some members opposed to selective waiver emphasized that the doctrine has been rejected by almost all federal courts, and therefore any rule adopting selective waiver should bear a heavy burden of justification — one that had not been met during the public comment. Finally, members noted that if a selective waiver provision were included in Rule 502, it would probably have to require state courts to adhere to selective waiver protection for disclosures made to federal regulators. Otherwise the provision could not be relied upon for sufficient protection from the consequences of disclosure. But binding state courts to selective waiver would raise significant problems of federalism, because most states do not recognize selective waiver.

After extensive discussion, the Committee voted unanimously to drop the provision on selective waiver from Proposed Rule 502.

The question for the Committee, after this vote, was whether the selective waiver provision should be made part of a separate report to Congress, and if so, whether the Committee should take any position in that report on the subject of selective waiver. The Committee unanimously determined that it would be appropriate to make some report to Congress on selective waiver. Members reasoned that Congress requested that the Committee consider selective waiver, and so Congress was entitled to some report on the Committee's extensive work on the subject. The Committee resolved that it would submit to the Standing Committee a separate report to Congress on selective waiver, with the recommendation that the report be submitted to the Judicial Conference and referred to Congress as a report of the Conference.

The next question for the Committee was whether it should take some position on selective waiver in the report to Congress. As the Committee had already decided to drop selective waiver from Proposed Rule 502 because it could not support the provision on the merits, the three options remaining for the Committee in the report to Congress were: 1) provide language that Congress might use for a statute on selective waiver but take no position on the merits; 2) provide language that Congress might use, but recommend against any enactment of a selective waiver statute; and 3) recommend against a selective waiver statute and provide no language for Congress to use.

The Committee quickly rejected the third option — providing no statutory language for

Congress to consider — on the ground that this option would not fully respond to the request for a rulemaking procedure on selective waiver. The Committee held three hearings in which much of the testimony focused on selective waiver, and the Committee spent many hours drafting and reviewing language for a selective waiver provision. Under these circumstances, the Committee determined that it was appropriate to refer this work product to Congress, in the event that Congress should decide to proceed with separate legislation on selective waiver.

One member argued in favor of the second option — recommending against selective waiver. That member reiterated many of the arguments against selective waiver that were raised in the public comment. In response, many members emphasized that while they may not personally support selective waiver, it would not be appropriate to take a position on the merits recommending against such legislation. To take such a position would involve the Committee in the political disputes and unresolved empirical questions that led the Committee to drop the selective waiver provision from Rule 502 in the first place.

At the end of the discussion, the Committee voted 1) to propose the submission of a report to Congress that would set forth the arguments before and against selective waiver that were raised in the public comment; 2) to take no position on the merits of selective waiver in that report, while explaining that selective waiver raises controversial issues that the Committee was not in a position to resolve; and 3) to set forth draft language for separate legislation, for Congress to consider should it decide to implement selective waiver. One member dissented.

The Committee next considered whether the language for a statute on selective waiver should be changed in any respect from the selective waiver provision that was released for public comment as Rule 502(c). The Committee unanimously agreed that the suggested statutory language should cover disclosures made to federal agencies only. Members reasoned that the federalism issues attendant to controlling disclosures to state agencies are extremely serious, and that including language even in brackets to cover state disclosures might suggest that covering disclosures was simply a question of drafting.

7. Extending Rule 502(d) to Confidentiality Orders Not Based Upon the Agreement of the Parties: At the Fall 2006 meeting, the Committee tentatively agreed to amend the court order provision of Rule 502 so that the enforceability of a court order would not depend on agreement between the parties. Members 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. Public comment also noted that court orders on confidentiality would be useful to limit the costs of discovery even where all parties do not agree to such an order (e.g., when only one party has most of the discovery obligations) or when the parties disagree on certain provisions.

At the Spring meeting, the Committee agreed unanimously that the court order provision should be amended to delete the language making enforceability of a confidentiality order dependent

on the agreement of the parties.

8. Amendment to Definition of Work Product: Two public commenters argued that the definition of work product in Rule 502 as issued for public comment was too limited, because the work product protection extends to intangibles under federal common law. Thus, a definition limited to "materials" may be construed as not protecting intangible work product.

The law on this subject indicates that while Rule 26 protects only tangible "materials," the federal common law extends equivalent protection to intangibles such as facts learned from work product, and electronic data not in hardcopy. The Committee agreed with the public comment and voted unanimously to amend the definitions section to provide coverage of intangible work product. The definitions section approved by the Committee reads as follows:

> **(g) Definitions**. — In this rule:
>
> 1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and
>
> 2) "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

The Committee also unanimously approved a Committee Note to the definitions section to read as follows:

> **Subdivision (g).** The rule's coverage is limited to 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.
>
> The definition of work product "materials" is intended to include both tangible and intangible information. *See In re Cendant Corp. Sec. Litig.*, 343 F.3d 658, 662 (3d Cir. 2003) ("It is clear from *Hickman* that work product protection extends to both tangible and intangible work product").

9. ABA Proposal on Implied Waiver: At the very end of the public comment period, the ABA proposed an amendment to proposed Rule 502 to cover a purported problem that had not been addressed in any of the hearings on the rule and is not treated by the rule: whether waiver of privileged communications can be implied by disclosing underlying factual information. The proposal was to add an entirely new and lengthy section to Rule 502 on this separate subject matter. The ABA also proposed an extensive Committee Note to accompany this major change to Rule 502.

The Committee voted unanimously to take no action on the ABA proposal regarding implied waiver. Substantial changes to an Evidence Rule, such as proposed by the ABA, require significant research and careful consideration by the Committee. The Committee determined that it could not,

under the circumstances presented, simply add the ABA proposal to proposed Rule 502.

Final Committee Determination on Rule 502:

The Committee voted unanimously to recommend to the Standing Committee that Proposed Rule 502 and its Committee Note (both as amended at the meeting), together with a cover letter to Congress (as approved at the meeting), be approved and referred to the Judicial Conference for eventual recommendation to Congress. The text of proposed Rule 502, the Committee Note, and the cover letter to Congress are attached to these minutes. The text of the separate cover letter to Congress on selective waiver, approved unanimously by the Committee is also attached to these minutes, as is the draft language for a selective waiver statute, on which the Committee takes no position.

Harm-to-Child Exception to the Marital Privileges

Public Law 109-248, the Adam Walsh Child Protection and Safety Act of 2006, Section 214, 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 Reporter and the consultant on privileges prepared a memorandum to assist the Committee in assessing the necessity and desirability of amending the Evidence Rules to provide a harm to child exception to the marital privileges. That memo indicated that almost all courts considering the question had in fact refused to apply either the confidential communications privilege or the adverse testimonial privilege to cases in which the defendant is charged with harm to a child in the household. In other words, a harm to child exception to both marital privileges is already recognized in the federal case law. One recent federal case, however, refused to adopt a harm to child exception to the adverse testimonial privilege. The memorandum concluded that this recent case was dubious authority, because it provided no analysis; relied on a purported lack of case law on the subject, even though other federal cases apply the exception; and failed to cite a previous case in its own circuit that applied a harm-to-child exception to the adverse testimonial privilege

(and accordingly the new case is not even controlling in its own circuit).

The Committee reviewed and discussed the necessity and desirability of an amendment to implement a harm to child exception to the marital privileges. Most members agreed that if it were the Committee's decision, it would not and should not propose an amendment to implement the harm to child exception. This is because the Committee ordinarily does not propose an amendment unless one of three conditions is established: 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. With respect to the existence of a harm to child exception, there is no risk of unconstitutional application, and there is no problem of workability, because the exception either applies or it does not. With respect to a split in the circuits, the courts are in fact uniform about the existence of a harm to child exception to the privilege for confidential communications. It is true that there is a split of sorts on the application of the harm to child exception to the adverse testimonial privilege, but that split was only recently created, and by a single case — a case that ignores the fact that its own circuit had previously established the exception. Thus, the Evidence Rules Committee would not ordinarily 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.

Committee members also noted that an amendment to establish a harm to child exception would raise at least four other problems: 1) piecemeal codification of privilege law; 2) codification of an exception to a rule of privilege that is not itself codified; 3) difficulties in determining the scope of such an exception, e.g., whether it would apply to harm to an adult child, a step-child, etc.; and 4) policy disputes over whether it is a good idea to force the spouse, on pain of contempt, to testify adversely to the spouse, when it is possible that the spouse is also a victim of abuse.

The Department of Justice representative noted, however, that the question for the Committee was not whether it would propose an amendment, but rather how to respond to Congress's request for input on the necessity and desirability of such an amendment. Because privilege rules must be enacted by Congress, the standard for proposing a rule of privilege might be different from that used by the Evidence Rules Committee for other rules.

After discussion, the Committee voted to recommend to the Standing Committee a report to Congress concluding that an amendment to the Evidence Rules to codify a harm-to-child exception was neither necessary nor desirable. The Committee approved the draft report prepared by the Reporter, which explains why the exception is neither necessary nor desirable. The Department of Justice representative dissented.

The Committee then reviewed and approved language for a harm-to-child exception to be included in the report to Congress, for its consideration should Congress decide to proceed with the exception. The draft language as approved by the Committee 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.

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. That template takes a "days are days" approach to time-counting, meaning that weekend days and holidays are counted for all time periods measured in days. It also provides for uniform treatment on when to begin and end counting of any time period, and a uniform method of counting when the period ends on a weekend or holiday.

The question for the Evidence Rules Committee at the Spring meeting was whether a version of the Time-Counting template should be proposed as an amendment to the Evidence Rules. The Committee noted that there are only a handful of Evidence Rules that are subject to day-based time-counting: 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, unless good cause is shown; 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, unless good cause is shown. There are only two year-based time periods that could potentially be subject to the time-counting rule that would govern when a time period begins and ends: 1) Rule 609(b) provides a special balancing test for convictions offered for impeachment when the conviction is over 10 years old; and 2) Rules 803(16) and 901(b)(8) together provide for admissibility of documents over 20 years old.

The Committee reviewed a memorandum from the Reporter which indicated that 1) the day-based time periods in the Evidence Rules will not be shortened or otherwise affected by the time-counting template, because they are all 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 14 days or longer — so there is no reason to change those periods; and 2) there appears to be 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. Perhaps this is because the day-based time periods in the Evidence Rules are all subject to being excused for good cause, and if there is any close question as to when to begin and end counting days, the court has the authority to excuse the time limitations. And as to the year-based time periods, it would be extremely unlikely for a situation to arise in which the timespan is so close to the limitation that it would make a difference to count one day or another. For example, how likely is it that a document will be 20 years old, depending on how one counts the first or last day of the period? Any dispute on time-counting could be handled by the court or the proponent of the evidence by simply waiting a day to admit the evidence.

Committee members noted another problem with adding a time-counting rule to the Evidence Rules: If the template is adopted as an Evidence Rule and kept uniform with the Civil and Criminal Rules on time-counting, some anomalies may arise. For example, the template contains an entire subdivision on counting hour-based time periods. But there are no hour-based time periods in the Evidence Rules. It seems unusual to have a rule on counting hour-based periods when there is no such period in the Evidence Rules — nor is there likely ever to be one. Including such a provision may well create confusion; lawyers who assume quite properly that Evidence Rules are written for a purpose may think that there must be some hour-based time period that they have overlooked. Also, the template provides extensive treatment of what to do if the clerk's office is inaccessible. But the clerk's availability is essentially irrelevant to the time-based periods in the Evidence Rules. Similarly, the "last day" provision, which is tied to when something can be filed with the clerk, is unlikely to have any applicability to any time-based question in the Evidence Rules.

Committee members noted that the anomalies raised above (of having provisions with no practical utility) could be addressed by tailoring the text of the template and deleting the provisions that have no utility in the Evidence Rules. But that solution raises problems of its own. Any time-counting Evidence Rule would have to co-exist with the time-counting Civil and Criminal Rules. To the extent those rules do not match, there will be confusion and an invitation to litigation — one party arguing that the Evidence Rules count the time in one way and the other arguing that the Civil/Criminal rule comes out differently. And this is especially problematic because the template covers not only time-counting under the *rules*, but also time-counting under statutes, local rules and court orders. Under that language, the time-counting rule in the Evidence Rules would make it applicable not only to the few time-based Evidence Rules, but also to any statute or local rule that may be raised in the litigation — making it all the more important that the time-counting Evidence Rule track the Civil and Criminal Rules exactly. The alternative, perhaps, is to change the template version to provide that the time-counting Evidence Rule is applicable only to time-counting under the Evidence Rules themselves. But disuniformity would still create a problem if the Evidence Rule counted one way as to the time-based Evidence Rules, but the Civil or Criminal Rule came out differently.

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, and adding the template to the Evidence Rules is likely to create confusion and unnecessary litigation.

Restyling Project

At a previous meeting the Committee directed the Reporter to prepare restyled versions of a few Evidence Rules, so that the Committee could consider the desirability of undertaking a project to restyle the Evidence Rules. That project would be similar to the restyling projects for Appellate, Criminal and Civil Rules that have been completed. 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. Many of the Evidence rules are "paper-based"; they

refer to evidence in written and hardcopy form. A restyling project could be used to update the paper-based language used throughout the Evidence Rules, and more broadly it might be useful in making the Evidence Rules more user-friendly. The general sense of the Committee at previous meetings was that a restyling project had merit and was worthy of further consideration. Members reasoned that the Evidence Rules in current form are often hard to read and apply, and that a more user-friendly version would especially aid those lawyers who do not use the rules on an everyday basis.

The Reporter asked Professor Joseph Kimble, the Standing Committee's consultant on Style, to restyle three rules of evidence — Rules 103, 404(b) and 612. Professor Kimble graciously agreed to do so. The rules were picked as representative of the types of challenges and questions that would be presented by a restyling project. They raised questions such as: 1) whether updating certain language would be a substantive or stylistic change; 2) whether adding subdivisions within a rule would be unduly disruptive; and 3) whether certain substantive changes that would improve the rule could be proposed for amendment along with the style changes. After Professor Kimble restyled the three rules, the Reporter reviewed the changes and provided suggestions for change, on the ground that some of the proposed style changes would have substantive effect. Professor Kimble incorporated the Reporter's suggestions in a second draft, and it was that draft that was reviewed by the Committee at a previous meeting.

The Committee recognized that before any more work was done on a restyling project, the Committee would need to determine whether the Chief Justice supported restyling of the Evidence Rules. At the Spring 2007 meeting, John Rabiej reported that the Chief Justice was informed about the possible project to restyle the Evidence Rules and had no objection to the project.

In light of the Chief Justice's position, the Committee voted unanimously to begin a project to restyle the Evidence Rules. No timetable was placed on the project. The Reporter stated that he would work with Professor Kimble to prepare some restylized rules for the Committee's consideration at the next meeting.

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 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 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. Most

recently, however, the Court in *Whorton v. Bockting* explicitly held that if hearsay is not testimonial, then its admissibility is governed solely by rules of evidence, and not by the Confrontation Clause.

The Reporter stated to the Committee that the Court's recent decision in *Bockting* raised the question of whether any amendments should be proposed to the hearsay exceptions on the ground that as applied to non-testimonial hearsay, a particular exception may not be sufficiently reliable to be used against an accused. Before *Bockting*, it could still be argued that reliability-based amendments would not be necessary in criminal cases because the Confrontation Clause still regulated the reliability of non-testimonial hearsay. But that is no longer the case after *Bockting*. The Reporter noted that one possibly questionable exception is Rule 804(b)(3), which provides that a hearsay statement can be admitted against the accused upon a finding that a reasonable declarant could believe that making the statement could send to subject him to a risk of penal sanction. There is no requirement in the Rule that the government provide any further corroborating circumstances indicating that the statement is trustworthy — even though the accused must provide corroborating circumstances to admit such a statement in his favor.

The Committee directed the Reporter to prepare a memorandum for the next meeting, on whether it is necessary to amend Rule 804(b)(3) to require that the government provide corroborating circumstances guaranteeing trustworthiness before a declaration against penal interest can be admitted against an accused.

Closing Business

The Committee noted that the Spring 2007 meeting was Judge Smith's last meeting as Chair of the Committee. The Committee expressed its deep gratitude and appreciation for Judge Smith's outstanding work as Chair. Members and the Reporter emphasized that without Judge Smith's guidance and leadership, the Committee could not have tackled such difficult and important issues as waiver of attorney-client privilege and offers of compromise; Judge Smith was responsible for the Committee's success on these projects, and he will be sorely missed.

The meeting was adjourned on April 13, 2007, with the time and place of the Fall 2007 meeting to be announced.

Respectfully submitted,

Daniel J. Capra
Reporter