

# Advisory Committee on Evidence Rules

Minutes of the Meeting of November 16, 2006

Washington, D.C.

The Advisory Committee on the Federal Rules of Evidence (the “Committee”) met on November 16, 2006 at the Thurgood Marshall Building in Washington, D.C..

*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. Hangle, Esq.  
Marjorie A. Meyers, Esq.,  
Ronald J. Tenpas, Esq., Department of Justice

*Also present were:*

Hon. Thomas W. Thrash, Jr., Liaison from the Standing Committee on Rules of Practice and Procedure  
Hon. Christopher M. Klein, Liaison from the Bankruptcy Rules Committee  
Hon. Michael M. Baylson, Liaison from the Civil Rules Committee  
Professor Daniel Coquillette, Reporter to the Standing Committee on Rules of Practice and Procedure  
Thomas W. Hillier II, Esq., outgoing member  
Patricia L. Refo, Esq., outgoing member  
Elizabeth Shapiro, Esq., Department of Justice  
Timothy Reagan, Esq., Federal Judicial Center  
John K. Rabiej, Esq., Chief, Rules Committee Support Office  
James Ishida, Esq., Rules Committee Support Office  
Jeffrey N. Barr, Esq. Rules Committee Support Office  
Timothy Dole, Esq., Rules Committee Support Office  
Professor Daniel J. Capra, Reporter to the Evidence Rules Committee  
Professor Kenneth S. Broun, Consultant to the Evidence Rules Committee  
Professor Joseph Kimble, Consultant on Style

## **Opening Business**

Judge Smith welcomed the two new members of the Committee, William Hangle and Marjorie Meyers. He reported on the June meeting of the Standing Committee, in which that Committee approved proposed Evidence Rule 502 for release for public comment. He also noted that the proposed amendments to Rules 404, 408, 606(b) and 609, are before Congress and are expected to become effective on December 1, 2006.

Judge Smith asked for approval of the minutes of the April 2006 Committee meeting. The minutes were approved.

## **Possible Restyling Project**

At its last 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 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.

The Committee engaged in an extensive discussion of the costs and benefits of restyling the Evidence Rules. Judge Thrash, who is a member of the Style Subcommittee of the Standing Committee, stated that restyling would require extensive time and effort from the Committee and the Reporter. He noted that when the Civil Rules were restyled, dozens of questions arose as to whether a purported style change would change the substance of a rule. Judge Thrash remarked,

however, that the end product of restyled Civil Rules was worth the effort, as those rules are now much more user-friendly, easier to read and apply.

Committee members noted that if the Evidence Rules were reviewed for style, there would inevitably be suggestions that those Rules could be improved substantively as well. Yet those at the meeting who were involved in previous style projects strongly recommended that substantive improvements be put to the side during restyling. Adding substantive changes would complicate and delay the restyling process, and would make it harder for the project to gain approval. The recommendation was that the substantive changes raised in the restyling process should be placed on a separate track and proposed after restyling was completed.

Some Committee members expressed reservations about restyling the Evidence Rules. One member noted that the Committee did not have its full complement of members, and therefore it might be difficult to complete the project in a timely fashion. Another member opined that any difficulty in using the Evidence Rules was not because of their wording and structure, but because of difficult evidentiary concepts such as the difference between hearsay and a statement not offered for its truth. Another member questioned whether the restyling of the Evidence Rules might be problematic because most states use the existing Federal Rules as a model for their own rules of evidence.

Despite these reservations, the general sense of the Committee was that the 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 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. The Reporter to the Standing Committee noted that the Chair of the Standing Committee would be meeting with the Chief Justice in the near future. The sense of the Committee was that it would be useful if the Chief Justice's views on restyling of the Evidence Rules could be addressed at that meeting.

## **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 was not even controlling in its own circuit).

The Committee considered 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 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 two other anomalies: 1) piecemeal codification of privilege law; and 2) codification of an exception to a rule of privilege that is not itself codified.

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.

The Committee unanimously agreed that it was important to consider the request from Congress seriously and that, even if the Committee would not propose an amendment to implement a harm to child exception, it should in its report to Congress 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.

The Committee directed the Reporter to prepare a draft report to Congress that would set forth: 1) the reasons why the costs of an amendment are not warranted when the only benefit is to address the results of an aberrational case; 2) concerns about piecemeal adoption of privilege rules; 3) concerns about drafting an amendment that would provide an exception to privileges that are not themselves codified; and 4) proposed language for Congress to consider should it decide to promulgate an amendment that would codify a harm to child exception to the marital privileges. The Committee will consider the draft report at its next meeting.

## **Time-Counting Project**

The Standing Committee has appointed a Subcommittee to prepare rules that would provide for uniform treatment for counting time-periods under the national rules. The Subcommittee has prepared a template and has solicited comments and suggestions from the Advisory Committees. 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 or longer periods. It also provides for uniform treatment on when to begin and end counting, and a uniform method of counting when the end of the period is a weekend or holiday.

The Committee reviewed the Time-Counting template and unanimously approved of the approach taken by the Time Counting subcommittee. It had no suggestions for improvement to the template.

The Committee then discussed whether the Evidence Rules should be amended to implement the uniform time-counting rules provided in the Template. The Committee noted that there are only a handful of Evidence Rules that are subject to 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; 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; 3) Rule 609(b) provides a different balancing test for convictions offered for impeachment when the conviction is over 10 years old; and 4) Rules 803(16) and 901(b)(8) 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; 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 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.

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 to provide that the Civil and Criminal time-counting rules would govern time-counting under the Evidence Rules.

## **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.

*Crawford* raises questions about the constitutionality as-applied of some of the hearsay exceptions in the Federal Rules of Evidence. The Evidence Rules Committee has therefore resolved to monitor federal case law developments after *Crawford*, in order to determine whether and when it might be necessary to propose amendments that would be necessary to bring a hearsay exception into compliance with constitutional requirements. The memorandum prepared by the Reporter indicated that the federal courts are in substantial agreement that certain hearsay statements are always testimonial and certain others are not. Those considered testimonial include grand jury statements, statements made during police interrogations, prior testimony, and guilty plea allocutions. Statements uniformly considered nontestimonial include informal statements made to friends, statements made for purposes of medical treatment, and garden-variety statements made during the course and in furtherance of a conspiracy. Federal courts have also held that certifications of a record or the non-existence of a record may be admitted despite *Crawford*, even if those certifications are prepared specifically for litigation.

The Committee discussed whether any amendment should be proposed in order to bring any of the hearsay exceptions into compliance with the Confrontation Clause after *Crawford* and its progeny. Some members were of the opinion that no amendment was 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, i.e., that the admissibility requirements of the Federal Rules hearsay exceptions screen out testimonial hearsay as that term has been construed in *Davis* and the lower courts. Others were less confident that the Federal Rules hearsay exceptions were coextensive with the Confrontation Clause, but these members nonetheless agreed that it would be unwise at this point to propose amendments that would attempt to codify *Crawford* and its progeny. These members concluded that the case law remained in flux, and noted that the Supreme Court's opinion in *Davis* was less than a year old and had yet been applied or construed by many of the lower courts.

The Committee unanimously resolved that it was not advisable to propose an amendment in response to *Crawford* at this time. It directed the Reporter to continue to monitor case law developments under *Crawford* and *Davis*.

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

At previous meetings, Committee members noted a number of problems with the current federal common law governing the waiver of attorney-client privilege and work product. In complex litigation the lawyers spend significant amounts of time and effort to preserve the privilege, even

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

Concerns about the common law of waiver of privilege and work product have been voiced in Congress as well. The Chairman of the House Committee on the Judiciary, by letter dated January 23, 2006, requested the Judicial Conference to initiate the rulemaking process to address the litigation costs and burdens created by the current law on waiver of attorney-client privilege and work product protection. The Chairman recognized that while any rule prepared by the Advisory Committee could proceed through the rulemaking process, it would eventually have to be enacted directly by Congress, as it would be a rule affecting privileges. See 28 U.S.C. § 2074(b). In response to that letter, the Committee prepared a proposed Rule 502 that would protect against waiver of privilege or work product under certain circumstances. The first draft of that rule 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 2006 meeting, the Reporter prepared a discussion memorandum that highlighted some comments and suggestions concerning Rule 502 that were made outside the formal public comment process, which was still in an early stage. The Committee discussed these comments and suggestions at the meeting, with the recognition that no immediate action could or should be taken on any proposal for change to Rule 502 until the end of the formal comment period. The Committee did, however, reach some tentative conclusions on some issues raised by the informal comments.

The comments considered by the Committee, and the Committee's tentative position on each of the comments, was as follows:

***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. The Reporter received an informal comment suggesting 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. It is also argued that the “should have known” language would be difficult to apply in electronic discovery cases, in which mistaken disclosures are all but inevitable and so one could argue that the holder “should have known” about mistaken disclosure at the very time that *any* production of electronic material was made.

The suggestion was discussed by the Committee. The sense of the Committee was that the “should have known” language had substantial merit. Committee members noted that an “actual knowledge” standard would also give rise to litigation. Questions would be raised on the exact point at which a producing party “knew” about a mistaken disclosure. One Committee member remarked 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. 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.

The Committee recognized that in many cases actual knowledge will be relatively easy to determine, because in most jurisdictions a lawyer who receives the information has an ethical obligation to notify the producing party of its receipt. But that ethical proscription would not apply, for example, where the recipient is a pro se litigant. And actual knowledge arguments might still be made for the period between the time of disclosure and the time that the recipient recognizes that the material is protected and notifies the producing party. For all these reasons, the Committee tentatively determined to retain the “should have known” language in Rule 502(b).

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

An informal comment suggested that Rule 502 contains an inconsistency when the inadvertent disclosure provision is compared to the selective waiver provision. The inadvertent disclosure provision (Rule 502(b)) provides protection from waiver when the disclosure is “inadvertent and is made *in connection with federal litigation or federal administrative proceedings.*” In contrast, the selective waiver provision (Rule 502(c)) provides protection from waiver 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 comment questioned whether there was a rationale for applying the protection of selective waiver to regulatory investigations, while not extending the protection of inadvertent disclosure to those same investigations.

In discussion of this comment, most Committee members concluded that the difference in

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

One Committee member argued in response that a federal interest could be retained by amending Subdivision (b) to cover mistaken disclosures in federal proceedings *and in response to investigations by federal regulators*. Extending the protection for mistaken disclosures to those made to regulators outside a proceeding might be justified on the ground that mistaken disclosures of privileged information are likely to occur much more frequently in response to investigations by regulators than in other non-litigation contexts.

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 comment received on the relationship between the inadvertent disclosure provision and the selective waiver provision led the Committee to a preliminary discussion of the merits of the selective waiver provision. The Committee has not decided whether to propose a selective waiver provision in Rule 502, i.e., a provision that disclosure of privileged information to a regulator does 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.

It is clear that the selective waiver provision is the most controversial part of proposed Rule 502. 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. Leaving the decision on the merits to Congress could be appropriate because rules of privilege must be directly enacted by Congress in any case. And including a selective waiver provision as a drafting option for Congress (without a suggestion on its merits) is probably appropriate given that in essence the Committee is drafting the rule for Congress and so should 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.

Other than on the merits of the proposal per se, a number of comments at the Committee meeting suggested changes to the language of Rule 502(c). One member suggested that the Rule should set forth procedures by which the producing party could prevent a regulator from disclosing privileged information to third parties. That member was concerned that a regulator, once receiving privileged information, might distribute it widely. But most Committee members noted that the Evidence Rules are not the place for establishing procedures for preventing disclosure of privileged material outside the context of a proceeding. Procedures for retrieving, or preventing disclosure of, privileged material are already set forth in the Civil Rules.

A Committee member noted that under the Rule as issued for public comment, a disclosure to a federal regulator would operate as a waiver to a state regulator. This is because Rule 502(c) 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 rule were to be adopted, then a disclosure to a federal regulator should not constitute a waiver to a state regulator. The Reporter was directed to provide a drafting alternative, for consideration at the next meeting, 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 Reporter received a private comment asking whether this rule would protect an inadvertent disclosure made in the context of a federal arbitration proceeding. 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. In that sense, providing for more efficiency in arbitration proceedings is beyond the scope of the rule.

One Committee member 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 the 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 Reporter received an informal comment from a federal judge, suggesting that the protection of the Rule should be extended to *any* confidentiality order entered by the court. That judge pointed out that if a court finds, for example, that a disclosure of privileged information during discovery was not a waiver, then that order should be enforceable against third parties even though the parties before the court did not enter into a confidentiality agreement.

The Committee unanimously agreed with the comment. 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. 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. That 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:***

At its Spring 2006 meeting, the Committee unanimously determined that Rule 502 should not purport to regulate disclosures made at the state level, i.e., in state court proceedings or before state regulators. The only impact of the Rule on state courts is that those courts must adhere to the federal rule on waiver with respect to disclosures originally made in federal proceedings or before federal regulators. 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. If there is a conflict between the waiver rules of the state and those provided under Rule 502, which law of waiver controls?

The Reporter submitted a memorandum to the Committee on 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 (and distinct from Rule 502) would govern in federal question cases.

After discussion, the Committee directed the Reporter to provide the Committee with three drafting alternatives to cover the three choice of law possibilities. The Committee will consider the drafting alternatives at its next meeting.

## **Closing Business**

Judge Smith expressed the Committee's deep gratitude and appreciation to departing members Tom Hillier and Trish Refo. He noted that both had served with great distinction, and that each had been a tremendous help and resource to the Committee.

The meeting was adjourned on November 16, 2006, with the time and place of the Spring 2007 meeting to be announced.

Respectfully submitted,

Daniel J. Capra  
Reporter