ADVISORY COMMITTEE
ON
EVIDENCE RULES

New York, NY
April 24-25, 2006

ADVISORY COMMITTEE ON EVIDENCE RULES

AGENDA FOR COMMITTEE MEETING
Fordham Law School
New York, New York
April 24-25, 2006

I. Hearing on Rule Concerning Waiver of Attorney-Client Privilege and Work Product

On April 24, from 9 a.m. until 1 p.m., the Committee will conduct a hearing on a proposed rule that would govern waiver of attorney-client privilege and work product. The hearing will consist of short statements by invited presenters, with time left for a discussion among the presenters and questions from the Committee.

The Committee has invited distinguished members of the judiciary, academia, private practice and government practice. What follows is a list of the presenters:

Judges:

Hon. John Koeltl, United States District Judge, Southern District of New York
Hon. Paul Grimm, United States Magistrate Judge, District of Maryland

Practitioners:

David M. Brodsky, Esq., Latham & Watkins, New York City
Gregory P. Joseph, Esq., Law Offices of Gregory Joseph, New York City
James Robinson, Esq., Cadwalader Wickersham & Taft, Washington, D.C.
Stephen D. Susman, Esq., Susman Godfrey, Houston, Texas
Ariana J. Tadler, Esq., Milberg Weiss, Bershad & Schulman, New York City
Mary Jo White, Esq., Debevoise & Plimpton, New York City

Organizations

American College of Trial Lawyers: John Kenney, Esq.
Association of Trial Lawyers of America: John Vail, Esq.

Regulators

Peter Pope, Esq., New York Attorney General's Office
Richard Humes, Esq., Securities Exchange Commission

Academics

Professor Bruce A. Green, Fordham Law School
Professor Timothy Glynn, Seton Hall Law School

Short bios of each of the presenters are included behind Tab 1 of the agenda book. The draft Rule 502 is also behind Tab 1.

II. Committee Meeting — Opening Business

After the hearing, the Committee will convene for its Spring 2006 meeting. Opening business includes approval of the minutes of the Fall 2005 meeting; a report on the status of the proposed amendments to Evidence Rules 404, 408, 606(b) and 609; and a report on the January 2006 meeting of the Standing Committee. The draft minutes of the Fall 2005 meeting are included in this agenda book.

III. Privileges

The Committee will consider the draft Rule 502 concerning waiver of attorney-client privilege and work product, especially in light of the testimony presented at the morning's hearing. The agenda book, behind Tab 3, includes: 1) a memorandum prepared by the Reporter and Professor Ken Broun, providing background on the Rule, response to comments already received on the Rule, and drafting alternatives; 2); the draft Rule and Committee Note; and 3) a letter from the Chair of the House Committee on the Judiciary, Congressman Sensenbrenner, soliciting the assistance of the Rules Committee in promulgating a rule to govern waiver of attorney-client privilege and work product.

IV. Update on Case Law Development After *Crawford v. Washington.*

The agenda book contains a memorandum from the Reporter setting forth the federal case law applying the Supreme Court's decision in *Crawford v. Washington*, and discussing the implications of that case law on any future amendments of hearsay exceptions.

V. Further Consideration of Proposed Amendments to the Evidence Rules

The Committee has requested the Reporter to prepare a memorandum on the advisability of amending the hearsay rule and its exceptions in light of *Crawford,* and also has tentatively approved a proposed amendment to the Evidence Rules (Rule 107). These proposals are ripe for consideration as a package of amendments, along with proposed Rule 502.

A. *Crawford* Package — Adding Constitutional "Warnings" to Rules 801(d), 802, 803, 804 and 807

The agenda book contains a memorandum from the Reporter on the possibility, suggested by Committee members at the last meeting, that the hearsay rule and its exceptions should be amended to refer to the constitutional limitations imposed on the admissibility of hearsay after *Crawford v. Washington.*

B. New Rule 107

The agenda book contains a memorandum from the Reporter on an amendment tentatively approved by the Committee at its last meeting: a new Evidence Rule 107, which accommodates technological developments by updating the paper-based language that currently exists in the rules.

VI. Next Meeting

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Subcommittee on Privileges
Professor Daniel J. Capra
Judge Jerry E. Smith, *ex officio*
(Open)
Professor Kenneth S. Broun, Consultant

March 28, 2006
Projects

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Robert L. Hinkle	D	Florida (Northern)	2002	2008
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Ronald J. Tenpas*	DOJ	Washington, DC	2001	Open
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Daniel J. Capra Reporter	ACAD	New York	1996	Open

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* Ex-officio
** Ex-officio, non-voting members' terms coincide with terms on Civil & Criminal Rules

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Judicial Conference Advisory Committee on Evidence Rules

Hearing on Proposed Rule Governing Waiver of Attorney-Client Privilege and Work Product

April 24, 2006

Biographical Summaries of Participants

David M. Brodsky is a partner in the New York office of Latham & Watkins, and Co-Chair of the Securities Litigation and Professional Liability Practice Group. Prior to joining Latham & Watkins, Mr. Brodsky served as Managing Director and General Counsel – Americas at Credit Suisse First Boston (CSFB), and was chairman of the Litigation Department of Schulte Roth & Zabel. With more than 30 years trial experience as both a federal prosecutor and private practitioner, Mr. Brodsky's practice focuses primarily on securities litigation with particular focus on internal investigations, SEC and other regulatory investigations and enforcement actions, securities actions and white collar criminal inquiries and prosecutions. Mr. Brodsky is a frequent lecturer in forums on shareholder actions, securities enforcement, both civil and criminal, internal investigations, corporate attorney-client privilege, corporate ethics, and the roles of audit committees and boards of directors in crisis management in programs sponsored by the Association of the Bar of the City of New York, Practicing Law Institute, American Lawyer Conferences and American Conference Institute. Mr. Brodsky has written numerous works on litigation topics, including "Federal Securities Litigation: A Deskbook for the Practitioner" (co-author with Daniel J. Kramer); "Opening Statements in Business and Commercial Litigation in Federal Courts;" "Judgments in Commercial Litigation in New York State Courts;" and "The Planning Process in Successful Partnering Between Inside and Outside Counsel." He is a graduate of Harvard Law School and Brown University.

Timothy Glynn is a professor at Seton Hall University School of Law School, where he has taught since 1999. He teaches courses in the corporate, employment, and civil procedure areas. His current scholarship focuses on corporate law, employment law, and the law of evidentiary privileges. Professor Glynn received his B.A., magna cum laude, from Harvard University, and his J.D., magna cum laude, from the University of Minnesota Law School, where he served as Editor-in-Chief of the Minnesota Law Review. He clerked for the Honorable Donald P. Lay, United States Court of Appeals for the Eighth Circuit. He then practiced law as an associate at the firm of Leonard, Street and Deinard in Minneapolis, Minnesota, focusing in the areas of securities, business, and employment litigation. Prior to joining Seton Hall, he again served as a judicial clerk, this time for the Honorable John R. Tunheim, United States District Court for the District of Minnesota.

Bruce A. Green is the Louis Stein Professor at Fordham Law School, where he directs the Louis Stein Center for Law and Ethics. He teaches and writes primarily in the areas of legal ethics and criminal law. Professor Green currently serves as the Reporter to the ABA Task Force on the Attorney-Client Privilege and as a member of a N.Y. State Bar Association task force on the same subject. Prior to joining the Fordham faculty in 1987, Professor Green was a law clerk to Judge James L. Oakes and Justice Thurgood Marshall and an Assistant U.S. Attorney and Chief Appellate Attorney in the Office of the U.S. Attorney for the Southern District of New York.

Hon. Paul W. Grimm, United States Magistrate Judge, District of Maryland. Judge Grimm is a 1973 graduate of the University of California, Davis, and a 1976 graduate of the University of New Mexico School of Law. Following graduation from law school, he served on active duty in the Army Judge Advocate General's Corps. Thereafter, he served as an Assistant State's Attorney for Baltimore County, an Assistant Attorney General for the State of Maryland, and was in private practice for 13 years. He was appointed as a United States Magistrate Judge in February, 1997. Judge Grimm is an adjunct faculty member at the University of Maryland School of Law, where he teaches pretrial civil procedure, evidence and trial evidence. He has authored two books on evidence, one on deposition practice, and most recently co-authored *Discovery Problems and their Solutions*, published by the American Bar Association Litigation Section. He also has authored numerous articles on evidence and civil procedure. He lectures frequently on the subjects of evidence, civil procedure, and trial practice. He is a retired Lieutenant Colonel, United States Army Reserve.

Richard M. Humes, has been an Associate General Counsel of the Securities Exchange Commission since 1990. He previously served as Assistant General Counsel, Special Trial Counsel, and Staff Attorney to the Office of General Counsel, SEC. He has also served as Special Assistant to the United States Attorney for the District of Columbia. Mr. Humes has received the SEC Distinguished Service Award and the Presidential Meritorious Executive Award. Mr. Humes is a graduate of Howard University Law School and Brown University.

Gregory P. Joseph is a past Chair of the ABA Section of Litigation (1997-98) and is currently a member of the Board of Regents of the American College of Trial Lawyers. He served on the Advisory Committee on the Federal Rules of Evidence from 1993-98. He is the author of Sanctions: The Federal Law of Litigation Abuse (3d ed. 2000; Supp. 2006); Modern Visual Evidence (Supp. 2005); and Civil RICO: A Definitive Guide (2d ed. 2000). He is also a member of the Editorial Board of Moore's Federal Practice and a member of the American Law Institute.

John Kenney, Retired Partner, Simpson Thacher & Bartlett. Fellow, American College of Trial Lawyers; former Chair of the Committee on the Federal Rules of Evidence. President, Federal Bar Council, 1994-96. Chair, Committee on Criminal Law, Association of the Bar of the City of New York, 1992-95. President, New York County Lawyers' Association, 1997-98. J.D. Fordham, 1969. A.B., St. Michael's College, 1966.

Hon. John G. Koeltl, United States District Judge, Southern District of New York. Nominated by William J. Clinton on April 26, 1994, confirmed by the Senate on August 9, 1994, and received commission on August 10, 1994. Education: Georgetown University, A.B., 1967. Harvard Law School, J.D., 1971. Law clerk, Hon. Edward Weinfeld, U.S. District Court, Eastern District of New York, 1971-1972. Law clerk, Justice Potter Stewart, Supreme Court of the United States, 1972-1973. Assistant special prosecutor, Watergate Special Prosecution Force, 1973-1974 Private practice, New York City, 1975-1994. Member of the Judicial Conference Committee on Court Administration and Case Management. Former Chair and Member, Committee on Federal Legislation, Association of the Bar of the City of New York. Adjunct Professor, NYU School of Law.

Peter B. Pope was appointed Deputy Attorney General for the Criminal Division of the New York State's Attorney General's Office in August 2000, having joined the office as Special Counsel to the Attorney General in January 1999. Prior to his appointment, Mr. Pope served as Vice President and Inspector General of the New York City School Construction Authority; Vice President at Goldman Sachs; and Assistant District Attorney for the Hon. Robert M. Morgenthau, in whose office he was Deputy Chief of the Labor Racketeering Unit. Mr. Pope was a law clerk to the Hon. Robert W. Sweet. He is a graduate of Yale Law School and Harvard College.

James K. Robinson is a partner in the law firm of Cadwalader, Wickersham & Taft, resident in the D.C. office. He served as Assistant Attorney General in charge of the Criminal Division of the U.S. Department of Justice from 1998-2001. He has testified frequently before Congress concerning criminal justice issues, including testimony with respect to money laundering, encryption export control policy, campaign finance, and grand jury reform. He also represented the United States in a wide variety of international fora, including service as head of the U.S. delegation to the G-8 government/industry cybercrime conference in Paris and the South American Justice Ministers conference in Argentina. Mr. Robinson is a former partner and head of the litigation department at the law firm of Honigman Miller Schwartz & Cohn in Detroit where he practiced for 18 years. He was also the Dean and a Professor of Law at Wayne State University Law School, where he taught courses in the area of evidence law. He chaired the Michigan Supreme Court committee that drafted the Michigan Rules of Evidence and has co-authored a three-volume treatise and a courtroom handbook on evidence published by West. Mr. Robinson served two terms as a member of the Advisory Committee on Evidence Rules. He is chair of the committee of the National Conference of Bar Examiners that drafts the evidence questions for the Multistate Bar Exam. Mr. Robinson holds a B.A. with honors from Michigan State University and a J.D., magna cum laude, from Wayne State University Law School where he was Editor-in-Chief of the Wayne Law Review. Following law school he served as a law clerk to the Honorable George C. Edwards of the United States Court of Appeals for the Sixth Circuit.

Stephen D. Susman, is the founding Partner of Susman Godfrey, a firm specializing in commercial litigation. He served as a law clerk to Justice Hugo Black and to Judge John R. Brown of the Fifth Circuit Court of Appeals. He has served as Chairman of the Section on Antitrust and

Trade Regulation of the Texas State Bar. He has been appointed to many positions in the American Bar Association, including the Section of Antitrust Law (member of Council, 1989-91); the Section of Litigation (currently member of Trial Advisory Board and Federal Practice Task Force and formerly co-chair of Task Force on Training the Advocate, Chairman of Task Force on Fast Track Litigation, and member of Committee to Improve Jury Comprehension); and the Section of Intellectual Property. He is a member of the American Law Institute. He serves on the ALI-ABA Advisory Group on Antitrust, and on the Editorial Advisory Board for the BNA Civil RICO Reporter and "Inside Litigation." He also serves on the Advisory Board of the University of Texas School of Law's Review of Litigation. Mr. Susman is the Chairman of the Texas Supreme Court Advisory Committee's Discovery Subcommittee, and Director of the Texas Association of Civil Trial and Appellate Specialists. Mr. Susman is a magna cum laude graduate of the University of Texas School of Law and Yale University.

Ariana J. Tadler is a partner at Milberg Weiss Bershad & Schulman. Ms. Tadler has extensive experience litigating complex securities class actions, and is one of the principal liaison counsel on behalf of plaintiffs in the Initial Public Offering Securities Litigation. In that capacity, she manages on a day-to-day basis 309 separate class actions which have been coordinated for pretrial purposes. Ms. Tadler has attended numerous lectures and seminars nationwide at which she has been a selected speaker on various topics. Recent conferences include: The Sedona International Conference, "International Electronic Information Management Discovery and Disclosure" (July 2005); ABA Panel Securities Section Meeting, "Recent Developments in Federal Securities Class Actions" (August 2005); 8th Circuit Judicial Conference, "Panel on E-Discovery"; SEC Institute Conference, "Staying Out of Trouble with the SEC, Analysts and the Plaintiff's Bar" (October 2005). Ms. Tadler is the co-author of "Damages in Federal Securities Litigation," Securities Litigation 1991: Strategies and Current Developments," Practicing Law Institute, 1991. Ms. Tadler is also a member of the Steering Committee of The Sedona Conference and has been a selected speaker on various panels regarding "Electronic Document Retention and Production." Ms. Tadler is a member of the Federal Bar Council, the American Bar Association, the Association of Trial Lawyers of America, the New York State Bar Association and the New York County Lawyers Association. She received her J.D. from Fordham in 1992 and her B.A. from Hamilton College in 1989.

John Vail is an original member of the Center for Constitutional Litigation, where he is Vice President and Senior Litigation Counsel. He has focused his work solely on access to justice issues since 1997, representing clients in numerous state supreme courts and in the Supreme Court of the United States. His legal theories, and the evidence he has developed to support them, have been used widely to keep open the doors to America's courtrooms. His articles, such as "Big Money v. The Framers," Yale L.J. (The Pocket Part), Dec. 2005, "A Common Lawyer Looks at State Constitutions," 32 Rutgers L.J. 977 (Summer 2001) and "Defeating Mandatory Arbitration Clauses," 36 TRIAL 70 (January 2000), have enlivened scholarly debate and have guided practitioners. Mr. Vail is a graduate of the College of the University of Chicago and of Vanderbilt Law School.

Mary Jo White is Chair of the litigation group of Debevoise & Plimpton LLP. Ms. White's practice concentrates on internal investigations and defense of companies and individuals accused by the government of involvement in white collar corporate crime or SEC and civil securities law violations, and on other major business litigation disputes and crises. Ms. White is a Fellow in the American College of Trial Lawyers, a Fellow in the International Academy of Trial Lawyers, and was named to The National Law Journal's 2002 list of Top 10 Women Litigators. Ms. White served as the United States Attorney for the Southern District of New York from June 1, 1993 until January 7, 2002. Ms. White also served as the first Chairperson of Attorney General Janet Reno's Advisory Committee of United States Attorneys from all over the country. Prior to becoming the United States Attorney in the Southern District of New York, Ms. White served as the First Assistant United States Attorney and Acting United States Attorney in the Eastern District of New York from March 1990 until June 1, 1993.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE*

Rule 502. Attorney-Client Privilege and Work Product; Waiver By Disclosure

(a) Waiver by disclosure in general. — A person waives an attorney-client privilege or work product protection if that person — or a predecessor while its holder — voluntarily discloses or consents to disclosure of any significant part of the privileged or protected information. The waiver extends to undisclosed information concerning the same subject matter if that undisclosed information ought in fairness to be considered with the disclosed information.

(b) Exceptions in general. — A voluntary disclosure does not operate as a waiver if:

(1) the disclosure is itself privileged or protected;

(2) the disclosure is inadvertent and is made during discovery in federal or state litigation or administrative

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*New material is underlined; matter to be omitted is lined through.

proceedings — and if the holder of the privilege or work product protection took reasonable precautions to prevent disclosure and took reasonably prompt measures, once the holder knew or should have known of the disclosure, to rectify the error, including (if applicable) following the procedures in Fed. R. Civ. P. 26(b)(5)(B); or

(3) the disclosure is made to a federal, state, or local governmental agency during an investigation by that agency, and is limited to persons involved in the investigation.

(c) Controlling effect of court orders. — Notwithstanding subdivision (a), a court order concerning the preservation or waiver of the attorney-client privilege or work product protection governs its continuing effect on all persons or entities, whether or not they were parties to the matter before the court.

(d) Controlling effect of party agreements. — Notwithstanding subdivision (a), an agreement on the effect

of disclosure is binding on the parties to the agreement, but not on other parties unless the agreement is incorporated into a court order.

(e) Included privilege and protection. — As used in this rule:

1) "attorney-client privilege" means the protections provided for confidential attorney-client communications under either federal or state law; and

2) "work product" means the immunity for materials prepared in preparation of litigation as defined in Fed.R.Civ.P. 26 (b) (3) and Fed.R.Crim.P. 16 (a) (2) and (b)(2), as well as the federal common- law and state-enacted provisions or common-law rules providing protection for attorney work product.

Committee Note

This new rule has two major purposes:

1) It resolves some longstanding disputes in the courts about the effect of certain disclosures of material protected by the attorney-client privilege or the work product doctrine— specifically those disputes involving inadvertent disclosure and selective waiver.

2) It responds to the widespread complaint that litigation costs for review and protection of material that is privileged or work product have become prohibitive due to the concern that any disclosure of protected information in the course of discovery (however innocent or minimal) will operate as a subject matter waiver of all protected information. This concern is especially troubling in cases involving electronic discovery. *See, e.g., Rowe Entertainment, Inc. v. William Morris Agency,* 205 F.R.D. 421, 425-26 (S.D.N.Y. 2002) (finding that in a case involving the production of e-mail, the cost of pre-production review for privileged and work product material would cost one defendant $120,000 and another defendant $247,000, and that such review would take months). *See also Report to the Judicial Conference Standing Committee on Rules of Practice and Procedure by the Advisory Committee on the Federal Rules of Civil Procedure,* September 2005 at 27 ("The volume of information and the forms in which it is stored make privilege determinations more difficult and privilege review correspondingly more expensive and time-consuming yet less likely to detect all privileged information."); *Hopson v. City of Baltimore,* 232 F.R.D. 228, 244 (D.Md. 2005) (electronic discovery may encompass "millions of documents" and to insist upon "record-by-record pre-production privilege review, on pain of subject matter waiver, would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation") .

The rule seeks to provide a predictable, uniform set of standards under which parties can determine the consequences of a disclosure of information protected by the attorney-client privilege or work product doctrine. As part of that predictability, the rule is intended to regulate the consequences of disclosure of information protected by the attorney-client privilege or work product doctrine at both the state and federal level. Parties to litigation need to know, for example, that if they exchange privileged information pursuant to a confidentiality order, the court's order will be enforceable in both state and federal courts. If a federal court's confidentiality order is not enforceable in a state court (or vice versa) then the burdensome costs of privilege review and retention are unlikely to be reduced.

The Committee is well aware that a privilege rule proposed through the rulemaking process cannot bind state courts, and indeed that a rule of privilege cannot take effect through the ordinary rulemaking process. See 28 U.S.C § 2074(b). It is therefore anticipated that Congress must enact this rule directly, through its authority under the Commerce Clause. Cf. Class Action Fairness Act of 2005, 119 Stat. 4, PL 109-2 (relying on Commerce Clause power to regulate state class actions).

Subdivision (a). This subdivision states the general rule that a voluntary disclosure of information protected by the attorney-client privilege or work product doctrine constitutes a waiver of those protections. *See, e.g., United States v. Newell,* 315 F.3d 510 (5th Cir. 2002) (client waived the privilege by disclosing communications to other individuals who were not pursuing a common interest). The rule provides, however, that a voluntary disclosure generally results in a waiver only of the information disclosed; a subject matter waiver is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information. *See, e.g., In re von Bulow,* 828 F.2d 94 (2d Cir. 1987) (disclosure of privileged

information in a book did not result in unfairness to the adversary in a litigation, therefore a subject matter waiver was not warranted). The rule thus rejects the result in *In re Sealed Case,* 877 F.2d 976 (D.C.Cir. 1989), which held that inadvertent disclosure of documents during discovery automatically constituted a subject matter waiver.

The rule governs only waiver by disclosure. Other common-law waiver doctrines may result in a finding of waiver even where there is no disclosure of privileged information or work product. *See, e.g., Nguyen v. Excel Corp.,* 197 F.3d 200 (5th Cir. 1999) (reliance on an advice of counsel defense waives the privilege with respect to attorney-client communications pertinent to that defense); *Ryers v. Burleson,* 100 F.R.D. 436 (D.D.C. 1983) (allegation of lawyer malpractice constituted a waiver of confidential communications under the circumstances). The rule is not intended to displace or modify federal common law concerning waiver of privilege or work product where no disclosure has been made.

Subdivision (b). This subdivision collects the basic common-law exceptions to waiver by disclosure of attorney-client privilege and work product.

Protected disclosure: Disclosure does not constitute a waiver if the disclosure itself is protected by the attorney-client privilege or work product immunity. For example, if a party privately discloses a privileged communication to another party pursuing a common legal interest, that disclosure is itself protected and the privilege covering the underlying information is not waived. *See, e.g., Waller v. Financial Corp. of America,* 828 F.2d 579 (9th Cir. 1987) (communications by a client to his lawyer remained privileged where the lawyer shared the communications with codefendants pursuing a common defense); *Hodges, Grant & Kaufman v. United States Gov't Dept. of Treasury,* 768 F.2d 719, 721 (5th Cir. 1985) (noting that the

privilege is not waived "if a privileged communication is shared with a third person who has a common legal interest with respect to the subject matter of the communication"). Similarly, the protection of the attorney-client privilege or work product immunity is not waived if protected information is disclosed by one lawyer to another in a law firm.

Inadvertent disclosure during discovery: Courts are in conflict on whether an inadvertent disclosure of privileged information or work product, made during discovery, 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 preserving the privilege and failed to request a return of the information in a timely manner. And a few courts hold that any mistaken disclosure of protected information constitutes 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 privileged or protected information during discovery constitutes a waiver only if the party did not take reasonable precautions to prevent disclosure and did not make reasonable and prompt efforts to rectify the error. This position is in accord with the majority view on whether inadvertent disclosure is a waiver. *See, e.g., Alldread* v. *City of Grenada,* 988 F.2d 1425 (5th Cir. 1993) (governmental attorney-client privilege); *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, information protected by the attorney-client privilege or work product immunity

should not be treated lightly. On the other hand, a rule imposing strict liability for an inadvertent disclosure during discovery threatens to impose prohibitive costs for privilege review and retention, especially in cases involving electronic discovery.

Selective waiver: Courts are in conflict on whether disclosure of privileged or protected information to a government agency conducting an investigation of the client constitutes a general waiver of the information disclosed. Most courts have rejected the concept of "selective waiver", holding that waiver of privileged or protected information to a government agency constitutes a waiver for all purposes and to all parties. *See, e.g., Westinghouse Electric Corp. v. Republic of the Philippines,* 951 F.2d 1414 (3d Cir. 1991). Other courts have held that selective waiver is enforceable if the disclosure is made subject to a confidentiality agreement with the government agency. *See, e.g., Teachers Insurance & Annuity Association of America v. Shamrock Broadcasting Co.,* 521 F. Supp. 638 (S.D.N.Y. 1981). And a few courts have held that disclosure of protected information to the government does not constitute a general waiver, so that the information remains shielded from use by other parties. *See, e.g., Diversified Industries, Inc. v. Meredith,* 572 F.2d 596 (8th Cir. 1977).

The rule rectifies this conflict by providing that disclosure of protected information to an investigating government agency does not constitute a general waiver of attorney-client privilege or work product protection. A rule protecting selective waiver to investigating government agencies furthers the important policy of cooperation with government agencies, and maximizes the effectiveness and efficiency of government investigations. *See In re Columbia/HCA Healthcare Corp. Billing Practices Litigation,* 293 F.3d 289, 314 (6th Cir. 2002) (Boggs, J., dissenting) (noting that the "public interest in easing government investigations" justifies a rule that disclosure to

government agencies of information protected by the attorney-client privilege or work product immunity does not constitute a waiver to private parties).

The Committee considered whether the protection of selective waiver should be conditioned on obtaining a confidentiality agreement from the government agency. It rejected that condition for a number of reasons. If a confidentiality agreement were a condition to protection, disputes would be likely to arise over whether a particular agreement was sufficiently air-tight to protect against a finding of a general waiver, thus destroying the predictability that is essential to proper administration of the attorney-client privilege and work product immunity. Moreover, a government agency might need to use the information for some purpose and then would find it difficult to be bound by an air-tight confidentiality agreement, however drafted. If such an agreement were nonetheless required to trigger the protection of selective waiver, the policy of furthering cooperation with and efficiency in government investigations would be undermined. Ultimately, the obtaining of a confidentiality agreement has little to do with the underlying policy of furthering cooperation with government agencies that animates the rule. The Committee found it sufficient to condition selective waiver on a finding that the disclosure is limited to persons involved in the investigation.

Subdivision (c). Confidentiality orders are becoming increasingly important in limiting the costs of privilege review and retention, especially in cases involving electronic discovery. *See Manual for Complex Litigation Fourth* § 11.446 (Federal Judicial Center2004) (noting that fear of the consequences of waiver "may add cost and delay to the discovery process for all sides" and that courts have responded by encouraging counsel "to stipulate at the outset of discovery to a 'nonwaiver' agreement, which they can adopt as a

case-management order."). But the utility of a confidentiality order in reducing discovery costs is substantially diminished if it provides no protection outside the particular litigation in which the order is entered. Parties are unlikely to be able to reduce the costs of pre-production review for privilege and work product if the consequence of disclosure is that the information can be used by non-parties to the litigation.

There is some dispute on whether a confidentiality order entered in one case can bind non-parties from asserting waiver by disclosure in a separate litigation. *See generally Hopson v. City of Baltimore,* 232 F.R.D. 228 (D.Md. 2005) for a discussion of this case law. The rule provides that such orders are enforceable against non-parties. As such the rule provides a party with a predictable protection that is necessary to allow that party to limit the prohibitive costs of privilege and work product review and retention.

Subdivision (c) contemplates that the court may order production and guarantee confidentiality under criteria different from those providing exceptions to waiver under subdivision (b). For example, the court order may provide for return of documents without waiver irrespective of the care taken by the disclosing party; the rule contemplates enforcement of "claw-back" and "quick peek" arrangements as a way to avoid the excessive costs of pre-production review for privilege and work product..

Subdivision (d). Subdivision (d) codifies the well-established proposition that parties to litigation can enter an agreement to limit the effect of waiver by disclosure between or among them. *See, e.g., Dowd v. Calabrese,* 101 F.R.D. 427, 439 (D.D.C. 1984) (no waiver where the parties stipulated in advance that certain testimony at a deposition "would not be deemed to constitute a waiver of the attorney-client or work product privileges"); *Zubulake*

v. UBS Warburg LLC, 216 F.R.D. 280, 290 (S.D.N.Y. 2003) (noting that parties may enter into "so-called 'claw-back' agreements that allow the parties to forego privilege review altogether in favor of an agreement to return inadvertently produced privilege documents"). Of course such an agreement can bind only the parties to the agreement. The rule makes clear that if parties want protection from a finding of waiver by disclosure in a separate litigation, the agreement must be made part of a court order. *See Hopson v. City of Baltimore,* 232 F.R.D. 228, 238 (D.Md. 2005) (noting that "it is essential to the success of this approach in avoiding waiver that the production of inadvertently produced privileged electronic data must be at the compulsion of the court, rather than solely by the voluntary act of the producing party").

Subdivision (d) contemplates that the parties may agree to production and guarantee confidentiality under criteria different from those providing exceptions to waiver in subdivision (b). For example, the parties may provide for return of documents without waiver irrespective of the care taken by the disclosing party, and may agree to "claw-back" or "quick peek" arrangements to reduce the cost of pre-production review for privilege and work product.

Subdivision (e). This subdivision makes clear that the rule governs waiver by disclosure for the attorney-client privilege and work product immunity under both state and federal law.

The rule's coverage is limited to attorney-client privilege and work product. The limitation in coverage is consistent with the goals of the rule, which are 1) to provide a reasonable limit on the costs of privilege and work product review and retention that are incurred by parties to litigation; and 2) to encourage cooperation with government investigations and reduce the costs of those investigations. These two interests arise mainly, if not exclusively, in the context of disclosure

of 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.

Advisory Committee on Evidence Rules

Minutes of the Meeting of November 14th, 2005

Washington, D.C.

The Advisory Committee on the Federal Rules of Evidence (the "Committee") met on November 14th 2005 in Washington, D.C..

The following members of the Committee were present:

Hon. Jerry E. Smith, Chair
Hon. Joseph F. Anderson, Jr.
Hon. Joan N. Ericksen
Hon. Robert L. Hinkel
Hon. Andrew D. Hurwitz
Thomas W. Hillier, Esq.
Patricia Refo, Esq.
William W. Taylor III, Esq.
John S. Davis, Esq., Department of Justice

Also present were:

Hon. David F. Levi, Chair of the Standing Committee on Rules of Practice and Procedure
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
Hon. David Trager, Liaison from the Criminal Rules Committee
Professor Daniel Coquillette, Reporter to the Standing Committee
John K. Rabiej, Esq., Chief, Rules Committee Support Office
James Ishida, Esq., Rules Committee Support Office
Timothy K. Dole, Esq., Rules Committee Support Office
Jeffrey N. Barr, Esq., Rules Committee Support Office
Tim Reagan, Esq., Liaison from Federal Judicial Center
Professor Daniel J. Capra, Reporter to the Evidence Rules Committee
Professor Kenneth S. Broun, Consultant to the Evidence Rules Committee
Ronald Tenpas, Esq., Department of Justice
Roger Pauley, Esq., former Committee member

Opening Business

Judge Smith welcomed the new members of the Committee, Judge Anderson and Judge Ericksen. Judge Smith and Judge Levi reported on the actions taken on the proposed amendments to Rules 404, 408, 606(b) and 609. Those rules were approved by the Judicial Conference and are being referred to the Supreme Court.

Judge Smith asked for approval of the minutes of the April 2005 Committee meeting. The minutes were approved.

Privileges

At previous meetings, Committee members noted a number of problems with the current federal common law governing the waiver of privilege. 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 was 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 privileged report. 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 is a problem because it can deter corporations from cooperating in the first place.

At the November 2005 Committee meeting, Professor Broun presented for the Committee's consideration a draft statute that would provide the following:

1. Inadvertent disclosures would not constitute a waiver so long as the producing party acted reasonably in trying to maintain the privilege and promptly sought return of the privileged material.

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

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

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

5. Parties could enter into agreements protecting against the consequences of waiver in a case, but those agreements would not bind third parties unless they were incorporated into a court order.

Professor Broun explained that the proposal was in the form of a statute because the Enabling Act does not permit the Judicial Conference to amend rules on privilege directly. Rules of privilege must be directly enacted by Congress.

The Committee first unanimously determined that a proposed rule change covering waiver of privileges was important, timely and necessary, and that the Committee should work toward finalizing such a proposal. The Committee then discussed how a waiver rule might be enacted. One suggestion was that the proposal could be sent to Congress by the Judicial Conference as a piece of suggested legislation. Under this suggestion, the ordinary time periods and constraints of the rulemaking process would not be applicable, but the Standing Committee could provide a period of public comment before the proposal would be referred to the Judicial Conference as an action item. Another suggestion was to seek legislation from Congress that would provide an exception to the Enabling Act limitation on rules of privilege; this amendment would allow the Judicial Conference to use the regular rulemaking process to establish a rule on waiver of privileges. Judge Levi, Chair of the Standing Committee, promised to take these two suggestions under advisement. The Committee resolved to revisit this procedural question at its next meeting.

The Committee then discussed the text of the proposal. A number of considerations were raised and discussed concerning, among other things, the breadth of the rule; its impact on state courts, if any; the relationship between the private ordering provisions of the rule and the default rules governing inadvertent disclosure and selective waiver; the impact of the rule on the work product immunity; how the rule would apply to protections in other rules that are not labeled "privileges", such as Criminal Rule 16; whether the rule could be applied so broadly as to protect against use of disclosures made voluntarily to police officers or the grand jury; whether the rule should be limited to the context of discovery; and how the rule should be drafted to make clear that it is not intended to and does not cover the question of waiver of a Fifth Amendment privilege.

Professor Broun agreed to take all these questions and suggestions and redraft the proposed waiver rule for consideration at the next meeting. He will also consider whether it is necessary or advisable to propose not only a waiver rule for the Evidence Rules, but also a parallel statute applying the same waiver standards to state court actions. The binding of state courts is important because otherwise parties cannot structure their conduct in reliance on the federal rule protecting against waivers. The Committee agreed, however, that any rule purporting to bind state courts to a waiver rule would have to come through a statute located outside the Federal Rules of Evidence, as the Federal Rules by definition limit their applicability to federal proceedings.

Crawford v. Washington

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 the defendant violates the right to confrontation unless the declarant is available and subject to cross-examination. The Court rejected its previous reliability-based confrontation test, at least as it applied to "testimonial" hearsay. The Court in *Crawford* declined to define the term "testimonial" and also declined to establish a test for the admissibility of hearsay that is not "testimonial."

Crawford raises questions about the constitutionality as-applied of some of the hearsay exceptions in the Federal Rules of Evidence. The 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 solely for purposes of medical treatment, and garden-variety statements made during the course and in furtherance of a conspiracy. In contrast, courts are in dispute about whether 911 calls and statements made to responding officers are testimonial. The Reporter noted that the Supreme Court has granted certiorari in two state cases to determine whether 911 calls and statements made to responding officers are testimonial within the meaning of *Crawford.*

One concern after *Crawford* was whether it invalidated Rules such as 803(6), 803(10) and 902(11) and (12), all of which permit proof by affidavit to authenticate records or, in the case of 803(10), the non-existence of a public record. The Reporter noted that the federal courts to this point has declared that *Crawford* does not bar the use of these kinds of affidavits as they are not considered testimonial.

The Reporter was directed to monitor developments in the case law and to prepare an updated report on post-*Crawford* case law for the next Committee meeting.

Rule 804(b)(3)

The Committee considered a memorandum by the Reporter on whether it should revive its proposal to amend Evidence Rule 804(b)(3), the hearsay exception for declarations against penal interest. The Committee's previous proposal was approved by the Judicial Conference, but the Supreme Court remanded it for reconsideration in light of the intervening decision in *Crawford*. The Reporter's memorandum revised the previously proposed amendment to address some of the concerns about testimonial evidence raised in *Crawford*. The Committee considered the revised proposal and determined that it should not be adopted at this point, as further time was necessary

to determine the meaning and application of *Crawford.* Deferring the proposal was especially prudent because, after the Reporter's memorandum was prepared, the Supreme Court granted certiorari in two cases to determine the correct scope of the term "testimonial", the definition of which was left open in *Crawford.* As such there is a risk that an amendment attempting to exclude testimonial hearsay offered under Rule 804(b)(3) might not be congruent with the Supreme Court's definition of the term "testimonial." Moreover, one reason to propose the amendment would be to assure that non-testimonial declarations against penal interest offered by the prosecution would comply with the reliability requirements of the Supreme Court decision in *Roberts v. Ohio.* But while all courts after *Crawford* have held that those reliability requirements remain applicable to non-testimonial hearsay, the Supreme Court has yet to resolve this question. Therefore any amendment to Rule 804(b)(3) to bring it into compliance with *Roberts* might be premature.

While the Committee decided not to propose an amendment to Rule 804(b)(3) at this time, members did express concern that hearsay statements admitted under some of the Federal Rules exceptions would violate the right to confrontation after *Crawford.* Examples include certain excited utterances, declarations against penal interest, and possibly certain statements for purposes of medical treatment. The Evidence Rules Committee has long taken the position that rules should be amended if they are subject to unconstitutional application; otherwise the rules become a trap for the unwary, as counsel may not make a constitutional objection under the assumption that the rules would never allow admission of evidence that violated a party's constitutional rights.

Committee members determined that it would not make sense to try to define in the rules all of the possible hearsay statements that might be constitutionally problematic after *Crawford*—especially because *Crawford* remains a moving target and certiorari has been granted on two *Crawford* cases. Committee members concluded, however, that a generic reference to constitutional requirements might usefully be placed either in the hearsay rule itself (Rule 802), or before each of the rules providing exceptions that might be problematic after *Crawford* (Rules 801(d)(2), 803, 804 and 807. Such a generic reference does not run the risk of being inconsistent with the Supreme Court's subsequent interpretations of the Confrontation Clause. The Reporter noted that there is precedent for such generic constitutional language in the Evidence Rules: Rule 412 provides that evidence must be admitted (despite the exclusionary language in the Rule) where exclusion would violate the constitutional right of the accused.

The Committee directed the Reporter to prepare an amendment that would provide a basic reference to the constitutional rights of the accused with regard to admission of hearsay under the Federal Rules hearsay exceptions. The Reporter stated that he would prepare one model that would be an amendment to Rule 802, the hearsay rule itself, and another model that would amend the hearsay exceptions by providing a reference to the constitutional rights of the accused at the beginning of Rules 801(d)(1)(2), 803, 804 and 807. The Committee agreed to consider these models at the next meeting.

Electronic Evidence

The Reporter prepared a memorandum proposing consideration of an amendment that would make it clear that the Evidence Rules cover evidence presented in electronic form. The proposal was to add a new Rule 107 that would provide as follows:

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

The Reporter noted that the courts are not having much trouble in applying the existing, paper-based Evidence Rules to all forms of electronic evidence. Courts have been using basic evidentiary standards—relevance, reliability, prejudice, accuracy, authenticity—to determine the admissibility of electronic evidence. The Reporter stated that the goal of the proposal was not to change or affect any of the current evidentiary standards being applied to electronic evidence. Rather the goal was simply to bring the language of the Evidence Rules up to date with technological changes.

After discussion, the Committee agreed that the amendment would be a good addition to the Evidence Rules, but members also noted that there was no pressing need to proceed immediately on the amendment. The Committee resolved to adhere to its practice of proposing amendments as a package where possible, thus avoiding yearly changes to the Evidence Rules. The proposed amendment was tentatively approved as part of any package of amendments that the Committee might propose in the future. Some Committee members expressed concern that the amendment might lead to admission of electronic information that is not properly authenticated. The Reporter was directed to research whether the proposed amendment might lead to that result, and to revise the proposal to avoid any such problem.

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

Respectfully submitted,

Daniel J. Capra
Reporter

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

Honorable J. Dennis Hastert
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

I have the honor to submit to the Congress the amendments to the Federal Rules of Evidence that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Evidence be, and they hereby are, amended by including therein the amendments to Evidence Rules 404, 408, 606, and 609.

[See infra., pp. ___ ___ ___.]

2. That the foregoing amendments to the Federal Rules of Evidence shall take effect on December 1, 2006, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Evidence in accordance with the provisions of Section 2072 of Title 28, United States Code.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 6-7, 2006
Phoenix, Arizona
Draft Minutes

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ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Phoenix, Arizona, on Friday and Saturday, January 6-7, 2006. All the members were present:

Judge David F. Levi, Chair
David J. Beck, Esquire
Douglas R. Cox, Esquire
Judge Sidney A. Fitzwater
Judge Harris L Hartz
Dean Mary Kay Kane
John G. Kester, Esquire
Judge Mark R. Kravitz
William J. Maledon, Esquire
Associate Attorney General Robert D. McCallum, Jr.
Judge J. Garvan Murtha
Judge Thomas W. Thrash, Jr.
Justice Charles Talley Wells

Providing support to the committee were: Professor Daniel R. Coquillette, the committee's reporter; Peter G. McCabe, the committee's secretary; John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office; James N. Ishida, senior attorney in the Office of Judges Programs of the Administrative Office; Emery Lee, Supreme Court Fellow at the Administrative Office; Joe Cecil of the Research Division of the Federal Judicial Center; and Joseph F. Spaniol, Jr., and Professor Geoffrey C. Hazard, Jr., consultants to the committee.

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Carl E. Stewart, Chair
Professor Patrick J. Schiltz, Reporter
Advisory Committee on Bankruptcy Rules —
Professor Jeffrey W. Morris, Reporter
Advisory Committee on Civil Rules —
Judge Lee H. Rosenthal, Chair
Professor Edward H. Cooper, Reporter
Advisory Committee on Criminal Rules —
Judge Susan C. Bucklew, Chair
Professor Sara Sun Beale, Reporter
Advisory Committee on Evidence Rules —
Judge Jerry E. Smith, Chair
Professor Daniel J. Capra, Reporter

Judge Thomas S. Zilly, chair of the Advisory Committee on Bankruptcy Rules, was unable to attend in person, but he participated by telephone in the bankruptcy portion of the meeting.

In addition to Associate Attorney General McCallum, the Department of Justice was represented at the meeting by Benton J. Campbell, Counselor to the Assistant Attorney General for the Criminal Division. Alan Dorhoffer attended on behalf of the U.S. Sentencing Commission.

At the committee's request, Professor Alan N. Resnick, Donald B. Ayer, and James C. Duff made presentations to the committee.

INTRODUCTORY REMARKS

Judge Levi reported that he and Professor Coquillette had met with the new Chief Justice. He said that John Roberts will be an excellent Chief Justice and a very good friend to the rules process. He noted that the Chief Justice had served on the Advisory Committee on Appellate Rules for five years, and he would have become the new chair of that committee on October 1, 2005, but for his appointment to the Supreme Court. The committee conveyed its congratulations to Chief Justice Roberts and wished him great success in his new endeavor.

Judge Levi added that Judge Samuel Alito, chair of the Advisory Committee on Appellate Rules until October 1, 2005, had also been nominated to the Supreme Court. The committee congratulated Judge Alito on his selection and wished him well in his confirmation hearings and his future position on the Court.

Judge Levi noted that Professor Patrick Schiltz, reporter to the Advisory Committee on Appellate Rules, had just been nominated by the President to be a district judge for the District of Minnesota. He thanked Professor Schiltz for his excellent service and dedication as a reporter. The committee congratulated Professor Schiltz and wished him success.

Finally, Judge Levi reported that Judge Carl Stewart had been appointed by the Chief Justice as the new chair of the Advisory Committee on Appellate Rules. He emphasized that the high quality of these four appointments reflects very well on the quality of the membership of the rules committees as a whole.

Judge Levi noted that the terms of two members of the Standing Committee had expired on October 1, 2005 – Charles J. Cooper and David M. Bernick. He pointed out that neither was able to attend the meeting, but Professor Coquillette read a letter of appreciation from Mr. Cooper expressing his view that his participation in the work on the committee had been among the most rewarding service of his professional career. Judge Levi added that Mr. Bernick will attend the next committee meeting.

Judge Levi also welcomed Mr. Cox and Mr. Maledon as new members to the committee and read their impressive professional qualifications.

Judge Levi reported that the Judicial Conference at its September 2005 session had approved many rule amendments as part of its consent calendar, including some relatively controversial rules. The amendments included the package of changes to the civil rules relating to discovery of electronically stored information. They also included amendments to the evidence rules, including Rule 408 (use of admissions made in the course of settlement negotiations in a later criminal case) and Rule 609 (automatic

impeachment of a witness by evidence of a prior conviction involving dishonesty or false statement).

Judge Levi explained that a great many changes were needed in the bankruptcy rules to comply with the provisions of the massive Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. He pointed to the enormous effort of the Advisory Committee on Bankruptcy Rules in producing a comprehensive package of revised official forms and interim bankruptcy rules. The advisory committee, he said, had effectively completed several years of rules work in just six months. Even organizing the advisory committee into subcommittees to write so many different rules, he said, had been difficult. He noted, too, that the new legislation was very complex and had given rise to many problems of interpretation, making it difficult to draft rules and forms.

He added that he had asked Professor Alan Resnick to attend the meeting and give the members a perspective on the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 and what it means for the rules process. Finally, he noted that Congress was likely to conduct oversight hearings on implementation of the legislation, and the revised bankruptcy rules will be examined closely by Congress.

Judge Levi reported that the Judicial Conference had placed one proposed rule on its discussion calendar for the September 2005 session – new FED. R. APP. P. 32.1, governing citation of judicial dispositions. The rule, he said, was controversial and had encountered opposition from a number of circuit judges. He explained that he and Judge Alito had made a joint presentation on the new rule to the Conference. Judge Levi spoke first about the thorough procedures followed by the rules committees in considering the new rule, and then Judge Alito addressed the substance of the rule.

Judge Levi noted that one chief circuit judge spoke against the rule, arguing that each circuit is different and there is no need for national uniformity on citation policy. The chief judge also objected to having the rule made retroactive. In the end, Judge Levi noted, the Conference approved the rule, but made it prospective only. He said that the new rule was a great achievement, and the work of the Advisory Committee on Appellate Rules had been truly exceptional. The thoroughness of the committee's work, he said, had been very persuasive to the Conference.

Judge Levi reported that the Advisory Committee on Criminal Rules was in the process of considering controversial amendments to two criminal rules – Rule 29 (judgment of acquittal) and Rule 16 (disclosure of information). Under the proposed revision to Rule 29, he explained, a trial judge would normally have to defer entering a judgment of acquittal until after the jury returns a verdict. But the judge could enter a judgment of acquittal before a jury verdict if the defendant waives his or her double jeopardy rights. The revised rule, thus, would allow the Department of Justice to appeal

the trial judge's granting of a judgment of acquittal. He noted that the advisory committee is considering amendments to Rule 16 that would address the recommendation of the American College of Trial Lawyers that the rule specify the government's obligations to disclose exculpatory and impeaching information under *Brady v. Maryland,* 373 U.S. 83 (1963), and *Giglio v. United States,* 405 U.S. 150 (1972).

Judge Levi reported that the Advisory Committee on the Rules of Evidence had under active consideration a new rule governing privilege waiver. He explained that the Advisory Committee on Civil Rules had been concerned for many years that reviewing documents for privilege waiver as part of the discovery process adds substantially to the cost and complexity of civil litigation without real benefit. He said that the new electronic discovery rules just approved by the Judicial Conference contain a "clawback" provision, allowing a party to recover privileged or protected material inadvertently disclosed during the discovery process, and a "quick peek" provision, recognizing agreements between the parties to allow an initial examination of discovery materials without waiving any privilege or protection.

But, he said, the new rules do not address the substantive question of whether a privilege or protection has been waived or forfeited. Nor do they address whether an agreement of the parties or an order of the court protecting against waiver of privilege or protection in a specific case can bind later actions or third parties.

Judge Levi noted that it is very unusual for the rules committees to consider a rule invoking substance because the Rules Enabling Act specifies that the rules may not abridge, enlarge, or modify any substantive right. The Act, moreover, states that any rule creating, abolishing, or modifying an evidentiary privilege can only go into effect if approved by an act of Congress. He reported that he had discussed the problems of privilege and protection waiver with the chairman of the House Judiciary Committee, who responded that the matter was one of great interest to the Congress. The chairman stated that he will send a letter asking the committee to develop a privilege-waiver rule that could eventually be enacted as a statute. Thus, Judge Levi explained, the Advisory Committee on the Rules of Evidence would develop a rule through the regular rulemaking process. After the Judicial Conference and the Supreme Court approve the rule, it would be submitted to Congress for enactment as a statute.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held on June 15-16, 2005.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej reported that legislation had passed the House of Representatives to undo the 1993 amendments to FED. R. CIV. P. 11 (sanctions), thereby requiring a court to impose sanctions for every violation of the rule. The legislation would also require a federal district court to suspend an attorney from practice in the court for a year if the attorney has violated Rule 11 three or more times.

Mr. Rabiej noted that other provisions had been added to the bill on the House floor. One would prohibit a judge from sealing a court record in a Rule 11 proceeding unless the judge specifically finds that the justification for sealing the record outweighs any interest in public health and safety.

Mr. Rabiej pointed out that the House Judiciary Committee's Subcommittee on Commercial and Administrative Law had held an oversight hearing in July 2005 on the judiciary's implementation of the new bankruptcy legislation. He noted that Judge A. Thomas Small, former chair of the Advisory Committee on Bankruptcy Rules, had appeared on behalf of the Judicial Conference and testified as to the substantial amount of work accomplished by the rules committees, other Judicial Conference committees, and the Administrative Office. Mr. Rabiej reported that the testimony had been very impressive, and Judge Small had reassured the Congressional subcommittee that the judiciary would be able to meet all the statutory deadlines.

Mr. Rabiej said that proposed legislation to allow cameras in federal courtrooms at the discretion of the presiding judge was gathering steam. He noted that the Judicial Conference generally opposes cameras in the courtroom.

Mr. Rabiej reported that the rules office had received a request from the Foreign Intelligence Surveillance Court in October to comment on its local rules and to inquire about the rules process in general. He said that he and Professor Capra had reviewed the court's rules, and the court had accepted virtually all their suggested comments.

Judge Levi noted that the Director of the Administrative Office, Leonidas Ralph Mecham, had announced his retirement, and a search committee of judges had been appointed by the Chief Justice to assist him in recommending a replacement.

Mr. McCabe reported that the Administrative Office's rules web site had become very popular. He noted that the staff had posted all rules committee minutes and reports back to 1992, and they will soon post all the committee agenda books back to 1992. He added that all public comments are now being posted as they are received, and the rules office is attempting to locate all the key records of the rules committees – especially

minutes and reports – back to the earliest days of the rules program. These records, once posted, should be of substantial benefit to scholars, judges, and lawyers.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Cecil reported on the status of various pending projects of the Federal Judicial Center, as summarized in Agenda Item 4. He directed the committee's attention to two projects involving the federal rules.

First, the Center is examining the impact of the Class Action Fairness Act of 2005 on the resources of the federal courts. The study will begin by determining whether there has been any increase in the number of class actions filed as a result of the Act. Center staff will then examine whether there have been any changes in the workload burdens of the district courts. Finally, they will also look at the burdens imposed by class actions on the courts of appeals. Mr. Cecil reported that there are serious limitations on the data available, and researchers are going through individual case records on a district-by-district basis.

Second, Mr. Cecil described the Center's project to address ongoing confusion regarding the standard of review in patent claims construction. He noted that about one-third of the patent cases are remanded to the district courts on claims construction issues. He said that a survey was being conducted of district judges and attorneys to identify case-management techniques that might improve the claims-construction process and to explore whether some increased ability for interlocutory appeals in patent cases would be helpful.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Stewart and Professor Schiltz presented the report of the advisory committee, as set forth in Judge Stewart's memorandum and attachment of December 9, 2005 (Agenda Item 5).

Judge Stewart reported that the advisory committee had no action items to present. He pointed out that the committee had just completed its marathon efforts to approve new Rule 32.1, governing citation of opinions. He said that the thorough work of the committee, the extent of the public comments, and the invaluable research produced for the committee by the Federal Judicial Center and the Administrative Office had shown that the Rules Enabling Act process had worked exceedingly well.

Judge Stewart noted that the advisory committee would meet next in April 2006 and would address a number of issues described in the agenda book.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Professor Morris and Judge Zilly (by telephone) presented the report of the advisory committee, as set forth in Judge Zilly's memorandum and attachments of December 12, 2005 (Agenda Item 6).

Professor Morris reported that the committee had met twice since the last Standing Committee meeting and had conducted numerous teleconferences in order to complete work on the package of official forms and interim rules to implement the omnibus bankruptcy legislation. He pointed out that the interim rules and the forms had been circulated to the courts in August 2005 and posted on the rules web site for public comment. The advisory committee considered the public comments and made a few essential changes in the interim rules and the forms at its September 2006 meeting. He added that every district had adopted the interim rules without change or with very minor changes.

Professor Morris said that the advisory committee will meet next in March 2006, and it plans to submit a package of permanent rule revisions for publication at the June 2006 meeting of the Standing Committee. The proposed national rules will build on the interim rules and include a number of other provisions not included in the interim rules and some amendments unrelated to the bankruptcy legislation.

Professor Morris reported that the advisory committee had also conducted a cover-to-cover study of the restyled civil rules at the request of the Advisory Committee on Civil Rules. He explained that the civil rules apply generally in adversary proceedings, and they may be applied in contested matters. In addition, some bankruptcy rules are modeled on counterpart provisions in the civil rules. He noted that the advisory committee had broken into six groups, each of which carefully reviewed an assigned block of rules, checked for any possible impact on the bankruptcy rules, and examined whether any changes were needed in language or cross-references. At the end of this detailed study, he said, the advisory committee found very few problems with the restyled civil rules, and it communicated its observations to the Advisory Committee on Civil Rules.

Judge Zilly added that the individual members of the advisory committee had spent an enormous amount of time studying the new bankruptcy legislation and drafting the interim rules. In addition, they devoted an enormous amount of time to revising the official bankruptcy forms and devising new forms to implement the new procedural

requirements of the legislation. He noted that the official forms took effect on October 17, 2005, following approval by the Executive Committee of the Judicial Conference.

Historical Perspective

At the request of Judge Levi, Professor Resnick gave the committee a historical perspective on the bankruptcy system and the Federal Rules of Bankruptcy Procedure.

He explained that the Constitution gives Congress authority to establish uniform laws on the subject of bankruptcy and to make bankruptcy exclusively federal. The first meaningful national bankruptcy law, he said, was enacted in 1898, and it lasted until 1978. The 1898 Bankruptcy Act was amended substantially in the 1930s. Enactment of Chapter 11 in 1938 marked a major move away from liquidation and towards saving businesses.

By the late 1960s, several bankruptcy experts thought that it was time to conduct a complete review of the bankruptcy system. So Congress passed a law in 1968 creating a national bankruptcy commission, comprised of members of Congress, law professors, judges, and lawyers. The commission filed a report in 1973 that recommended replacing the 1898 Act with a new substantive bankruptcy law and a revised bankruptcy court structure. From 1973 to 1978, a great deal of debate ensued over the commission's recommendations, both in Congress and in the bankruptcy community, and in 1978 Congress enacted a new Bankruptcy Code and a new Article I court structure.

New procedural rules were needed to implement the 1978 Code. But there was not sufficient time to promulgate rules under the regular Rules Enabling Act process before the provisions of the 1978 Code took effect on October 1, 1979. Therefore, the Advisory Committee on Bankruptcy Rules drafted a set of "suggested interim rules" over a period of nine months. They were circulated to the courts in October 1979, with the notation that they had not been approved either by the Standing Committee or the Judicial Conference. They were generally adopted by the courts as local rules. The advisory committee then began work on drafting the new Federal Rules of Bankruptcy Procedure, which eventually took effect in 1983.

In 1982, the Supreme Court declared the jurisdictional provisions of the 1978 law unconstitutional in *Northern Pipeline Co. v. Marathon Pipeline Co.,* 458 U.S. 50 (1982). In 1984, new legislation was enacted that cured the jurisdictional defects and created the current bankruptcy court system under which bankruptcy jurisdiction is vested in the district courts and then delegated to the bankruptcy judges. The new court structure was reflected in a package of rule amendments that took effect in 1987. In 1986, the pilot U.S. trustee program – which took over the estate administration responsibilities in

bankruptcy cases – was made a nationwide system. The advisory committee drafted rule amendments to implement the U.S. trustee system, and they took effect in 1991.

In the early 1990s, credit and lending groups complained that the pendulum in bankruptcy had swung too far toward protecting debtors at the expense of creditors, and they initiated efforts to change the Bankruptcy Code. In 1994, Congress created another national bankruptcy review commission, which issued a comprehensive report in 1997. But the credit community was not satisfied with the recommendations, and their efforts led to the introduction of legislation in 1997 that would amend the Code substantially to better protect creditors' rights. The legislation was pending in each Congress from 1997 until April 2005, when it was enacted as the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

At first, the Advisory Committee on Bankruptcy Rules did not move to draft potential rule changes to implement the pending legislation because its future was uncertain. In fact, the bill was vetoed by President Clinton. But with the election of President Bush in 2000, it appeared very likely that it would be enacted soon. So, the advisory committee, under the leadership of Judge Small, retained two additional bankruptcy law professors as consultants and began to study the legislation in depth to determine what changes would be needed in the bankruptcy rules and forms. By 2002, the committee had developed rough drafts of rules amendments.

The legislation was eventually enacted in April 2005, and it contained a general effective date of October 17, 2005. Fortunately, the six-month grace period gave the judiciary and the Department of Justice time to accomplish the many tasks required of them. The advisory committee, through concentrated efforts and starting from the 2002 drafts, was able to complete an emergency package of interim rules and revised official forms.

Professor Resnick said that the legislation was very controversial and had been opposed by the National Bankruptcy Conference, a committee of the American Bar Association, and virtually all bankruptcy judges and academics. But it was strongly supported by the credit card companies, banks, landlords, and certain other special interest groups.

In consumer cases, the legislation imposes additional restrictions on debtors, particularly Chapter 7 debtors. Among other things, they must undergo credit counseling and debtor education, and they must submit to a means test to determine whether they are presumed to be abusing the bankruptcy system. The test examines the debtor's monthly income, expenses, and discretionary income. Consumer bankruptcy lawyers, moreover, must meet new requirements and are exposed to additional liability that may lead them to raise their fees or go out of the consumer bankruptcy business.

For Chapter 11 business cases, a court's ability to extend the debtor's exclusive period to file a plan has been limited. The new law, moreover, generally makes it harder for small businesses to reorganize. It also gives landlords additional authority regarding leases.

Professor Resnick said that the legislation also contains some very good provisions, such as the new Chapter 15, dealing with cross-border insolvencies, and provisions dealing with health care, nursing homes, and patient rights. It also allows direct appeals from the bankruptcy court to the court of appeals in appropriate circumstances.

Professor Resnick pointed out that there are many technical flaws and ambiguities in the 500-page legislation, largely because it was drafted by special interest groups and lobbyists, and Congress was reluctant to make any changes. Moreover, he said that he thought it unlikely that Congress would enact technical amendments to correct the flaws in the near future.

He reported that the day after the legislation was signed, on April 21, 2005, the Advisory Committee on Bankruptcy Rules held a meeting of its subcommittee chairs and committee staff to decide on organizing its work. The committee decided at the outset that it should not wait the full three years it normally takes to complete the rules process. Rather, it had to produce forms and interim rules before the October 17, 2005 effective date of the legislation.

In Professor Resnick's view, there were three reasons for the advisory committee to act expeditiously. First, many of the existing national rules were now inconsistent with the statute. Second, rules and forms were needed quickly to implement the various new concepts and procedures contained in the law, such as the means test and Chapter 15 cross-border insolvency. Third, the new law explicitly directed the Judicial Conference to promulgate several new rules and forms.

Professor Resnick noted that the format of the interim rules drafted by the advisory committee differs from interim rules issued in the past. The committee, he said, decided to create the interim rules as amendments to the existing national rules, striking through deleted provisions and underlining new provisions. The interim local rules, therefore, will become the advisory committee's first draft of the proposed permanent amendments to the national rules.

He pointed out that the advisory committee had encountered a number of difficult problems in drafting the rules and forms. First of all, addressing some of the provisions in the legislation required a great deal of technical and specialized expertise in several different areas. Moreover, the advisory committee did not have time to benefit from public

comment. It adopted a subcommittee system, with six different subcommittees addressing different aspects of the legislation – consumer provisions, business provisions, cross-border insolvency, health care, appeals, and forms. Professor Resnick praised Judge Zilly as a truly amazing chair, delegating work to the subcommittees, but also serving as an active participant in the work of every subcommittee.

After the advisory committee had completed and published the interim rules and forms on the Internet in August 2005, it received a number of helpful public comments pointing out a few technical errors. The advisory committee quickly made the corrections at its September 2005 meeting.

Professor Resnick pointed out that the advisory committee had drafted interim rules only in those areas where it was important to have a rule in place by October 17, 2005, such as where the new statute conflicted with an existing national rule. The advisory committee, he said, had involved the U.S. trustee organization in all its deliberations and activities, and it received a good deal of help and advice from the U.S. trustees.

The advisory committee also tried to make the rules and forms as neutral as it could on substantive issues. For the most part, it tried to leave the resolution of ambiguities in the legislation up to the courts. But in several instances it had to resolve ambiguities in order to devise the rules and forms. Most importantly, he said, in his opinion, every member of the advisory committee left behind any personal views or opposition to the legislation, and everybody worked hard to implement the law faithfully. The advisory committee, moreover, tried to be as transparent as possible, posting its work product on the Internet. The entire staff of the Administrative Office was outstanding, and particular appreciation is due to Patricia Ketchum, who was the centerpiece of the committee's efforts to redraft the bankruptcy official forms.

Professor Resnick said that he believes that it is very unlikely that the advisory committee will consider making any additional changes in the interim rules. Instead, it will concentrate on drafting the permanent amendments to the national rules. In the process, it will look at the actual experiences of the courts in using the interim rules, review all the public comments, and add some additional rules and forms at its March 2006 meeting.

In conclusion, Professor Resnick said that the advisory committee should approve a complete set of amendments to the national rules and official forms at its March 2006 meeting and publish them for public comment in August 2006. The revisions, therefore, will be on track under the regular Rules Enabling Act process, and the revised national rules would become effective on December 1, 2008.

Mr. McCabe added that the Act also contains a number of provisions that adversely impact the finances of the federal judiciary. For example, it allows debtors to petition for filing in forma pauperis. If the petition is granted, the judiciary loses its designated portion of the filing fee, which is used to fund basic court operations. Moreover, if the debtor does not pay a filing fee, there is no statutory authority in a chapter 7 case to pay the case trustee the $60 fee that funds the trustee's work. In addition, the Act imposes substantial additional work and costs on the courts. Among other things, the Administrative Office is required to compile and report substantial new statistics in areas that are of no direct concern to the business needs of the judiciary. The Act's requirements have required the Administrative Office to expedite development of a multi-million dollar new statistical infrastructure capable of receiving and processing the new statistics.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Rosenthal and Professor Cooper presented the report of the advisory committee, as set out in Judge Rosenthal's memorandum and attachment of December 15, 2005 (Agenda Item 7).

Amendment for Publication

FED. R. CIV. P. 8(c)

Judge Rosenthal reported that the advisory committee had only one action item to present. She explained that FED. R. CIV. P. 8(c) (pleading affirmative defenses) lists "discharge in bankruptcy" as one of the affirmative defenses that a party must plead. She said that bankruptcy judges had suggested to the advisory committee that the rule is incorrect because § 524 of the Bankruptcy Code specifies that a discharge voids any judgment obtained on the discharged debt. It also operates as an injunction against a creditor bringing any action to collect the debt. Therefore, a discharge is not an affirmative defense as a matter of substantive bankruptcy law.

Judge Rosenthal said that the advisory committee was seeking authority to publish a proposed amendment to eliminate "discharge in bankruptcy" from the list of affirmative defenses in Rule 8(c). She added, however, that the advisory committee did not plan to publish the amendment immediately, but would hold it for publication as part of a package of amendments at a later date.

The committee without objection approved the proposed amendment for publication at a later date by voice vote.

Informational Items

Style Project

Professor Cooper provided a status report on the work of the advisory committee in restyling the body of civil rules. He noted that the project to restyle all the federal rules of procedure had been initiated in the early 1990's by Judge Robert Keeton and Professor Charles Alan Wright. Their goal was to rewrite the rules to achieve greater clarity and ease of use without changing meaning or substance. In addition, they sought to eliminate inconsistencies and to use language consistently throughout the federal rules of procedure.

Professor Cooper pointed out that the Federal Rules of Appellate Procedure had been the first body of rules to be restyled. They were followed by the restyled Federal Rules of Criminal Procedure. Now, the Advisory Committee on Civil Rules had completed a style revision of all the Federal Rules of Civil Procedure, which it published for comment in February 2005. Professor Cooper noted that the advisory committee had received 21 written comments to date and had held one hearing in Chicago. The hearing, he said, was essentially a comprehensive round table discussion on the restyled rules with Gregory P. Joseph and Professor Stephen B. Burbank, who represented the views of a group of 21 distinguished lawyers and professors who had read the restyled rules carefully and provided detailed written comments to assist the advisory committee.

Professor Cooper noted that a majority of the reviewing group had expressed the view that the project to restyle the civil rules should not proceed further because it could introduce inadvertent changes in the meaning of rules and possibly lead to litigation and added transactional costs. It might also preclude a more comprehensive overhaul of the civil rules. He also reported that members of the reviewing group had expressed concern that if the entire body of civil rules were re-adopted as a package, the supersession clause of the Rules Enabling Act process might cause mischief by overturning statutory provisions. Professor Cooper responded, though, that the advisory committee was considering a number of options for dealing with this problem.

Judge Rosenthal added that there had been no supersession problems when the restyled criminal rules were promulgated. Professor Cooper agreed that the fears expressed at the time about the criminal and appellate rules had not been realized in practice. He noted, for example, that the Department of Justice had reported that lawyers in its various divisions had not experienced any problems with the other restyled rules. Three of the law professors at the meeting added that they regularly read all the reported decisions in their fields and have not seen a single problem to date with the restyled rules.

Judge Rosenthal said that much of the public commentary on the restyled rules had been very positive, adding that the new rules are much clearer, easier to understand, and easier to use. She said that the advisory committee had been extraordinarily disciplined in its work and had avoided making any changes in language where there could be a potential change in meaning. She also thanked the Litigation Section of the American Bar Association for its help in supporting the project and providing very helpful input.

Other Amendments Under Consideration

Judge Rosenthal reported that the advisory committee had been so occupied with the restyling and electronic discovery projects that it had put aside a number of other issues. She listed several future committee agenda items, including:

(1) Rule 15 (amended and supplemental pleadings) – whether to consider changes in the automatic right of a party to amend its pleading or in the provision allowing relation back of an amendment changing the party against whom a claim is asserted, if the plaintiff files a case without knowing the name of the defendant but later discovers the name;

(2) Rule 26(a)(2)(B) (pretrial disclosure of expert testimony) – whether reports should have to be filed by employees who only sporadically give expert testimony;

(3) Rule 30(b) (notice of deposition) – whether to address a number of problems and possible misuses of the rule in taking depositions of institutional witnesses;

(4) Rule 48 (number of jurors and participation in the verdict) – whether the rule should be amended to include a provision on polling the jury as found in FED. R. CRIM. P. 31;

(5) Rule 58(c)(2) (entry of judgment in a cost or fee award) – together with Rule 54(d)(2) (motion for attorneys' fees) and FED. R. APP. P. 4 (timing of a notice of appeal) – whether to examine the practical effect of the provisions that give a district judge discretion to suspend the time to file an appeal when a motion is filed for attorney fees;

(6) Rule 60 (relief from judgment or order) — whether the rule should be amended, or a new rule drafted, to authorize a district court to make "indicative rulings" on post-trial motions when a pending appeal has deprived it of jurisdiction; and

(7) Rule 56 (summary judgment) – whether the rule should be rewritten to provide time limits, specify standards for granting summary judgment, and cure the disconnect between the text of the rule and the way that summary judgment motions are actually litigated in the courts.

Finally, Judge Rosenthal said that the advisory committee has also had on its agenda for a long time a controversial suggestion to reexamine notice pleading in the civil rules. She said that a number of courts are tempted to impose heightened pleading requirements, and the interplay between the pleading rule and the discovery rules had arisen several times during the advisory committee's deliberations on the discovery rules. She added that if the advisory committee decides to change Rule 56, the pleading rule will necessarily be implicated.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Earlier in the morning, before the meeting began, Judge Bucklew presided over a hearing to listen to the testimony of Federal Public Defender Jon M. Sands, on behalf of the Federal Defenders Sentencing Guidelines Committee, regarding the advisory committee's proposed amendments to FED. R. CRIM. P. 11 (pleas), 32 (sentencing and judgment), and 35 (correcting or reducing a sentence), published in August 2005. The proposed amendments would conform the criminal rules with *United States v. Booker,* 543 U.S. 220 (2005).

Following the committee's lunch break, Judge Bucklew presided over a hearing of the testimony of Mike Sankey, on behalf of the National Association of Professional Background Screeners, regarding proposed new FED. R. CRIM. P. 49.1 (privacy protection for filings made with the court), published for public comment in August 2005.

Judge Bucklew and Professor Beale then presented the report of the advisory committee, as set forth in Judge Bucklew's memorandum and attachments of December 8, 2005 (Agenda Item 8).

Judge Bucklew reported that the advisory committee had spent most of its October 2005 meeting on three issues: (1) rule amendments to implement the Crime Victims' Rights Act (part of the Justice for All Act of 2004); (2) a proposed amendment to FED. R. CRIM. P. 29 (judgment of acquittal); and (3) a proposed amendment to FED. R. CRIM. P. 16 requiring the disclosure of *Brady* information before trial.

Amendments for Publication

Judge Bucklew said that the advisory committee was seeking authority from the Standing Committee to publish amendments to the Federal Rules of Criminal Procedure to implement the Crime Victims' Rights Act. The amendments consist of one new rule and changes to five existing rules. She added that the advisory committee had incorporated Judge Levi's suggested improvements in the text of the rules and committee notes.

FED. R. CRIM. P. 1

Judge Bucklew explained that the proposed amendment to Rule 1 (scope and definitions) would merely incorporate the statutory definition of a "crime victim" set forth in the Crime Victims' Rights Act. She added that the statutory definition was quoted in full in the proposed committee note.

FED. R. CRIM. P. 12.1

Judge Bucklew said that the proposed amendment to Rule 12.1 (notice of alibi defense) would provide that a victim's address and telephone number not be given automatically to the defendant if an alibi defense is made. The amendment would give the court discretion to order disclosure of the information or to fashion an alternative procedure giving the defendant the information necessary to prepare a defense, but also protecting the victim's interests.

Two members questioned the language of proposed new subparagraph (b)(1)(B) that places the burden on the defendant to establish a need for the victim's address and telephone number. They said that the presumption should be reversed. Thus, the rule would provide that the defendant has the right to speak with the victim, and the government would have the burden of showing that there is a need to protect the victim's interests. One participant suggested that the advisory committee might consider drafting alternate versions of the provision and including both in the publication of the rules. Another suggested that the matter might simply be highlighted in the covering letter accompanying the publication.

FED. R. CRIM. P. 17

Judge Bucklew said that the proposed amendment to Rule 17 (subpoena) would require court approval to obtain a subpoena served on a third party that calls for personal or confidential information about a victim. The court could also require that the victim be given notice of the subpoena and an opportunity to move to quash or modify it.

FED. R. CRIM. P. 18

Judge Bucklew explained that the proposed amendment to Rule 18 (place of prosecution and trial) would require the court to consider the convenience of any victim in setting the place of trial.

FED. R. CRIM. P. 32

Judge Bucklew pointed out that the proposed amendments to Rule 32 (sentencing and judgment) would delete the current definition in the rule of a victim of a crime of violence or sexual abuse. The new, broader definition of a "crime victim," taken from the Crime Victims' Rights Act itself and incorporated in FED. R. CRIM. P. 1 (definitions), includes all federal crimes. The amended rule would also eliminate the current restriction that only victims of a crime of violence or sexual abuse are entitled to be heard at sentencing. The other proposed changes in the rule, she said, were relatively minor.

FED. R. CRIM. P. 43.1

Judge Bucklew explained that Rule 43.1 (victim's rights) was a completely new rule. She said that the advisory committee had debated whether to incorporate the changes implementing the Crime Victims' Rights Act into a single new rule or spread them throughout the rules. She said that the committee consensus was to place the principal changes in one rule.

Judge Bucklew said that subdivision (a) of the new rule deals with the right of a victim to receive notice of every public court proceeding, to attend the proceeding, and to be reasonably heard at certain proceedings. She noted that the government has the burden of using its best efforts to provide victims with reasonable, accurate, and timely notice of every court proceeding. Professor Beale added that paragraph (a)(3) uses the term "district court," rather than "court," to make sure that the rule does not provide a right to be heard in the court of appeals. This limitation tracks the language of the statute.

Some participants questioned whether all the provisions set forth in the proposed new rule are actually needed because most of them are specified in the Crime Victims' Rights Act itself. One participant noted, moreover, that FED. R. EVID. 615 already allows a court to exclude witnesses so that they cannot hear the testimony of other witnesses. Judge Bucklew and Professor Beale responded that victims' groups have argued strongly that pertinent provisions of the Act should be highlighted and located in the key provisions of the rules used every day by the bench and bar. They added that the advisory committee did not go beyond the substance of the statute itself in any way, but the committee was convinced that it was necessary to include some of the key victims' statutory provisions in the rules themselves.

One participant noted that the rules committees generally avoid repeating statutory language in the rules. Another added that the Standing Committee in its local rules project had discouraged the courts from repeating statutes in local rules because it can create style problems and lead to legal conflicts.

One member suggested that the new rule should not be numbered as Rule 43.1 because the preceding rule, FED. R. CRIM. P. 43, deals only with the presence of the defendant. He recommended that one of the open rule numbers, taken from abrogated rules, should be used. It was the consensus of the committee that an abrogated rule number should be used or the new rule placed at the end of the rules.

One member questioned the meaning of proposed subdivision (b), which states that the court must decide promptly "any motion asserting a victim's rights." Judge Bucklew explained that the main purpose of the amendment was to emphasize the need for the court to act promptly. Professor Beale added that the statute covers the matter and uses the word "forthwith." She said that the rule may not strictly be necessary, but it is politically important. Another member suggested that the rule should be limited to motions asserting a victim's rights "under these rules." The committee consensus was to include the additional language.

Judge Bucklew reported that paragraph (b)(1) states that the rights of a victim may be asserted either by the victim or the government. One member suggested that paragraphs (1) through (4) do not fit well under subdivision (b), but should become new subdivisions (c) through (f). Judge Levi recommended that the advisory committee consider whether renumbering of the provisions would be appropriate.

The participants suggested a number of other potential improvements in language and organization of the rule for the advisory committee to consider.

The committee without objection approved the proposed amendments and new rule, including the changes suggested by the members, for publication by voice vote.

Informational Items

Judge Bucklew reported that the Standing Committee had returned the proposed amendments to Rule 29 (judgment of acquittal) to the advisory committee for further consideration. She said that drafting the rule had been more difficult than anticipated. A subcommittee had been working on it, and the advisory committee expected to present a draft rule to the Standing Committee for action at its June 2006 meeting.

As revised, Rule 29 would allow a judge to deny a motion for acquittal before the jury returns a verdict, or to reserve decision on the motion until after a verdict. But if the judge decides to *grant* the motion of acquittal, the judge would have to wait until after the jury returns a verdict – unless the defendant waives double jeopardy rights. The proposed rule sets forth what the judge must tell the defendant in open court, and it addresses the substance of the defendant's waiver.

One member opposed the rule and said that the Standing Committee had not returned the rule to the advisory committee with an implied endorsement. Judge Bucklew responded that the instruction to the advisory committee was to produce the best possible rule. Judge Levi added that when a final draft is presented to the Standing Committee in June 2006, the advisory committee should make it clear whether or not it endorses the rule as a matter of policy.

Judge Bucklew described the proposed amendments to FED. R. CRIM. P. 16 (discovery and inspection), which would require the government to turn over exculpatory evidence to the defendant 14 days before trial. She said that the advisory committee did not have actual rule language yet, but it had taken a straw vote, and a majority of the members favored continuing work on a rule. She noted, though, that the Department of Justice was firmly opposed to the rule.

Professor Beale added that the proposal submitted by the American College of Trial Lawyers would go beyond the Supreme Court's substantive requirements in *Brady v. Maryland* and related cases. It would also specify the procedures for the government to follow in turning over specified types of information to the defendant before trial.

One participant emphasized that the rule would be very controversial, and he said that it would be essential for the advisory committee to prepare a complete background memorandum on the applicable law if it decides to present a rule to the Standing Committee. Judge Bucklew added that the advisory committee had also discussed the desirability of the Department of Justice making appropriate revisions to the U.S. attorneys' manual.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Smith and Professor Capra presented the report of the advisory committee, as set forth in Judge Smith's memorandum and attachments of December 1, 2005 (Agenda Item 9).

Judge Smith reported that the advisory committee had no action items to present.

Informational Items

Judge Smith noted that the advisory committee had continued its work on a rule governing waiver of privileges for submission to Congress. He said that the advisory committee was considering holding a special meeting or conference to complete work on a rule that could be submitted to the Standing Committee in June 2006.

Judge Smith reported that the advisory committee was continuing to monitor case law developments following the Supreme Court's decision in *Crawford v. Washington,* 541 U.S. 36 (2004), which limits the admission of "testimonial" hearsay. He said that because of the uncertainty raised by *Crawford,* the advisory committee would not move forward with any rule amendments dealing with hearsay. Judge Smith also reported that the advisory committee was considering a possible amendment governing evidence presented in electronic form.

REPORT OF THE TIME-COMPUTATION SUBCOMMITTEE

Judge Kravitz and Professor Schiltz presented the report of the subcommittee, as set forth in Judge Kravitz's memorandum of December 9, 2005 (Agenda Item 10).

Judge Kravitz pointed out that the subcommittee included several practicing lawyers, and it was blessed with having Professor Schiltz as its reporter. He reported that the subcommittee's work had begun with a memorandum drafted by Professor Schiltz that outlined all the potential time-computation issues in the federal rules. The memorandum, he said, had been circulated to the committee reporters for comment and then considered at a subcommittee meeting in October 2005.

Judge Kravitz explained that the subcommittee was focusing at the moment on how time should be computed, rather than on the specific time limits scattered throughout the rules. The latter, he said, would be addressed later by the respective advisory committees.

Judge Kravitz noted that the subcommittee had decided preliminarily to propose a number of changes in how time is computed, the most significant of which would be to eliminate the "10-day rule," set forth in FED. R. CIV. P. 6(e) and counterpart provisions in the appellate, bankruptcy, and criminal rules. The existing rules, he explained, specify two different ways of counting time. If a time period specified in a civil, criminal, or appellate rule is 10 days or less, intervening weekends and holidays are excluded in the computation. But if a time period set forth in a rule is 11 days or more, weekends and holidays are in fact counted. (For bankruptcy rules, the dividing line is 8 days, rather than 11.) Judge Kravitz said that by abolishing the "10-day rule," all days would then be

counted in the future. And if the last day of a prescribed period is a weekend or holiday, the deadline would roll over to the next weekday.

Professor Schiltz said that in drafting a proposed model rule, the subcommittee had decided against simply eliminating the "10-day" language in the current rule. That approach, he said, might be too subtle and could be missed by lawyers. Instead, the proposed rule attracts attention to the change and tells the bar affirmatively to count every day or hour.

Judge Kravitz said that after the subcommittee makes its final recommendations, the individual advisory committees will take a hard look at the impact on each of the specific deadlines in their rules. For example, 10-day deadlines in the current rules would necessarily be shortened because the parties will no longer get the benefit of excluding weekends. The advisory committees, thus, might wish to increase some 10-day deadlines to 14 days.

He added that the time-computation subcommittee was comprised largely of members of the advisory committees. The members, he said, would be expected to go back to their respective advisory committees and take a leading role in examining and adjusting the deadlines. Judge Kravitz added that the subcommittee's recommendations would be completed by early 2006, circulated to the advisory committees for comment, and considered by the Standing Committee in June 2006. After reviewing all the comments, the subcommittee would send its recommendations to the advisory committees and ask them to proceed with making any needed changes in their deadlines.

Judge Kravitz reported that the subcommittee had also considered amending the time-computation rules to take account of electronic filing and service. Anticipating that electronic filing and service will become virtually universal in the future, the subcommittee discussed eliminating the provision that gives a party three additional days to act after being served by mail, electronically, or by leaving papers with the clerk's office. He pointed out that the practicing attorneys on the subcommittee were strongly of the view that as long as mail remains a service option, the three additional days must be retained. But, he said, even though the additional three days had been provided to encourage the use of electronic service, that incentive is probably no longer needed. Judge Kravitz said that the subcommittee needs to address the three-day rule, and it would likely decide to retain the three-day rule for mail but eliminate it for other kinds of service.

In addition, Judge Kravitz said, the subcommittee had drafted a provision to calculate time periods stated in hours, rather than days. Professor Schiltz explained that the subcommittee had drafted a simple rule that would extend a deadline by 24 hours if the last day falls on a weekend or holiday.

Judge Kravitz said that the subcommittee had also addressed the issue of "backwards counting," such as in computing the deadline for a party to file a paper in advance of a hearing or other event. Professor Schiltz pointed out that the proposed draft states that when the last day is excluded, the computation "continues to run in the same direction," *i.e.,* backwards. Thus, if the final day of a backward-looking deadline falls on a Saturday, the paper would be due on the Friday before the Saturday, not on the Monday following the Saturday.

Judge Kravitz reported that the subcommittee also considered whether all time limits in the rules should be expressed in seven-day increments, but decided not to mandate such a rule. Rather, it would encourage the advisory committees to keep such a protocol in mind as they adjust deadlines in response to the subcommittee's new time-counting rule.

REPORT OF THE TECHNOLOGY SUBCOMMITTEE

Judge Fitzwater presented the report of the Technology Subcommittee. He noted that proposed amendments to the rules had been published in August 2005 to implement section 205 of the E-Government Act of 2002. The legislation requires the Supreme Court to prescribe rules –

> "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically."

Judge Fitzwater reported that some comments had been received on the proposed rules, but there had been only one request to testify at a scheduled public hearing. He also noted that he had recently attended a conference at which some concern had been expressed regarding the viability of the two-tier access system contemplated in the proposed rules, under which certain sensitive records would be made available at the courthouse, but not on a court's web site.

One of the members pointed out that many of the provisions dealing with electronic filing are set forth in local court standing orders and general orders, rather than in local court rules. He suggested that it would be very helpful if the committee provided guidance to the courts and circuit councils as to what matters should be placed in local rules and what should be set forth in orders.

PANEL DISCUSSION ON THE LEGACY OF CHIEF JUSTICE REHNQUIST

Judge Levi explained that he had asked former committee member Charles Cooper and current committee member Judge Kravitz to put together a panel reflecting on the rich legacy of the late Chief Justice William H. Rehnquist and his contributions to the federal rulemaking process. He noted, though, that after putting the program together, Mr. Cooper was unable to attend because of a last-minute conflict. Judge Levi noted that both Judge Kravitz and Donald Ayer had been law clerks of the late Chief Justice, and James Duff had served as the chief justice's administrative assistant, *i.e.*, chief of staff, from 1996 to 2000.

Judge Kravitz explained that he would speak about the personal qualities that impressed him most about the late Chief Justice when he had served as his law clerk. Mr. Ayer, he said, would then discuss the Chief Justice's legacy on the important issue of federalism. Finally, he added, Mr. Duff would speak about the Chief Justice as the administrative leader of the Third Branch and his support of the rules program.

Judge Kravitz noted that Mr. Ayer has an active appellate practice in Washington and had served in the past as the principal deputy to the Solicitor General, as Deputy Attorney General, and as the U.S. attorney for the Eastern District of California. Mr. Duff, he said, is the managing partner in the Baker Donelson law firm in Washington and also serves as the legislative counsel for the Federal Judges Association.

Judge Kravitz said that he had read many tributes to the late Chief Justice and saw a number of common themes reflected in them. The eulogists all recognized the same character traits in Chief Justice Rehnquist, namely: (1) how brilliant he was; (2) what a wonderful teacher he was; (3) how well he understood the Supreme Court as a decision-making body; and (4) how decent, modest, and normal he was for a person of such enormous stature and authority.

As for his brilliance, Judge Kravitz said, the Chief Justice's mind was encyclopedic and his memory prodigious. He had an amazing ability to memorize citations, and he knew details about every congressional district. He could cite poetry, Gilbert and Sullivan librettos, and literature by heart. He could also dictate completely polished opinions into a tape recorder without any editing.

He was a dedicated teacher who spent a great deal of time with his law clerks. He had regular conferences with his clerks, but he did not have them write bench memos. Rather, he would tend to go for a walk with the clerks on the Mall and talk to them about cases and upcoming issues and opinions. He saw it as a way of training the clerks to think on their feet, without notes. It was also his way of preparing for arguments.

As a training device, he would have the clerks write opinions on stays, even though not strictly needed. He told them that it was important for them to be able to write under pressure. He set very tough deadlines and had the clerks produce draft opinions within 10 days after argument. He also spent a great deal of time teaching the clerks about life and about family, and he was very interested in the clerks' plans for the future.

He was also a master of the politics of the Court and how the Court functioned as a decision-making body. He knew how to move the Court and how to marshal a majority of votes in a case.

Finally, Judge Kravitz added, William Rehnquist's most important quality was his basic decency. In some courts, he noted, disputes arise among the judges, and dissenters occasionally use uncivil language. But the Chief Justice was overwhelmingly civil and polite. He got along very well with his ideological opponents, and he knew that the best way to influence people was with kindness.

He deeply loved his family, and they were the most important thing in his life. His law clerks put on skits, and he was the butt of their jokes and loved it. In all, he had great common sense, pragmatism, and good judgment.

Mr. Ayer agreed with the observations of Judge Kravitz and said that the great successes of the Chief Justice had everything to do with who he was as a person. He was a phenomenon in melding all these great personal qualities, and he ended up being loved by all the members of the Court. Mr. Ayer emphasized that very few people in high places today possess the same qualities.

The Chief Justice, he said, was also a person with a vision and an indelible sense of what the Constitution is and should be. He had an agenda and knew where he wanted to go. Thus, over the course of 33 years on the Court, he moved the Court in his direction, particularly in cases involving religion, habeas corpus, federalism, and criminal procedure.

Mr. Ayer presented a scholarly review of the late Chief Justice's decisions regarding federalism – the area where he affected the law most profoundly. The Chief Justice's allegiance, Mr. Ayer said, was to the union intended by the founding fathers that balanced federal and state powers. He was an activist in trying to restore that balance of power and undo the expansions of federal power that began with the New Deal.

Mr. Ayer divided his detailed analysis of the federalism cases into three broad areas: (1) "commandeering," *i.e.,* where Congress orders the behavior of state employees; (2) narrowing the Commerce Clause power of the federal government; and (3) the 11th Amendment and sovereign immunity.

Mr. Duff concurred that William Rehnquist was an extraordinary man with a combination of great talents. His support of the rules process was no different from the approach he took with everything else. He was intimately familiar with all the agendas of the Judicial Conference committees, including items on the Conference's consent calendar. He invariably would ask penetrating questions about agenda items that went right to the heart of a matter.

In the late 1980s, before the Chief Justice streamlined the Judicial Conference's operating procedures, Conference sessions used to go on for several days, as each committee chair would read his or her report. Chief Justice Rehnquist, though, pushed most of the work from the Conference to its committees. He instituted the discussion and consent calendars, and he rotated the committee members and chairs. Nevertheless, he recognized that there is a need for greater continuity in the area of the federal rules, so he extended the terms of some rules committee chairs and members.

Mr. Duff said that the Chief Justice had an exacting sense of the separation of powers and the balance between the federal government and the states. He was also passionate about the independence of the judiciary. He recognized the important role of the rules committees, both in guiding Congress on procedural matters and in maintaining judicial independence.

Mr. Duff pointed to *Nixon v. United States,* involving the impeachment of a federal judge who had been convicted of perjury and imprisoned. Judge Nixon challenged the procedures chosen by the Senate in having a committee, rather than the full body, take the evidence at his impeachment trial. The opinion of the Supreme Court held that since the Constitution authorizes the Senate to conduct impeachment trials, the Senate can decide on its own procedures. He said that the decision was very important to the separation of powers and works ultimately to the benefit of the judiciary when it exercises its own powers. The rules committees, he said, need to exercise their authority over court procedures wisely and keep Congress from filling a vacuum with statutes.

Mr. Duff said that both sides of the aisle praised the Chief Justice for his leadership role in the impeachment trial of President Clinton. He pointed out that the chief justice and he had met with the Senate leadership to discuss trial procedure, and the exchanges had been very cordial. The chief justice had offered to conduct the trial as an ordinary trial, but the Senate had its own idea as to how the trial should be conducted. The Chief Justice, he said, was able to adapt very well to the Senate's rules.

In conclusion, Mr. Duff pointed out that in addition to his role as the leader of the Supreme Court, 84 different statutes give the chief justice administrative responsibilities.

Mr. Rabiej reported that the Chief Justice never announced his views regarding any rules proposal before the Judicial Conference. Nevertheless, he was able to affect the outcome of a proposal by shaping the procedure. For example, at its September 1999 session, the Conference had before it an important package of rules dealing with the scope of discovery and disclosure. Normally, only one rules committee chair would be allowed to speak. But with the 1999 package, the Chief Justice allowed both the chair of the Standing Committee and the chair of the civil advisory committee to address the Conference. He also decided who would speak first on an issue. Thus, he let both rules committee chairs speak first on the discovery rules package, before any opponent could speak. In addition, speakers normally would be given only five minutes to make a presentation, but the Chief Justice allowed the rules committee chairs a great deal more time. In the end, the 1999 rules package was approved by one vote.

Mr. Rabiej pointed out that several years ago, legislation had been introduced in Congress that would have required that a majority of the members of each rules committee be practicing lawyers. The Chief Justice, he said, made a number of phone calls, and the issue quickly died down. In addition, Mr. Rabiej said, the Chief Justice established the tradition of having the chair and the reporter of the Standing Committee meet annually with him to discuss the current and future business of the rules committees.

Judge Kravitz concluded the panel discussion by reading a letter from Judge Anthony Scirica, former chair of the Standing Committee, emphasizing how supportive Chief Justice Rehnquist had been in rules matters and how he had been the best friend of the rules process.

NEXT COMMITTEE MEETING

The next committee meeting was scheduled for Thursday and Friday, June 22-23, 2006, in Washington, D.C.

Respectfully submitted,

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter and Ken Broun, Consultant
Re: Consideration of Rule Concerning Waiver of Attorney-Client Privilege and Work Product
Date: March 22, 2006

At its last meeting, the Committee reviewed two versions of a rule that would govern waiver of privileges and work product. The Committee agreed to continue its consideration of a possible rule on this subject. The Committee resolved that the questions of waiver of privilege and work product were of the utmost importance, and that disuniformity in these waiver rules imposed unnecessary cost and inefficiency in litigation.

In the interim, the Chair of the House Committee on the Judiciary, Congressman Sensenbrenner, issued a letter requesting that the Judicial Conference "initiate a rule-making on forfeiture of privileges." Of course, a rule of privilege cannot become law under the ordinary rulemaking process. Privilege rules must be enacted directly by Congress. Congressman Sensenbrenner's letter recognizes this fact. He requests the rulemaking process to proceed in the ordinary fashion, however, with the idea that whatever comes out of that process will be reviewed by Congress and directly enacted if acceptable.

In light of these developments, the Reporter and Consultant drafted a Rule 502, and a Committee Note. That Rule and Note are included in the hearing materials behind Tab 1 of the agenda book, and they are also attached as an appendix to this memorandum.

Rule 502 and the accompanying note are intended to capture the discussion at the previous Committee meeting, at which there appeared to be substantial agreement on the following fundamental principles:

1. Uniform rules on waiver are required, so that parties are able to predict in advance the consequences of litigation conduct.

2. The waiver rules must be uniform at both the federal and the state level. If, for example, conduct does not constitute a waiver in federal practice but does so in a state court, parties would have no assurance that information protected by privilege or work product will remain protected.

3. Subject matter waiver should be limited to situations where fairness requires such an extreme result.

4. Parties should be able to, and encouraged to, cooperate with government investigations by turning over protected material without risking a finding that the cooperation constitutes a waiver in private litigation.

5. When disclosure is by mistake, a waiver should be found only if the disclosing party was negligent in production and in failing to seek return of the protected material.

6. In addition to the protection provided by a default rule, litigants should be able further to reduce the costs of pre-privilege review by additional terms contained in court-entered confidentiality orders; for such orders to be protective, they must preclude a finding of waiver in any court.

This memorandum is in five parts. Part One is Ken Broun's memo on the case law concerning waiver (with a few Reporter's comments interspersed). Part Two is Ken's memo concerning the authority necessary for implementing a waiver rule that will bind state courts. Part Three is Ken Broun's memo on the justification for a fairness–based subject matter waiver test for work product. Part Four provides a discussion of comments received on the Rule so far. Part Five discusses and explains two important drafting choices made in preparing the draft rule for the Committee's consideration.

I. Ken Broun's Memo on Case Law on Waiver of Privilege

Waiver of privilege problems frequently arise in large document litigation. The issues usually involve the attorney-client privilege, but may involve other privileges as well. There are at least three distinct, but sometimes overlapping, problems:

1. The effect on a privilege of an inadvertent production of a privileged document ["inadvertent waiver"].

2. The scope of the waiver of a document produced either intentionally or inadvertently ["scope of waiver"].

3. The effect on future privilege claims of the production of documents in the course of a government investigation, either with or without a confidentiality agreement entered into with the government agency ["selective" or "limited" waiver referred to in this memorandum as "selective waiver"].

Concern that privilege may be waived even by an unintended disclosure of a document will cause counsel and his or her staff to spend countless hours reviewing documents in large volume cases to insure against inadvertent disclosure. The rule applied by many courts that waiver of privilege by disclosure of a single document is a waiver of privilege with regard to all communications dealing with the same subject matter will cause counsel to guard against disclosure of privileged documents even though counsel may not really care if a particular document is disclosed to opposing counsel. These rulings raise the cost of pre-production privilege review to astronomic proportions — in the thousands of dollars for a basic action, in the millions for a major action with electronic discovery.

The likelihood that disclosure of documents to a government agency may result in waiver of privilege as against other parties may limit a party's willingness to cooperate fully with a government investigation.

With regard to the inadvertent waiver and scope of waiver issues, the cases differ widely on such matters as the effect of an inadvertent disclosure and the scope of the subject matter if a waiver or forfeiture is found. Stipulations or case-management orders saving the privilege, at least against inadvertent disclosure, have become common. Nevertheless, as will be discussed, such orders are of somewhat limited usefulness.

With regard to selective waivers, most federal circuits hold, at least without a confidentiality agreement, that a party may not selectively waive a privilege. In other words, disclosure to a government agency literally destroys the privilege. One circuit, the Eighth, holds to the contrary. The other circuits are split on whether the existence of a confidentiality agreement with the government agency preserves the privilege against the rest of the world.

This memorandum seeks to flesh out the dimensions of these interrelated problems, to discuss the case law dealing with the issues, and to propose some statutory models intended to ease the burden on the courts and counsel.

Inadvertent waiver and scope of waiver: the problem

The best formal statement of these two related problems is contained in Richard L. Marcus, *The Perils of Privilege: Waiver and the Litigator*, 84 Mich. L. Rev. 1605, 1606-07 (1986).

Marcus sets forth the concerns as follows:

> . . . [E]normous energy can be expended to guarantee that privileged materials are not inadvertently revealed in discovery, and lawyers may adopt elaborate witness preparation strategies in order to prevent witnesses from seeing privileged materials. Judges also feel the burden; where waiver is at stake, parties will litigate privilege issues that otherwise would not require judicial attention. Finally, for those not lucky or wealthy enough to adopt strategies that avoid waiver, broad waiver rules erode the reliability of the privilege. In recognition of these costs, courts are increasingly willing to enter orders preserving privilege despite disclosure in order to facilitate the pretrial preparation process. Although commendable, these orders appear totally unenforceable under classical waiver doctrine.

See also, Melanie B. Leslie, *The Costs of Confidentiality and the Purpose of Privilege*, 2000 Wis. L. Rev. 31, 73; *Paul R. Rice, Attorney-Client Privilege: The Eroding Concept of Confidentiality Should Be Abolished*, 47 Duke L. J. 853 (1998).

Although the Marcus piece is now almost twenty years old, its description of the problem is still largely current. Perhaps the only things that have changed are the even more frequent use of protective orders to deal with inadvertent disclosures in discovery and the added complexities caused by the increasing existence of electronically stored information.

The Report of the Civil Rules Advisory Committee (May 17, 2004, Revised, August 3, 2004) dealing with proposed amendments concerning electronic discovery specifically notes the problem as well as the attempts of parties to deal with the issue by protocols minimizing the risk of waiver.[1] The Committee notes (p. 8):

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[1]The Civil Rules Advisory Committee elected to use the term "waiver" in connection with even inadvertent or unintended disclosures of privileged material. Technically, such disclosures may result in a "forfeiture" rather than a "waiver," which by definition would be intentional. Nevertheless, the courts have consistently used the term "waiver" in connection with unintentional disclosures, and this memorandum and the draft Rule 502 continue that use of terminology.

Such protocols may include so-called quick peek or claw back arrangements, which allow production without a complete prior privilege review and an agreement that production of privileged documents will not waive the privilege.

The Civil Rules Committee Report cites the Manual for Complex Litigation (4th) § 11.446, setting forth the same issue:

> A responding party's screening of vast quantities of unorganized computer data for privilege prior to production can be particularly onerous in those jurisdictions in which inadvertent production of privileged data may constitute a waiver of privilege as to a particular item of information, items related to the relevant issue, or the entire data collection. Fear of the consequences of inadvertent waiver may add cost and delay to the discovery process for all parties. Thus, judges often encourage counsel to stipulate at the outset of discovery to a "nonwaiver" agreement, which they can adopt as a case-management order. Such agreements protect responding parties from the most dire consequences of inadvertent waiver by allowing them to "take back" inadvertently produced privileged materials if discovered within a reasonable period, perhaps thirty days from production.[2]

The Civil Rules Committee's concern for the problem is reflected in its proposed amendments to Rules 16(b)(6) and 26(f)(4) and Form 35 providing that if the parties can agree to an arrangement that allows production without a complete privilege review and protects against waiver, the court may enter a case-management order adopting that agreement.

However, although a protective or case-management order may be quite useful as among the parties to a particular litigation, it is likely to have no effect with regard to persons or entities outside the litigation. As Marcus indicates in the statement quoted above, protective orders "appear totally unenforceable under classical waiver doctrine."

Moreover, even if the courts were to hold that a stipulation or protective order is effective to guard against waiver with regard to parties outside the litigation, problems still exist. For example, such orders may deal only with inadvertent disclosures. Questions may and do arise under

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[2]An example of a case-management order dealing with disclosure of privileged documents is contained in *Hoechst Celanese Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh,* 1995 WL 411805 at * 4 (Del. Super.Ct. Mar. 17, 1995), where the court quotes the order as stating:

> The production of a privileged document shall not constitute, or be deemed to constitute, a waiver of any privilege with respect to any document not produced. The production of a document subject to a claim of privilege or other objection and the failure to make a claim of privilege or other objection with respect thereto shall not constitute a waiver of a privilege or objection. . . .

such orders as to what is an inadvertent disclosure. See *Baxters Travenol Labs., Inc. v. Abbott Labs.*, 117 F.R.D. 119 (N.D. Ill. 1987) (disclosure not inadvertent under the circumstances).

Thus, an order requiring the return of an inadvertently disclosed document may help in the instant litigation, but it still requires careful counsel to claim privilege even where she doesn't care about disclosure, and it still requires counsel to conduct an extensive pre-production review for privilege.

Because both concepts are important to a discussion of possible legislative remedies for the above described problem, the next two sections of this memorandum attempt briefly to describe the case law on 1) the effect of inadvertent waiver and 2) the scope of waiver based upon disclosure of documents during the litigation process.

Inadvertent waiver

The courts have taken three different approaches to inadvertent disclosure: 1) inadvertent disclosure does not waive the privilege even with regard to the disclosed document; 2) inadvertent disclosure waives the privilege regardless of the care taken to prevent disclosure; 3) inadvertent disclosure may waive the privilege depending upon the circumstances, especially the degree of care taken to prevent disclosure of privileged matter and the existence of prompt efforts to retrieve the document.

Perhaps the fewest number of cases take the first approach finding no waiver from inadvertent disclosure. The leading case is *Mendenhall v. Barber-Greene Co.*, 531 F. Supp. 951, 955 (1982). The court stated:

> Mendenhall's lawyer (not trial counsel) might well have been negligent in failing to cull the files of the letters before turning over the files. But if we are serious about the attorney-client privilege and its relation to the client's welfare, we should require more than such negligence by counsel before the client can be deemed to have given up the privilege. [citing Dunn Chemical Co. v. Sybron Corp., 1975-2 Trade Cas. ¶ 60,561 at 67,463 (S.D.N.Y. 1975)] No waiver will be found here.

See also *Conn. Mut. Life Ins. Co. v. Shields*, 18 F.R.D. 448 (S.D.N.Y. 1955) (no evidence of intent to waive privilege).

The opposite approach has been taken by a significant number of courts. Among the more frequently cited cases holding that an inadvertent disclosure waives the privilege regardless of the circumstances is *International Digital Systems Corp. v. Digital Equipment Corp.*, 120 F.R.D. 445, 449-50 (D. Mass. 1988). The court in *International Digital Systems* analyzed the three different approaches to inadvertent disclosure. The court is particularly critical of the approach that analyzes

the precautions taken, noting that if precautions were adequate "the disclosure would not have occurred." It added:

> When confidentiality is lost through "inadvertent" disclosure, the Court should not look at the intention of the disclosing party. . . . It follows that the Court should not examine the adequacy of the precautions taken to avoid "inadvertent" disclosure either.

The court adds that a strict rule "would probably do more than anything else to instill in attorneys the need for effective precautions against such disclosure." 120 F.R.D. at 450.

The court in *International Digital Systems* relied upon *Underwater Storage, Inc. v. United States Rubber Co.*, 314 F. Supp. 546, 549 (D.D.C. 1970). In that case, the court stated:

> The Court will not look behind this objective fact [of disclosure] to determine whether the plaintiff really intended to have the letter examined. Nor will the Court hold that the inadvertence of counsel is not chargeable to his client. Once the document was produced for inspection, it entered the public domain. Its confidentiality was breached thereby destroying the basis for the continued existence of the privilege.

In accord are *Harmony Gold U.S.A., Inc. v. FASA Corp.*, 169 F.R.D. 113, 117 (N.D.Ill. 1996) ("With the loss of confidentiality to the disclosed documents, there is little this court could offer the disclosing party to salvage its compromised position."); *Ares-Serono v. Organon Int'l. B.V.*, 160 F.R.D. 1 (D. Mass. 1994) (trade secrets privilege); *Wichita Land & Cattle Co. v. Am. Fed. Bank, F.S.B.* 148 F.R.D. 456 (D.D.C. 1992) (attorney-client and work product privileges).

The third or balanced approach is also taken by a significant number of courts. Many decisions cite the factors for determining whether waiver exists as a result of inadvertent disclosure set forth in *Hartford Fire Insurance Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D. Cal. 1985). In *Hartford Fire*, the Court relied upon the analysis in an earlier case, *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103 (S.D.N.Y. 1985), which had found the following elements significant in deciding the existence of a waiver, calling it the "majority rule":

> (1) the reasonableness of the precautions to prevent inadvertent disclosure; (2) the time taken to rectify the error, (3) the scope of discovery; (4) the extent of the disclosure; and (5) the "overriding issue of fairness."

The court in *Hartford Fire* found there had been waiver under the circumstances.

Other cases among the many taking a similar balancing approach to inadvertent disclosure include *Alldread v. City of Grenada*, 988 F.2d 1425 (5th Cir. 1993) (governmental privilege); *Zapata v. IBP, Inc.*, 175 F.R.D. 574, 576-77 (D. Kan. 1997) (work product privilege); *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).

For more detailed descriptions of the various approaches see John T. Hundley, Annotation, *Waiver of Evidentiary Privilege by Inadvertent Disclosure – Federal Law*, 159 A.L.R. Fed. 153 (2005); Note, Jennifer A. Hardgrove, *Scope of Waiver of Attorney-Client Privilege: Articulating a Standard That Will Afford Guidance to Courts*, 1998 U.Ill. L. Rev. 643, 659.

The scope of waiver based upon disclosure of documents during the litigation process

A decision that an inadvertent disclosure results in waiver with respect to the disclosed document does not necessarily mean that the privilege is waived with regard to all communications dealing with the same subject matter. As in the case of the effect of an inadvertent disclosure with regard to a disclosed document, there are various approaches to the issue of subject matter waiver.

Some courts hold that even where an inadvertent disclosure results in a waiver with regard to the disclosed documents themselves, there is no waiver with regard to other communications – even those dealing with precisely the same subject matter.

For example, in *Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co., Inc.* 132 F.R.D. 204 (N.D. Ind. 1990), the court found that there had been a waiver of the attorney client privilege based upon an inadvertent disclosure. Waiver was found under either the strict or balancing approach. However, the court limited the waiver to the actual document produced, stating (132 F.R.D. at 208):

> Laying aside for the moment the question of whether the attorney-client privilege has been waived as to the letter, the court could find no cases where unintentional or inadvertent disclosure of a privileged document resulted in the wholesale waiver of the attorney-client privilege as to undisclosed documents concerning the same subject matter. [citing Marcus, supra, at 1636].

International Digital Systems Corp. v. Digital Equipment Corp., 120 F.R.D. 445, 449-50 (D. Mass. 1988), discussed above, is a leading case for the strict approach to inadvertent disclosure. Yet, the court in that case refused to find subject matter waiver.

In *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.*, 116 F.R.D. 46, 52 (M.D.N.C. 1987), the court used the balancing test to find waiver with regard to an inadvertent disclosure. However, the court noted:

> The general rule that a disclosure waives not only the specific communications but also the subject matter of it in other communications is not appropriate in the case of inadvertent disclosure, unless it is obvious a party is attempting to gain an advantage or make offensive or unfair use of the disclosure. In a proper case of inadvertent disclosure, the waiver should cover only the specific document in issue.

Despite the strong language in cases such as *Golden Valley*, other courts have in fact found subject matter waiver even where the disclosure was inadvertent. *E.g., In re Sealed Case*, 877 F.2d 976 (D.C. Cir. 1989); *In re Grand Jury Proceedings*, 727 F.2d 1352 (4th Cir. 1984); *Nye v. Sage Prods., Inc.*, 98 F.R.D. 452 (N.D. Ill. 1982) (court notes that plaintiffs had secured no agreement from defendants that inadvertent disclosure would not waive privilege with respect to other documents); *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146 (D.S.C. 1974) (statement of intent not to waive privilege ineffective); *Malco Mfg. Co. v. Elco Corp.*, 307 F. Supp. 1177 (E.D. Pa. 1969) (attempt to reserve privilege ineffective).

Other courts have applied a subject matter waiver but have limited that waiver in some way based upon the circumstances – often indicating a concern for fairness to both of the parties. For example in *Hercules, Inc. v. Exxon Corp.*, 434 F. Supp. 136, 156 (D. Del. 1977), the court applied subject matter waiver but noted:

> The privilege or immunity has been found to be waived only if facts relevant to a particular, narrow subject matter have been disclosed in circumstances in which it would be unfair to deny to the other party an opportunity to discover other relevant facts with respect to that subject matter.

See also *In re Grand Jury Proceedings Oct. 12, 1995*, 78 F.3d 251 (6th Cir. 1996) (intentional, non-litigation disclosure; waiver of subject matter, but subject matter limited under the circumstances); *Weil v. Inv./Indicators, Research and Mgmt., Inc.*, 647 F.2d 18 (9th Cir. 1981) (subject matter waiver; however, because disclosure made early in proceedings and to opposing counsel rather than the court, the subject matter of the waiver is limited to the matter actually disclosed and not related matters); *In re Sealed Case*, 877 F.2d 976 (D.C. Cir. 1989) (determination of subject matter of waiver depends on the factual context); *Goldman, Sachs & Co. v. Blondis*, 412 F. Supp. 286 (D.C. Ill. 1976) (disclosure at deposition; waiver limited to specific matter disclosed at deposition rather than broader subject matter); *Perrignon v. Bergen Brunswig Corp.*, 77 F.R.D. 455 (D.C. Cal. 1978) (same).

The Marcus article surveys the cases up to that point in time in great depth. The author uses the case of *Transamerica Computer Co. v. IBM*, 573 F.2d 646 (9th Cir. 1978) as an example of a court that appropriately considered the circumstances of the case in determining the existence of waiver. In *Transamerica Computer*, the court considered whether the inadvertent disclosure of documents in an earlier case waived the privilege in this case. The court determined that it did not, based upon the extreme logistical difficulties of protecting documents in the earlier case.

Marcus argues that waiver should be analyzed in terms of fairness, stating, "the focus should be on the unfairness that results from the privilege-holder's affirmative act misusing the privilege in some way." (84 Mich. L. Rev. at 1627). Elsewhere in the article, the author states (84 Mich. L. Rev. at 1607-08):

> This article therefore concludes that the focus should be on unfairness flowing from the act on which the waiver is premised. Thus focused, the principal concern is selective use of privileged material to garble the truth, which mandates giving the opponent access to related privileged material to set the record straight. . . .
>
> Contrary to accepted dogma that all disclosures work a waiver, the article suggests that there is no reason for treating disclosure to opponents or others as a waiver unless there is legitimate concern about truth garbling or the material has become so notorious that decision without that material risks making a mockery of justice.

Marcus expands on his "truth garbling" point later in the article where he raises the possibility that the use of disclosed information, while still protecting other information through the exercise of the privilege, might result in a distortion of the facts. He refers to cases involving the Fifth Amendment privilege against self-incrimination, including *Rogers v. United States*, 340 U.S. 367, 371 (1951). Marcus notes (84 Mich. L. Rev. at 1627-28):

> Similarly with the attorney-client privilege, the courts have condemned "selective disclosure," in which the privilege-holder picks and chooses parts of privileged items, disclosing the favorable but withholding the unfavorable. It is the truth-garbling risk that results from such affirmative but selective use of privileged material, rather than the mere fact of disclosure, that justifies treating such revelations as waivers.

Even where there is no use of the disclosed communications by the privilege holder, it is also possible that the matter disclosed has become so much a part of the common knowledge that protection of the other communications dealing with the same subject matter makes no sense. Marcus states (84 Mich. L. Rev. at 1641- 42):

> At some point widespread circulation of privileged information threatens to make a mockery of justice if, due to his inability to obtain the information or offer it in evidence, the opponent is subjected to a judicial result that many others (who do have the information) know to be wrong. Very strong fairness arguments then counsel disclosure, and the interest in preserving the privilege diminishes to the vanishing point. This, indeed, seems to be a central concern of courts that condemn "selective disclosure" to some but not others.

Selective Waiver

Only the Eighth Circuit has held that a selective waiver of the attorney-client privilege applies whenever a client discloses confidential information to a federal agency. Other courts

have suggested that a selective waiver may apply if the client has clearly communicated his or her intent to retain the privilege, such as by entering into a confidentiality agreement with the federal agency. The First, Third, Fourth, Sixth, and D.C. Circuits have expressly held that when a client discloses confidential information to a federal agency, the attorney client privilege is lost. Cases from the Third and Sixth Circuits have held that disclosure destroys the privilege, even in the presence of a confidentiality agreement.

Cases permitting selective waiver

The court in *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977) adopted a selective waiver approach. Diversified Industries had conducted an internal investigation over a possible "slush fund" that may have been used to bribe purchasing agents of other corporations to buy its product. The Securities and Exchange Commission instituted an official investigation of Diversified and subpoenaed all documents relating to Diversified's internal investigation. Without entering into a confidentiality agreement, Diversified voluntarily complied with the SEC's request. Subsequently, Diversified was sued by one of the corporations affected by the alleged bribery scandal. The plaintiff in that suit sought discovery of the materials disclosed to the SEC, arguing that the attorney-client privilege was waived when privileged material was voluntarily disclosed to the SEC. The Eighth Circuit rejected this argument, holding that because the documents were disclosed in a "separate and nonpublic SEC investigation . . . only a limited waiver of the privilege occurred." 572 F.2d at 611. The court explained, "To hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them. . . ." Id.

Some district courts outside the Eighth Circuit have adopted the *Diversified* approach to waiver, holding that the attorney-client privilege may be selectively waived to federal agencies even in the absence of an agreement by the agency to keep the information confidential. For example, in *In re Grand Jury Subpoena Dated July 13, 1979*, 478 F. Supp. 368, 373 (D. Wis 1979), the court held that cooperation with federal agencies should be encouraged, and therefore refused to treat disclosure of privileged information to the SEC as a waiver of the corporation's attorney-client privilege. See also *In re LTV Sec. Litig.*, 89 F.R.D. 595, 605 (N.D. Tex. 1981), where the court held that disclosure of privileged information to a federal agency does not always constitute an implied waiver of the attorney-client privilege. The court explained that, because the client did not intend to waive the privilege and assertion of the privilege was not unfair, the client's "disclosure of . . . materials to the SEC does not justify [a third party's] discovery of the identity of those documents. . . ."

General rejection of selective waiver

In *United States v. Massachusetts Institute of Technology*, 129 F.3d 681 (1st Cir. 1997), the court held that the attorney-client privilege was lost when MIT disclosed privileged materials to the Department of Defense. The documents had been disclosed voluntarily to the DOD pursuant to a regular audit. The same documents were sought as part of an IRS investigation. In rejecting the *Diversified* approach, the court explained that selective waiver was unnecessary because "agencies usually have means to secure the information they need and, if not, can seek legislation from Congress." 129 F.3d at 685. The court added that applying the general principle of waiver of privilege to any third party disclosure "makes the law more predictable and certainly eases its administration. Following the Eighth Circuit's approach would require, at the very least, a new set of difficult line-drawing exercises that would consume time and increase uncertainty." Id.

Reporter's Comment: The *MIT* rationale ignores the fact that while regulators might have the "means to secure the information they need," those "means" may 1) require substantial effort and cost, and 2) may never lead to the recovery of privileged information. Judge Boggs has critiqued the *MIT* rationale as follows:

> The court, as well as other courts addressing this question, argues that the government has "other means" to secure the information that they need, while conceding that those other means may consume more government time and money. *Massachusetts Inst. of Tech.*, 129 F.3d at 685. Presumably, the court is referring to search warrants or civil discovery. It should be emphasized, however, that the government has no other means to secure otherwise privileged information. That the documents or other evidence sought is privileged permits the target of an investigation to refuse production through civil discovery, to quash any subpoena duces tecum, or to prevent the admission of the privileged information even by the government. The only way that the government can obtain privileged information is for the holder of the privilege voluntarily to disclose it. The court's argument about the adequacy of other means, suggesting that the only difference between them and voluntary disclosure is cost, requires the premise that all privileged information has a non-privileged analogue that is discoverable with enough effort. That premise, however, does not hold.

In re Columbia/HCA Healthcare Corp. Billing Practices Litigation, 293 F.3d 289, 311 (6th Cir. 2002) (Boggs, J., dissenting). Thus, a waiver rule that promotes voluntary disclosure — without resort to these other means, which are unlikely to be successful anyway — promotes efficiency and saves expense on the part of the government.

In *Permian Corp. v. United States*, 665 F.2d 1214 (D.C. Cir. 1981), Permian sought attorney-client protection for documents sought by the Department of Energy. The documents had previously been disclosed to the SEC. The court rejected the approach of the *Diversified* case and held that the

privilege had been waived by the SEC disclosure. The court stated that "[v]oluntary cooperation with government investigations may be a laudable activity, but it is hard to understand how such conduct improves the attorney-client relationship." 665 F.2d at 1221. The court added that the "client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others, or to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit. . . . The attorney-client privilege is not designed for such tactical employment." Id.

Rejection of selective waiver even with a confidentiality agreement

Two prominent cases, from the Third and Sixth circuits, have rejected selective waiver, even when privileged material is disclosed to a federal agency pursuant to a confidentiality agreement.

In *Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414 (3d Cir. 1991), Westinghouse had voluntarily turned over privileged material to the SEC and to the Department of Justice in connection with investigations concerning the bribing of foreign officials. Westinghouse said that its disclosures to the SEC were made in reliance upon SEC regulations providing that "information or documents obtained in the course of an investigation would be deemed and kept confidential by SEC employees and officers unless disclosure was specifically authorized." 951 F.2d at 1418, n. 4 citing 17 C.F.R. § 240.0-4 (1978). The disclosures to the DOJ were subject to an agreement expressly providing that review of corporate documents would not constitute a waiver of Westinghouse's work product and attorney-client privileges. The Republic of the Philippines brought suit against Westinghouse alleging the bribing of former President Marcos to obtain a power plant contract. The Republic sought discovery of the documents Westinghouse had previously disclosed to the federal agencies. The court held that Westinghouse had waived the attorney-client privilege by its voluntary disclosure of privileged material to the SEC and DOJ. The court noted (951 F.2d at 1425):

> [S]elective waiver does not serve the purpose of encouraging full disclosure to one's attorney in order to obtain informed legal assistance; it merely encourages voluntary disclosure to government agencies, thereby extending the privilege beyond its intended purpose. . . . Moreover, selective waiver does nothing to promote the attorney-client relationship; indeed, the unique role of the attorney, which led to the creation of the privilege, has little relevance to the selective waiver permitted in Diversified. . . .
>
> The traditional waiver doctrine provides that disclosure to third parties waives the attorney-client privilege unless the disclosure serves the purpose of enabling clients to obtain informed legal advice. Because the selective waiver rule in *Diversified* protects disclosures made for entirely different purposes, it cannot be reconciled with traditional attorney-client privilege doctrine. Therefore, we are not persuaded to engraft the *Diversified* exception onto

the attorney-client privilege. Westinghouse argues that the selective waiver rule encourages corporations to conduct internal investigations and to cooperate with federal investigative agencies. We agree with the D.C. Circuit that these objectives, however laudable, are beyond the intended purposes of the attorney-client privilege, see *Permian*, 665 F.2d at 1221, and therefore we find Westinghouse's policy arguments irrelevant to our task of applying the attorney-client privilege to this case. In our view, to go beyond the policies underlying the attorney-client privilege on the rationale offered by Westinghouse would be to create an entirely new privilege.

The court also noted that in 1984, Congress had rejected an amendment to the Securities and Exchange Act of 1934, proposed by the SEC, that would have established a selective waiver rule regarding documents disclosed to the agency. 951 F.2d at 1425, citing SEC Statement in Support of Proposed § 24(d) of the Securities and Exchange Act of 1934, in 16 Sec.Reg. & L.Rep. at 461 (March 2, 1984). A regulation to the same effect was proposed, but not adopted, in connection with the Sarbanes-Oxley Act. See proposed 17 C.F.R. § 205.3 (e)(3), http://www.sec.gov/rules/final/33-8185.htm (Viewed Oct. 5, 2005). The Commission indicated that the regulation, although included in the final draft of the regulations implementing Sarbanes-Oxley, was not adopted because of the Commission's concern about its authority to enact such a provision. In its final report, the Commission reiterated its position that there were strong policy reasons behind such a provision and that, because of those policy reasons, it still intended to enter into confidentiality agreements. Id.

Relevant to the question of scope of waiver, the court in *Westinghouse* also held that the privilege is waived only as to those communications actually disclosed, "unless a partial waiver would be unfair to the party's adversary." Id. at 1426 n.12. If partial waiver disadvantages the adversary by allowing the disclosing party to present a one-sided story to the court, the privilege would be waived as to all communications on the same subject.

The court in *Westinghouse* distinguished between the attorney-client and work product privileges and stated that a disclosure to another party might not necessarily operate as a waiver of the work product privilege. Disclosures in aid of an attorney's preparation for litigation would still be protected. However, the court found that disclosure to the federal agencies in this instance did operate as a waiver, because the disclosures were not made to further the goal underlying the work product doctrine – the protection of the adversary process. Id. at 1429.

The court in *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation,* 293 F.3d 289 (6th Cir. 2002) also rejected a selective waiver doctrine for both the attorney-client and work product privileges, even in the face of an express confidentiality agreement. In that case, the Department of Justice had conducted an investigation of possible Medicare and Medicaid fraud. Columbia/HCA had disclosed documents to the DOJ under an agreement with "stringent" confidentiality provisions. Id. Numerous lawsuits were then instigated against Columbia/HCA by insurance companies and private individuals. These plaintiffs sought discovery of the materials disclosed to the DOJ. Columbia/HCA raised attorney-client and work product privilege objections. The court expressly rejected the application of selective waiver for either privilege under these

circumstances. In rejecting the argument that the confidentiality agreement precluded waiver, the court noted that the attorney-client privilege was "not a creature of contract, arranged between parties to suit the whim of the moment." Id. at 303. The court further reasoned that allowing federal agencies to enter into confidentiality agreements would be to allow those agencies to "assist in the obfuscating the truth-finding process." Id.

Reporter's Comment: The court in *Westinghouse* recognizes that enforcement of selective waiver is good policy because it encourages cooperation with government investigations. But it dismisses this policy argument as "beyond the intended purposes of the attorney-client privilege." Yet at the point of disclosure to a government regulator, the relevant question is not the purpose of the attorney-client privilege, but rather whether the purposes behind the law of *waiver* of the privilege are effectuated. Judge Boggs, dissenting in *Columbia,* critiques the *Westinghouse* argument as follows:

> It is not clear why an exception to the third-party waiver rule need be moored to the justifications of the attorney-client privilege. More precisely, we ought to seek guidance from the justifications for the waiver rule to which the exception is made. Those justifications are not exactly coincident with the justifications for the privilege itself. * * * The preference against selective use of privileged material is nothing more than a policy preference, and really also has very little to do with fostering frank communication between attorney and client. The question for this court is one of policy: Whether the benefits obtained by the absolute prohibition on strategic disclosure outweigh the benefits of the information of which the government has been deprived by the rule? As the harms of selective disclosure are not altogether clear, the benefits of the increased information to the government should prevail.

Recognition of selective waiver where a confidentiality agreement exists

A few courts have at least indicated that they would recognize selective waiver where there was an express reservation of confidentiality before disclosure.

The leading decision taking this position is *Teachers Insurance & Annuity Association of America v. Shamrock Broadcasting Co.*, 521 F. Supp. 638 (S.D.N.Y. 1981). The court held in that case that a waiver of the attorney-client privilege occurs upon disclosure of privileged information to a federal agency "only if the documents were produced without reservation; no waiver [occurs] if the documents were produced to the SEC under a protective order, stipulation or other express reservation of the producing party's claim of privilege as to the material disclosed." Id. at 646. The

court noted:

> [A] contemporaneous reservation or stipulation would make it clear that . . . the disclosing party has made some effort to preserve the privacy of the privileged communication, rather than having engaged in abuse of the privilege by first making a knowing decision to waive the rule's protection and then seeking to retract that decision in connection with subsequent litigation.

In *In re Steinhardt Partners, L.P.*, 9 F.3d 230 (2d Cir. 1993), the court rejected the *Diversified* selective waiver approach with regard to prior disclosures of documents to the SEC that would otherwise have been protected as work product. However, after so holding, the court stated (Id. at 236):

> In denying the petition, we decline to adopt a per se rule that all voluntary disclosures to the government waive work product protection. Crafting rules relating to privilege in matters of governmental investigations must be done on a case-by-case basis. . . . Establishing a rigid rule would fail to anticipate situations . . . in which the SEC and the disclosing party have entered into an explicit agreement that the SEC will maintain the confidentiality of the disclosed materials.

See also *Dellwood Farms, Inc. v Cargill,Inc.*, 128 F.3d 1122, 1127 (7th Cir. 1997) (claim of law enforcement privilege could have been maintained after government had disclosed information to a third party if the disclosure had been made under a confidentiality agreement); *Fox v. Cal./Sierra Fin. Serv.*, 120 F.R.D. 520, 527 (N.D. Cal. 1988) (privilege lost "without steps to protect the privileged nature of such information;" follows Teachers Insurance); *In re M & L Bus. Mach. Co.*, 161 B.R. 689, 697 (D. Colo. 1993) (prior disclosure to United States Attorney under a confidentiality agreement did not waive privilege against a private party).

II. Ken Broun's Memo on the Impact of the Draft Rule 502 on Waiver of Privilege in a State Action

If a statute or rule governing inadvertent waiver, scope of waiver and selective waiver of an evidentiary privilege is to be effective in eliminating the need for unnecessarily burdensome document review and rulings on privilege in mass document cases, the provision would have to be binding in all courts, state and federal. The proposed rule, as submitted to the Committee, is drafted with the intent to accomplish that end as broadly as possible, at least with regard to the attorney-client privilege and work product protection.

My conclusion is that, in order to be binding in both federal and state courts, the Rule would have to be enacted by Congress using both its powers to legislate in aid of the federal courts under Article III of the Constitution and its commerce clause powers under Article I. Although a Rule might be enacted, binding on the states, setting forth waiver rules for all evidentiary privileges where a disclosure is made in the course of federal litigation, a Rule governing disclosure in other circumstances would have to be limited to areas that affect interstate commerce – probably limiting the permissible scope to attorney-client privilege and work product protection. A separate rule might be considered that dealt with disclosures of matters covered by other privileges (e.g., marital communications or psychotherapist-patient communications) in the course of litigation. However, virtually all of the waiver problems that the Committee is trying to address concern the attorney-client privilege or work-product protection.

1. Possible limitations on federal court rulings dealing with waiver of privilege

A. Power to bind the states in the absence of a Rule

In the absence of a Congressionally-adopted rule, there may well be limitations on the power of a federal court to bind the state courts with regard to waiver or non-waiver of an evidentiary privilege.

There is no question that a federal court has the power to limit the use of information obtained in discovery. Protective orders, especially those involving trade secrets, abound and have universally been upheld. See *E.I. DuPont De Nemours Powder Co. v. Masland,* 244 U.S. 100, 103 (1917); *Chem. & Indus. Corp. v. Druffel,* 301 F.2d 126, 130 (6th Cir. 1962); 8 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice and Procedure § 2043.

However, limiting the use of documents or even information obtained in discovery is different from ruling that disclosures or other actions taken in federal court do or do not constitute a waiver of state evidentiary privileges. The most significant case dealing with this issue is *Bittaker v. Woodford,* 331 F.3d 715 (9th Cir. 2003). *Bittaker* was an *en banc* decision of the Ninth Circuit involving the scope of a habeas petitioner's waiver of the attorney-client privilege. The district court

had held that the petitioner had waived the attorney-client privilege by filing a claim based on ineffective assistance of counsel. The court, however, entered a protective order precluding use of the privileged materials for any purpose other than litigating the federal habeas petition – including barring the state from use of the information in a re-prosecution. The state appealed claiming that the court had no authority to prevent a state court from dealing with the issue of waiver of privilege under state privilege rules. A majority of the *en banc* court, in an opinion written by Judge Kozinski, held that the district court's order effectively determined that there would be no waiver of the privilege in a subsequent state trial. The court held that the district court had the power to determine the limits of the waiver and to make that determination binding on the state courts. The opinion noted that a waiver limiting the use of privileged communications to adjudicating the ineffective assistance of counsel claim fully serves federal interest as well as preserving "the state's vital interests in safeguarding the attorney-client privilege in criminal cases." 331 F.3d at 722. The court further noted that the courts of California "remain free, of course to determine whether Bittaker waived his attorney-client privilege on some basis *other than* his disclosure of privileged information during the course of the federal litigation." 331 F.3d at 726. [emphasis by the court]

On one level, Judge Kozinski's opinion is compelling from a policy standpoint. Limiting the use of information covered by the attorney-client privilege to dealing with the ineffective assistance appropriately limits the waiver to what is necessary to resolve the petitioner's claim. Arguably, the petitioner would pay too high a price for his attack on the prosecution if the information were to be permitted to be used by the state in a re-prosecution. Yet, the two concurring judges also make a valid point, one relevant to the power of the federal courts in dealing with waiver of privilege in a statute or rule such as we have under consideration. Judges O'Scannlain and Rawlinson concurred in *Bittaker* on the basis that the judge's order should not be interpreted as dealing with the scope of the privilege under state law. Rather, the order should be interpreted as preventing the use of information obtained in the federal litigation but would not prevent the state from the use of the same information obtained from another source if the California law would so permit. The privilege law of California would govern in any re-prosecution of the defendant. The courts of that state should be free to determine whether or not the privilege had been waived. The federal courts have a right to limit the use of information obtained in connection with its litigation – as in trade secrets cases – but no power to determine the application of a state privilege in the state courts.

At least one lower court has refused to issue an order having the effect that the majority in *Bittaker* prescribed. In *Fears v. Bagley,* 2003 WL 23770605 (S.D. Ohio 2003), the court rejected the reasoning of the majority in *Bittaker* and ordered only that the state would be bound to keep the information obtained confidential but that the court would not decide the issue of waiver of privilege in a subsequent state court proceeding.

Even though not a controlling precedent, the *Bittaker* case is useful in framing the issues. Although, as the court notes, the case involves a waiver by implication rather than an intentional or inadvertent disclosure of a privilege document (see 331 F.3d at 719-20), the case squarely presents the issue of the power of a federal court, at least in the absence of a Congressionally-enacted rule,

to affect the future application of a state court privilege. As the divided opinion in *Bittaker* graphically illustrates, the result is far from clear.

B. The effectiveness of a Federal Rule of Evidence or Civil Procedure, adopted under Congress's Article III powers, to bind the states

That the question of whether an individual court has the power to issue an order affecting subsequent state court proceedings is in doubt does not necessarily mean that such a power might not be conferred by rule or statute. Arguably, an issue such as that raised in *Bittaker* could be based on the absence of a common law rule conferring authority on the court to make such orders binding on the state courts – an absence that might be corrected by the adoption of a rule or statute governing the issue.

28 U.S.C. § 2074(b), providing that any "rule creating, abolishing, or modifying an evidentiary privilege" must be approved by an act of Congress, was adopted by Congress and obviously could be modified or eliminated by Congress. Furthermore, Congress could itself adopt a Rule without going through the Rules Enabling Act, 28 U.S. C. § 2072(b). *See, e.g.,* Fed. R. Evid. 413-415.

A rule that governed the effect on evidentiary privilege of disclosure of a document in the course of federal court litigation would almost certainly survive an attack on its constitutionality. Congress has broad powers to legislate in aid of the federal courts, whether through the Rules Enabling Act process or independently. Congress's power stems from Article III, §1 and Article I, § 8 cl. 9, giving it power to establish lower tribunals, as well as the necessary and proper clause of Article I, § 8, cl. 18. The broad power of Congress to describe and regulate modes of proceeding was established early in our Constitutional history. *See Wayman v. Southard,* 23 U.S. 1 (1825); *Livingston v. Story,* 34 U.S. 632, 656 (1835). *See also* the often quoted dissent by Justice Reed in *Erie RR v. Tompkins,* 304 U.S. 64, 92 (1938) ("no one doubts federal power over procedure").

Some have argued that the power of Congress to enact legislation dealing with procedural matters is broader than that delegated to the courts under the Rules Enabling Act. *See, e.g.,* Leslie M. Kelleher, *Taking "Substantive Rights" (in the Rules Enabling Act) More Seriously*, 74 Notre Dame L. Rev. 47, 94, 103 (1998).[3] However, whatever the merit of the debate over the extent of

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[3]Authors like Kelleher question whether Congress intended to delegate to the courts all of its power to establish procedure under Article III and the necessary and proper clause of Article I. Section 2072(b) prohibits rules that abridge, enlarge or modify any substantive right. The limitation was intended to reach not only federalism concerns but also to deal with the allocation of authority between Congress and the Courts. See Stephen B. Burbank, *The Rules Enabling Act of 1934,* 130 U.Pa.L.Rev. 1015, 1187 (1982). Certainly, Congress has established statutes dealing with clearly procedural matters, such as venue (28 U.S. C. § 1391) outside of the rules process. The argument is that there are certain policy matters, even though involving procedure, that

Congressional delegation, the issue is moot if the Rule is in fact enacted by Congress rather than promulgated through the Rules Enabling Act process.

It is unlikely that a rule limited to disclosures made in the course of federal litigation would be held invalid. *Hanna v. Plumer,* 380 U.S. 460, 472 (1965) established that the Congress's power delegated under the Rules Enabling Act extends to matters that fall in the "uncertain area between substance and procedure, [but] are rationally capable of classification as either." The Court has never found a Rule invalid for impermissibly affecting a substantive right, see, *e.g.,* Thomas D. Rowe, Jr., *Not Bad for Government Work: Does Anyone Else Think the Supreme Court is Doing a Halfway Decent Job in its Erie-Hanna Jurisprudence,* 73 Notre Dame L. Rev. 963 (1998); Paul D. Carrington & Derek P. Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The Illegitimacy of Mass-Tort Settlements Negotiated Under Federal Rule 23,* 39 Ariz. L. Rev. 461 (1997).

One could argue about whether rules governing evidentiary privileges are essentially procedural or essentially substantive. However, even writers who objected to the enactment of the proposed Federal Rules of Evidence governing privilege assumed the power of Congress to enact such rules, arguing against their adoption on policy grounds. *See, e.g.,* Louise Weinberg, *Choice of Law and the Proposed Federal Rules of Evidence: New Perspectives,* 122 U. Penn. L. Rev. 594 (1974). *See also* Earl C. Dudley, Jr., *Federalism and Federal Rule of Evidence 501: Privilege and Vertical Choice of Law,* 82 Geo. L. J. 1781 (1994) (arguing for an amendment of Fed.R.Evid.501 to provide for deference to state privileges in most cases).

The ability of the Rules to bind state court actions has been clearly established. For example, a federal court determination of the preclusive effect of a judgment controls state action with regard to that judgment. *Semtek Intl. Inc. v. Lockheed Martin Corp.,* 531 U.S. 497 (2001). *See also Stewart Organization v. Ricoh,* 487 U.S. 22 (1988) (federal law, not state law with regard to enforceability of forum selection clauses governed transfer under 23 U.S.C. § 1404); *Burlington Northern RR v. Woods,* 480 U.S. 1 (1987) (Fed.R.App.P 38, not state law, governed issue of damages after unsuccessful appeal).

The principle of the supremacy of federal law has been applied to state procedural rules where federal substantive law is preemptive. *See, e.g., Felder v. Casey,* 487 U.S. 131 (1988) (federal civil rights law prevented state from applying its notice of claim rule in a federal civil rights action filed in state court); *Dice v. Akron, C. & Y.R. Co.,* 342 U.S. 359 (1952) (validity of a release under

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should be left to Congress at least in part because state interests are in fact represented in Congress. *See* Paul J. Mishkin, *Some Further Last Words on Erie – The Thread,* 87 Harv. L. Rev. 1682, 1685 (1974). For example, under § 2074(b), Congress left for itself issues involving evidentiary privileges. It determined that it should decide such issues; it did not determine that legislation about such issues was beyond its powers. See Kelleher, 74 Notre Dame L. Rev. at 111.

Federal Employers Liability Act determined by federal law); *Brown v. Western Ry. of Ala.*, 338 U.S. 294 (1949) (federal pleading test should have been applied in FELA action filed in state court).

On the other hand, it would be difficult to argue that a Rule governing the effect of a disclosure outside of the litigation process – e.g., disclosure to an administrative agency or in private settlement negotiations before any litigation had begun – would be within the power of Congress under Article III.

Despite the wide berth to enact procedural rules established both in the cases and the legal literature, the language in *Hanna* would have to be considered on its face – the rule would have to be rationally capable of classification as either substance or procedure. Fairly recent cases, although not invalidating rules of procedure, have interpreted the rules somewhat narrowly so as to avoid application in a way that might conflict with state substantive policy. *See, e.g., Kamen v. Kemper Financial Services Inc.*, 500 U.S. 90 (1991) (limitations on application of Fed.R.Civ. P. 23.1 dealing with the demand requirement in a shareholders derivative action); *Gasperini v. Center for Humanities, Inc.*, 518 U. S. 415 (1996) (application of Fed.R. Civ.P. 59 and the test for granting a new trial); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997) (settlement class certification under Fed.R.Civ.P. 23 interpreted in light of constitutional limitations on the powers of Congress).

Any Rule seeking to have an effect beyond disclosure in the course of litigation would likely face a challenge that it was not rationally capable of classification as procedural. Arguments could be made in support of such legislation – *e.g.*, that the most significant likely impact of the waiver rules would be in the federal courts – but the risk of a finding that the rule would not be binding on the states would be significant.

In order to prevent more constitutional comfort for a rule dealing with disclosures outside the litigation process, Congress's commerce powers would have to come into play.

C. The constitutionality of a Rule, binding on the states, governing waiver of evidentiary privilege if enacted by Congress under its Commerce Clause powers.

A strong argument could and has been made for a federalized attorney client privilege enacted by Congress under its Commerce Clause powers. (Art. I, §8, cl. 3). The Rule under consideration would federalize issues of inadvertent and selective waiver and scope of waiver with regard to the attorney-client privilege and attorney work-product protection. If the power exists for a federalized attorney-client privilege, presumably a rule that affected only an aspect of that privilege, and its close relative – work-product protection – would also pass constitutional scrutiny.

Timothy P. Glynn, in his article, *Federalizing Privilege,* 52 Amer. U. L. Rev. 59, 156-171 (2002), argues that Congress would have the power under the Commerce Clause to enact a federal law of attorney-client privilege that would apply to the states. He recognizes that the Supreme Court has served notice that Congress's powers under the commerce clause have outer boundaries. Thus,

in *United States v. Lopez*, 514 U.S. 549 (1995), the Court invalidated an act making the possession of a gun on or near school premises a crime as beyond the commerce clause powers. It took the same action with regard to an act providing a federal civil remedy for the victims of gender-motivated violence. *United States v. Morrison,* 529 U.S. 598 (2000). Glynn points out the obvious differences between legislation such as that involved in *Lopez* and *Morrison* and a regulation that fosters and protects the economic and commercial activity between attorneys and clients. He adds that the "attorney-client privilege protects communications upon which the industry's article of commerce – provision of legal services depends." 52 Amer. U. L. Rev. 159.

Glynn also raises the possibility that Congressional action might be limited by Tenth Amendment considerations. There are recent cases that place limits on Congressional action because of a violation of principles of federalism. For example, in *New York v. United States,* 505 U.S. 144 (1992) the Court struck down a portion of the Low-Level Radioactive Waste Policy Amendments Act because it, in effect, required the states to implement legislation. Likewise, in *Printz v. United States,* 521 U.S. 898 (1997), the Court invalidated a provision in the Brady Handgun Violence Prevention Act that would have required law enforcement officers to administer a federal program. On the other hand, in *Reno v. Condon,* 528 U.S. 141 (2000), the Court upheld a provision of the Driver's Privacy Protect Act that made no such demands on state legislators or local executive officials.

The Rule under consideration makes no demands on the states like the legislation in *New York* and *Printz.* The rule is self-executing. It simply needs to be enforced by the courts of the state. At least one author has questioned the power of Congress under the Tenth Amendment to enact procedural rules unconnected with substantive federal rights. *See* Anthony J. Bellia Jr, *Federal Regulation of State Court Procedures,* 110 Yale L. J. 947 (2001). However, the legislation that was the focus of the Bellia article, the Y2K Act, involved notice to defendants before commencing suit – not a matter as integrally connected to the regulation of legal commerce as is the rule in question. Arguably, the attorney-client related protections involve substantive protections. The "privilege regulates, indeed protects and promotes, primary conduct and commercial activity – attorney-client communications and the provision of legal services– and serves interests wholly extrinsic to the litigation in which it is asserted." *See* Glynn, 52 Amer. U. L. Rev. at 165.

Although one could argue that Glynn takes the concept of a federal attorney-client privilege too far, politically and as a matter of policy, by proposing a federal law totally supplanting state attorney-client privileges, more modest legislation dealing simply with the existence and scope of waiver seems likely to be upheld. It is also arguable that the Article I commerce clause rationale may combine with the powers under Article III applicable in many instances to give a strong basis for the legislation.

Nevertheless, the likely validity of such legislation dealing with attorney-client privilege or work product protection may not extend to a statute that attempted to apply the same rules to evidentiary privileges generally. Perhaps one could argue that in many contexts the psychotherapist-patient privilege has some effect on commerce, although the concept stretches one's imagination.

It is even more difficult to argue for a statute that affected privileges such as those for marital or clergyman communications. Other privileges such as those involving law enforcement and the qualified journalist's privilege may involve additional constitutional analyses including a determination of the impact of the provisions on First or Sixth Amendment considerations.

Reporter's Comment: In drafting Rule 502 in light of Ken's analysis of statutory authority, we were cognizant of situations in which waiver questions might not affect interstate commerce, and in those situations, we decided as an initial matter not to extend the rule. The most important example is the rule on mistaken disclosures. That rule is limited to mistaken disclosures made during the course of discovery. Of course, mistaken disclosures may be made in other circumstances (e.g, a privileged document is mistakenly included in a package of other materials sent to a friend). But disclosures outside the litigation context might not affect interstate commerce, and so we decided not to cover those situations.

There may also be situations in which state proceedings are so localized that they do not affect interstate commerce, and in those cases a "federalized" waiver rule may be problematic. We chose, however, not to carve out those proceedings in the rule, for at least two reasons: 1) They may not exist; you don't have to go far to affect interstate commerce in a litigation; and 2) If they do exist, they are hard to describe. We thought it best to leave the matter to the implementing legislation.

III. Ken Broun's Memo on the Scope of Waiver of Work Product

Proposed Rule 502(a) extends the waiver of both attorney-client privilege and work product protection "to undisclosed information concerning the same subject matter if that undisclosed information ought in fairness to be considered with the disclosed information." Some members of the committee and others have raised the question of whether the draft proposed rule extends the waiver of work product privilege beyond the existing law.

Wright and Miller state that the disclosure of some documents does not destroy work-product protection for other documents. 8 C. Wright and A. Miller, Federal Practice and Procedure § 2024 at 209 (1970). However, an analysis of the cases dealing with the issue indicates that the statement is too broad. Rather, the scope of the waiver depends upon considerations of fairness that include the nature of the disclosure giving rise to the waiver and the subsequent use of the protected materials such as the presentation of testimony based on them. The case law is entirely consistent with the language of proposed draft Rule 502.

The most important case on waiver of work product privilege is *United States v. Nobles*, 422 U.S. 225 (1975). In *Nobles,* the Court held that the defendant would waive his work product privilege by calling his investigator to testify about interviews with two prosecution witnesses. The Court held that the investigator, if he testified, would have to disclose his report. The defendant refused to turn over the report and the investigator was precluded from testifying. The Court held that the preclusion was appropriate – if the investigator testified, the report would have to be disclosed. The testimony would waive the privilege "with respect to matters covered in his testimony." 422 U.S. at 239. In a footnote, the Court distinguished counsel's ordinary reference to notes during the course of the trial from testimonial use of such materials. The effect of the Court's ruling was that, not only was the work product protection waived with regard to matters directly reflected in the report but to all related matters – a subject matter waiver. *See also Chubb Integrated Systems, Ltd. v. National Bank of Washington,* 103 F.R.D. 52, 64 n. 3 (D.D.C. 1984) (*Nobles* cited for the proposition that "the testimonial use of work-product constituted waiver of all work-product of same subject matter").

More recent cases from the Courts of Appeal and District Courts reflect a view that subject matter waiver may be more limited than suggested in *Nobles* and that the limitation will depend upon consideration of fairness under the circumstances. Reflective of that view is *U.S. v. Doe*, 219 F.3d 175 (2d Cir. 2000). In *Doe*, a corporation had asserted its attorney-client and work-product privileges in its dealing with an ATF investigation concerning sales of firearms. A corporate officer testified and made references to advice of counsel. The primary question was whether his references to advice of counsel and disclosure of communications waived the corporation's attorney-client and work product privileges. The court noted that "the implied waiver analysis should be guided primarily by fairness principles." 219 F.3d at 185. The court indicated that the district court, in determining the existence and scope of waiver as a result of the corporate officer's disclosures, should consider such things as such as the witness's lack of legal training and the fact that the disclosures were made before the grand jury where the corporation could gain nothing affirmative.

Specifically with regard to waiver of work product privilege, the court stated (219 F.3d at 191), "[w]e believe that the district court on remand should consider further whether there was any waiver of Doe Corp.'s work-product privilege, and, if there was, the proper scope of the waiver. The fairness concerns that guide the waiver analysis above are equally compelling in this context." The court distinguished *Nobles* and *In re Martin Marietta Corp.*, 856 F.2d 619 (4th Cir. 1988), discussed below, stating (*Id.*)

> In this case, however, there was no actual disclosure of any privileged documents. Further the context – a grand jury proceeding – is, as already indicated, quite different from settlement negotiations or voluntary disclosure programs where the company, initially at least, stand to benefit directly from disclosing privileged materials.

In *Duplan Corp. v. Deering Milliken, Inc.,* 540 F.2d 1215 (4th Cir. 1976), the court held that there would be no subject matter waiver of work product protection under the circumstances. In *Duplan,* the party seeking protection had made partial and inadvertent waiver of some of the claimed protected documents, which consisted of mental impressions, opinions and legal theories of their attorneys and representatives. In refusing to find subject matter waiver, the court distinguished *Nobles* on two grounds. First, in *Nobles,* the work product was a witness's report, not the mental impressions of a lawyer. Second, the court noted that in this case the party had "neither made nor sought to make any affirmative testimonial use of the documents for which the throwsters [the party seeking protection] claim the work product privilege." 540 F.2d at 1223. The court noted that the principles of *Nobles* may be applicable if the documents were in fact used at trial.

The Fourth Circuit expanded on its reasoning in *Duplan* in *In re Martin Marietta Corp.*, cited above. In *Martin Marietta,* the defendant in a criminal case sought documents from Martin Marietta, his former employer, relating to matters on which he had been indicted. Martin Marietta claimed attorney-client and work product privilege. Defendant argued that the privilege had been waived because documents or some portions of them had been disclosed by the corporation to the United States. Attorney and the Department of Defense. The Court found a subject matter waiver of the attorney client privilege based upon the disclosure to the government. With regard to the work product privilege, the court held that the delivery to the government constituted a testimonial use of the documents, as in *Nobles,* and held that there would be a subject matter waiver of non-opinion work product. However, it held that there was no subject matter waiver of opinion work product. The court emphasized the added protection given to such work product and added (856 F.2d at 626):

> [T]he underlying rationale for the doctrine of subject matter waiver has little application in the context of a pure expression of legal theory or legal opinion. As we noted in *Duplan*, the Supreme Court applied the concept in Nobles: "where a party sought to make affirmative testimonial use of the very work product which was then sought to be shielded from disclosure." . . . There is relatively little danger that a litigant will attempt to use a pure mental impression or legal theory as a sword and as shield in the trial of a case so as to distort the factfinding process. Thus, the protection of lawyers from the broad repercussions

of subject matter waiver in this context strengthens the adversary process, and, unlike the selective disclosure of evidence, may ultimately and ideally further the search for the truth.

Both *Duplan* and *Martin Marietta* hold that there is not necessarily a subject matter waiver applied to disclosures of some matters protected as work product. Yet, the holding of both Fourth Circuit cases is consistent with the Proposed Rule: if it is fair to require apply the waiver to subject matter under the circumstances, the waiver should apply. *Martin Marietta* finds that the protected mental impressions had not been used in such a way as to require disclosure in that case and notes that there is little danger that they would be so used. The case does not predict the result where the party in fact used mental impression work product both as a shield and as a sword.

Relatively recent District Court cases confirm an approach that would apply considerations of fairness to the issue of subject matter waiver. One example is *Bank of America v. Terra Nova Insurance Co.,* 212 F.R.D. 166 (S.D.N.Y. 2002). The court found a split of authority on the issue of subject matter waiver of work product protection citing *Martin Marietta* and other cases.

The cases it cited are, with my brief parenthetical description of the holdings, as follows: Cases cited as holding that there is a broad subject matter waiver were *In re Sealed Case,* 676 F.2d 793, 822-23 (D.C. Cir. 1982) (revealing documents to the SEC waived work product privilege as to all other communications relating to the same subject matter); *Bowne v. AmBase Corp.,* 150 F.R.D. 465, 485-86 (S.D.N.Y. 1993) (work product protection waived based on deposition testimony); *Bristol-Myers Squibb Co. v. Rohne-Poulenc Rorer,* 1997 WL 801454 (S.D.N.Y) (subject matter waiver based on production of document; considerations of "fairness" govern). Cases limiting waiver to the specific materials disclosed were *Pittman v. Frazer,* 129 F.3d 983, 988 (8th Cir. 1997) (waiver limited to photographs actually used at trial); *St. Paul Reinsurance Co., Ltd. v. Commercial Fin. Corp.,* 197 F.R.D. 620, 639 (N.D. Iowa 2000) (no subject matter waiver under the circumstances; "the scope of the waiver depends upon the scope of the disclosure"); *In re United Mine Workers of America Employee Benefit Plans Litig.*, 159 F.R.D. 307, 312 (D.D.C. 1994)(waiver limited to specific subject matter under the circumstances; where the party did not deliberately disclose documents in an attempt to gain a tactical advantage, "the law does not mandate a subject-matter waiver and such a waiver is more likely to undermine the adversary system than to promote it"). The holding of none of these cases distracts from the proposition that fairness is a consideration in determining the existence of subject matter waiver.

In the *Bank of America v. Terra Nova* case itself, the court's treatment of the scope of waiver is based on the same kind of fairness considerations noted in the cases discussed in the preceding paragraphs (212 F.R.D. at 174):

> Here, the Court's decision on the scope of the waiver is guided by the nature of Terra Nova's conduct and the policies underlying the work product doctrine. Because all of the information available to Holland [the party's representative] regarding his investigation was made available in an oral presentation to the governmental authorities, it is only fair to permit Bank of America to examine the facts that were in Holland's possession at that time. That

> Holland freely revealed the contents of his investigation in Terra Nova's presence reflects that Terra Nova had no great interest in ensuring the confidentiality of the investigation – be it the actual facts revealed to the government or the underlying documents upon which the presentation was based. Thus, Terra Nova must permit Holland to be re-deposed and to answer questions regarding what factual information was available to him at the time he met with the government agencies.

The court held that any documents relating to the investigation in Holland's possession at the time of his presentation to the government authorities would have to be produced. However, the protection would not be waived with regard to documents in his possession after that date.

Cincinnati Ins. Co. v. Zurich Ins. Co., 198 F.R.D. 81 (W.D.N.C. 2000) is an example of circumstances calling for the extension of a subject matter waiver even with regard to opinion work product. The case involved an alleged negligent failure to settle by an insurance company. The attorney involved in the settlement negotiations was to be called as a witness at trial. The court held that there would be no work product protection, even for his opinions. In this case, the attorney's opinion would be used as a "sword."

In short, the proposed rule 502(a) language does not change the prevailing federal law with regard to the scope of work product waiver.

IV. Discussion of Comments Received

This section of the memo addresses some comments that have already been received on draft Rule 502. Where appropriate, language is suggested to address a comment if the Committee determines that the comment requires an adjustment in the draft rule or Committee Note.

1. Scope of Work Product Waiver

Greg Joseph expresses concern about the rule's provision that there is a subject matter waiver of work product when the undisclosed work product "ought in fairness to be considered with the disclosed information." He believes it changes existing law. As discussed in Ken Broun's memo on the subject, we believe that we accurately capture the existing case law on the subject. And it seems to us that there would have to be a subject matter waiver when the nondisclosed information "ought in fairness" to be considered. Certainly the work product doctrine should not be applied in such a way to allow the invoking party to engineer an unfair result.

Greg suggests that the first paragraph of the Committee Note should be amended to add some discussion about subject matter waiver of work product. He suggests first that the note clarify that the "ought in fairness" language is taken from Rule 106 (the rule of completeness); this reference will provide some guidance on how the subject matter waiver test should be applied. He also suggests that the note cite to a case involving subject matter waiver of work product.

Greg's suggestions seem eminently sensible. **What follows is a proposed change to the first paragraph of the Committee Note that would implement these suggestions**:

> **Subdivision (a).** This subdivision states the general rule that a voluntary disclosure of information protected by the attorney-client privilege or work product doctrine constitutes a waiver of those protections. *See, e.g., United States v. Newell,* 315 F.3d 510 (5th Cir. 2002) (client waived the privilege by disclosing communications to other individuals who were not pursuing a common interest). The rule provides, however, that a voluntary disclosure generally results in a waiver only of the information disclosed; a subject matter waiver (of either privilege or work product) is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to protect against a selective and misleading presentation of evidence to the disadvantage of the adversary. *See, e.g., In re von Bulow,* 828 F.2d 94 (2d Cir. 1987) (disclosure of privileged information in a book did not result in unfairness to the adversary in a litigation, therefore a subject matter waiver was not warranted); *In re United Mine Workers of America Employee Benefit Plans Litig.*, 159 F.R.D. 307, 312 (D.D.C. 1994)(waiver of work product limited to materials actually disclosed, because the party did not deliberately disclose documents in an attempt to gain a tactical advantage). The language concerning subject matter waiver — "ought in fairness" — is taken from Rule 106, because the animating principle is the same. A party that

makes a selective, misleading presentation that is unfair to the adversary opens itself to a more complete and accurate presentation. *See, e.g., United States v. Branch,* 91 F.3d 699 (5th Cir. 1996) (under Rule 106, completing evidence was not admissible where the party's presentation, while selective, was not misleading or unfair). The rule ~~thus~~ rejects the result in *In re Sealed Case,* 877 F.2d 976 (D.C.Cir. 1989), which held that inadvertent disclosure of documents during discovery automatically constituted a subject matter waiver.

* * *

Greg poses a hypothetical in light of these additions: Suppose a lawyer interviews three witnesses (all work product). Two are favorable and one unfavorable. If the lawyer proffers the two favorable statements, does that constitute a subject matter waiver as to the undisclosed unfavorable statement? If the answer to that is yes, then the rule obviously creates a substantial change in practice and it should be changed.

But at least in the Reporter's view, the hypothetical facts *do not* result in a subject matter waiver. The presentation of the two favorable witnesses is *selective*, but it is not *misleading*. The proper analogy is to the Rule 106 cases like *Branch,* cited above, where the government admitted a portion of the defendant's confession — the portion which essentially said, "I committed the crime." Other portions of the defendant's statement provided his motivation and a purported excuse for committing the crime. But the court held that Rule 106 did not require admission of these excised portions. According to the court, the government's presentation was "selective" but it was not misleading. The fact was that the defendant admitted the crime.

Accordingly, the Reporter's view of Greg's hypothetical is that it would not come close to a subject matter waiver. On the other hand, if counsel represented that his two favorable witnesses were the *only* witnesses to the event, then this would be not only a selective but also a misleading presentation, and it would result in a subject matter waiver under the rule.

The Consultant is less confident that Greg's hypothetical would not be problematic. He states that the question of "fairness" will be "difficult and often fact-bound", but concludes that these are the very kind of questions that courts are currently deciding in cases involving possible subject matter waiver of work product.

If the Committee is concerned that a subject matter waiver could be found under the facts Greg sets forth, or similar facts, then a sentence could be added to the Committee Note to allay concerns. That sentence could read something like this:

Under the rule, a subject matter waiver is not found merely because privileged information or work product is presented selectively. A subject matter waiver is found only where the

disclosure or use of privileged information or work product is selective and misleading, and a further disclosure is required to protect the adversary from a misleading presentation of the evidence.

2. Who "holds" the privilege or work product immunity?

Greg Joseph and Rick Marcus both raise the question of whether the rule should say something about who holds the privilege or work product protection, and accordingly who has the power to waive it. Greg suggests, for example, that subdivision (a) should be changed to read something like the following:

> **(a) Waiver by disclosure in general.** — A ~~person waives an~~ holder of an attorney-client privilege or work product protection ~~if that person~~ waives the privilege or protection if that holder — or a predecessor while its holder — voluntarily discloses or consents to disclosure of any significant part of the privileged or protected information. The waiver extends to undisclosed information concerning the same subject matter if that undisclosed information ought in fairness to be considered with the disclosed information.

We decided to avoid the term "holder" as much as possible (though the term does appear elsewhere in the rule) because it is not always clear who is the holder of the privilege, and it is even less clear who is the holder of the work product protection. *See* Fred Zacharias, *Who Owns Work Product?*, 2006 Univ. Ill. L.Rev. 127, for an extensive discussion of this very murky area. We are not sure that the addition of the word "holder" in place of "person" is any kind of improvement in the rule. But if it is, we would caution against going any further and trying to define who is a holder and who is not. **In fact, if the Committee does wish to implement a change from "person" to "holder" in the text, we strongly suggest that a sentence be added to the Committee Note that would disavow any intent to determine who is the holder of a privilege or work product — leaving that question to common law.**

The addition to the Committee Note could read something like this (including the changes to the entry on subject matter waiver, discussed above):

> **Subdivision (a).** This subdivision states the general rule that a voluntary disclosure of information protected by the attorney-client privilege or work product doctrine constitutes a waiver of those protections. *See, e.g., United States v. Newell,* 315 F.3d 510 (5th Cir. 2002) (client waived the privilege by disclosing communications to other individuals who were not pursuing a common interest). The rule provides, however, that a voluntary disclosure

generally results in a waiver only of the information disclosed; a subject matter waiver (of either privilege or work product) is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to protect against a selective and misleading presentation of evidence to the disadvantage of the adversary. *See, e.g., In re von Bulow,* 828 F.2d 94 (2d Cir. 1987) (disclosure of privileged information in a book did not result in unfairness to the adversary in a litigation, therefore a subject matter waiver was not warranted); *In re United Mine Workers of America Employee Benefit Plans Litig.*, 159 F.R.D. 307, 312 (D.D.C. 1994)(waiver of work product limited to materials actually disclosed, because the party did not deliberately disclose documents in an attempt to gain a tactical advantage). The language concerning subject matter waiver — "ought in fairness" — is taken from Rule 106, because the animating principle is the same. A party that makes a selective, misleading presentation that is unfair to the adversary opens itself to a more complete and accurate presentation. *See, e.g., United States v. Branch,* 91 F.3d 699 (5th Cir. 1996) (under Rule 106, completing evidence was not admissible where the party's presentation, while selective, was not misleading or unfair). Under the rule, a subject matter waiver is not found merely because privileged information or work product is presented selectively. A subject matter waiver is found only where the disclosure or use of privileged information or work product is selective and misleading, and a further disclosure is required to protect the adversary from a misleading presentation of the evidence. The rule ~~thus~~ rejects the result in *In re Sealed Case,* 877 F.2d 976 (D.C.Cir. 1989), which held that inadvertent disclosure of documents during discovery automatically constituted a subject matter waiver.

The rule governs only waiver by disclosure. Other common-law waiver doctrines may result in a finding of waiver even where there is no disclosure of privileged information or work product. *See, e.g., Nguyen v. Excel Corp.,* 197 F.3d 200 (5th Cir. 1999) (reliance on an advice of counsel defense waives the privilege with respect to attorney-client communications pertinent to that defense); *Ryers v. Burleson,* 100 F.R.D. 436 (D.D.C. 1983) (allegation of lawyer malpractice constituted a waiver of confidential communications under the circumstances). The rule is not intended to displace or modify federal common law concerning waiver of privilege or work product where no disclosure has been made.

The rule governs waiver by disclosure of the "holder" of the attorney-client privilege or work product protection. The rule does not attempt to determine or define who is a holder of either the privilege or the work product protection. The "holder" question is often difficult and fact-bound. *See generally* Fred Zacharias, *Who Owns Work Product?*, 2006 Univ. Ill. L.Rev. 127.

3. Inadvertent disclosure coverage limited to discovery:

Professor Bob Pitler of Brooklyn Law School asks why the provision on inadvertent disclosure should be limited to the context of discovery. The draft rule provides that a disclosure is not a waiver if:

> the disclosure is inadvertent *and is made during discovery in federal or state litigation or administrative proceedings* — and if the holder of the privilege or work product protection took reasonable precautions to prevent disclosure and took reasonably prompt measures, once the holder knew or should have known of the disclosure, to rectify the error, including (if applicable) following the procedures in Fed. R. Civ. P. 26(b)(5)(B);

We made the choice to limit the rule's coverage to mistaken disclosures during discovery for three reasons: 1) Almost all of the reported cases on mistaken disclosure involve disclosure during discovery; 2) The rule sweeps broadly and dramatically in its attempt to control waiver principles under both federal and state law, and so we tried not to extend it to situations that rarely arise — as Ken puts it, it "seems piggy" to extend the rule any further than it already goes; and 3) At the state level, we were confident that the risk of mistaken disclosures in discovery would affect interstate commerce and therefore could be regulated by Congress — but we were less confident that commerce would be affected when a mistaken disclosure of privilege or work product is made outside of a litigation context.

If the Committee believes, however, that the rule should extend to *all* mistaken disclosures, this can be done easily.

1. The italicized, qualifying language in the above paragraph (*and is made during discovery in federal or state litigation or administrative proceedings*) can simply be deleted.

2. The Committee Note would need to be altered to delete references to discovery, but again this could be effectuated easily. The relevant language of the Committee Note would be changed as follows:

> *Inadvertent disclosure during discovery:* Courts are in conflict on whether an inadvertent disclosure of privileged information or work product~~, made during discovery,~~ 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 preserving the privilege and failed to request a return of the information in a timely manner. And a few courts hold that any mistaken disclosure of protected information constitutes 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 privileged or protected information ~~during discovery~~ constitutes a waiver only if the party did not take reasonable precautions to prevent disclosure and did not make reasonable and prompt efforts to rectify the error. This position is in accord with the majority view on whether inadvertent disclosure is a waiver. *See, e.g., Alldread* v. *City of Grenada,* 988 F.2d 1425 (5th Cir. 1993) (governmental attorney-client privilege); *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, information protected by the attorney-client privilege or work product immunity should not be treated lightly. On the other hand, a rule imposing strict liability for an inadvertent disclosure ~~during discovery~~ threatens to impose prohibitive costs for privilege review and retention, especially in cases involving electronic discovery.

4. Subdivision (c) court orders: state and federal?

Rick Marcus points out that subdivision (c) , on the controlling effect of court orders, does not specify whether state confidentiality orders are covered by the rule. The rule simply refers to "a court order." Rick states that ordinarily "court order" in a federal rule would mean the order of a federal district court.

Rick's point is well-taken. The rule is intended to cover both state and federal courts. (*See* Part Five of this memo for an explanation of this drafting choice.) It is intended to protect the expectations of all litigants, permitting them to rely on a confidentiality order, whether entered by a federal or a state court.

Therefore, we suggest that the language of the subdivision be changed slightly, as follows:

(c) Controlling effect of court orders. — Notwithstanding subdivision (a), a <u>federal or state</u> court order concerning the preservation or waiver of the attorney-client privilege or work product protection governs its continuing effect on all persons or entities, whether or not they were parties to the matter before the court.

5. Subdivision (e)— Work Product

Rick Marcus suggests that the reference to "work product" in the definitional section, subdivision (e), should instead be "work product *protection*" because that is the phrasing used throughout the rule. We agree with this suggestion and so propose adoption of that slight change, as follows:

> (e) Included privilege and protection. — As used in this rule:
>
> 1) "attorney-client privilege" means the protections provided for confidential attorney-client communications under either federal or state law; and
>
> 2) "work product protection" means the immunity for materials prepared in preparation of litigation as defined in Fed.R.Civ.P. 26 (b) (3) and Fed.R.Crim.P. 16 (a) (2) and (b)(2), as well as the federal common- law and state-enacted provisions or common-law rules providing protection for attorney work product.

6. Committee Note Reference to Commerce Clause as the Source of Legislative Authority:

The Committee Note makes reference to the Commerce Clause as the source of legislative authority for promulgating this rule — a rule that applies a single set of waiver rules to both state and federal litigation. That section of the Note states as follows:

> The Committee is well aware that a privilege rule proposed through the rulemaking process cannot bind state courts, and indeed that a rule of privilege cannot take effect through the ordinary rulemaking process. See 28 U.S.C § 2074(b). It is therefore anticipated that Congress must enact this rule directly, through its authority under the Commerce Clause. Cf. Class Action Fairness Act of 2005, 119 Stat. 4, PL 109-2 (relying on Commerce Clause power to regulate state class actions).

Rick Marcus argues that there might be enough authority for the rule in Congress's power to regulate federal courts, and finally concludes that "the Note need not say what the authority of Congress might be. That's not something it can get from the rules process." Reviewing Rick's comment, Ken Broun concludes that the Note should "leave out the question of the power to enact this legislation entirely" because the Note is "a guide for practitioners and the courts" and not an explication of the authority for promulgating the rule.

The Reporter placed the reference to authority for the rule in the Committee Note because this is obviously an unusual rule. It can be argued that an explanation of authority for is helpful — especially at this early point in the process — because otherwise those who review the rule during a public comment period may wonder how the Rules Committee could possibly believe it had the authority to promulgate not only a rule of privilege but also a rule that binds state as well as federal

courts. It is possible, of course, that this could all be explained in some kind of cover letter accompanying the rule through the public comment period. But those letters do not get the same focus as the Committee Note. And there is an argument that a notice function will be necessary for such a unique rule even once it becomes enacted.

Thus, the above paragraph in the Committee Note is intended to serve a (perhaps temporary) notice function that arguably is necessary given the unique provenance of the rule. But if the Committee decides that the source of authority for the rule is a topic not suite to, or better left untreated by, the Note, then the paragraph can be deleted.

7. Committee Note on Subdivision (d), Citation to Hopson

The section of the Committee Note covering subdivision (d) — on confidentiality agreements not entered as court orders — declares as follows:

> Subdivision (d) codifies the well-established proposition that parties to litigation can enter an agreement to limit the effect of waiver by disclosure between or among them. *See, e.g., Dowd v. Calabrese,* 101 F.R.D. 427, 439 (D.D.C. 1984) (no waiver where the parties stipulated in advance that certain testimony at a deposition "would not be deemed to constitute a waiver of the attorney-client or work product privileges"); *Zubulake v. UBS Warburg LLC,* 216 F.R.D. 280, 290 (S.D.N.Y. 2003) (noting that parties may enter into "so-called 'claw-back' agreements that allow the parties to forego privilege review altogether in favor of an agreement to return inadvertently produced privilege documents"). Of course such an agreement can bind only the parties to the agreement. The rule makes clear that if parties want protection from a finding of waiver by disclosure in a separate litigation, the agreement must be made part of a court order. *See Hopson v. City of Baltimore,* 232 F.R.D. 228, 238 (D.Md. 2005) (noting that "it is essential to the success of this approach in avoiding waiver that the production of inadvertently produced privileged electronic data must be at the compulsion of the court, rather than solely by the voluntary act of the producing party").

Rick Marcus argues that the citation of the *Hopson* case is problematic. He explains that the theme of *Hopson* "is that the Ninth Circuit's decision in *Transamerica Computers v. IBM* establishes that protection can only come if the court orders production. Thus, that is involuntary and can be sanitized from waiver, while a voluntary act of production can't be protected." Rick concludes that the citation is inapt if intended to establish the proposition that voluntarily entered court orders guard against waiver.

While the point can be argued one way or the other, we agree that the citation is not necessary, and if it could confuse the point made in the note, then it should be deleted. We

recommend simply deleting the citation to *Hopson* (and of course the parenthetical) from the above paragraph of the Committee Note.

V. Two Important Drafting Choices

The Reporter and the Consultant made (at least) two important drafting decisions in writing up the draft of the rule. The first is that the text of the rule specifically covers state court actions and state administrative proceedings. The second is that selective waiver is enforced even if there is no confidentiality agreement between the client and the government regulator. We want to explain why we made these choices, and set forth alternatives in case the Committee disagrees with these choices.

A. Covering State Court Actions and State Administrative Proceedings in the Text of the Rule

The Committee determined at its last meeting that any rule on waiver must apply uniformly in state and federal proceedings. Otherwise the rule could not be relied upon, and clients and lawyers would be back where they started—expending substantial resources to guard against waiver and unnecessarily increasing the cost of litigation; and being subject to a disincentive for cooperating with government regulators.

The question, then, is not whether a waiver rule should apply uniformly to both state and federal proceedings. The question is whether this should be made explicit in a Federal Rule of Evidence. Obviously, the Federal Rules apply to federal proceedings and so it is unusual to include within it a rule that covers state proceedings. The coverage can be justified by the fact that Rule 502 would be directly enacted by Congress. Still, there is some tension between draft Rule 502 and Rule 1101(a), which states that the rules apply to "the United States district courts." It could be argued that Rule 1101 (c) resolves any anomaly by providing that rules of privilege apply to "all stages of all actions, cases and proceedings." But it could also be argued that the term "all" is implicitly limited by subdivision (a), which refers to federal proceedings only.

Given the fact that it is critical to cover both state and federal proceedings with the same waiver standards, is there any drafting alternative to that taken in the draft Rule 502? One alternative would simply be to cover only federal proceedings in the rule, and leave state proceedings to parallel legislation adopted by Congress. This possibility is referred to in the Sensenbrenner letter, attached to this memo. This alternative would mean that all references to state proceedings would be eliminated from the draft, and a separate letter to Congress would stress the need for conforming legislation that covers state proceedings.

We decided to include state proceedings within the text of the rule, at least at this point, to make the public aware that there is an explicit intent to cover state proceedings in any legislative attempt to promulgate a waiver rule. That intent would not be as clear if the references to state proceedings were taken out of the text of the draft and left to an explanation in some kind of covering letter. After all, this rule has to be enacted by Congress. The Judicial Conference will not provide the final language. We thought it better to provide notice about the reach of the rule in the text of the rule, and to leave it to Congress to implement the rule in the way it sees fit.

If the Committee disagrees with our drafting choice, the alternative can be implemented without difficulty. Reference to "state" proceedings can be deleted from the text of the rule and the committee note, and we can draft a letter accompanying the rule indicating the need for parallel legislation to govern state proceedings.

Another drafting alternative would be to limit rule 502 to disclosures made during litigation in the federal courts, but to define its effect as including a determination of waiver under either federal or state law. In other words, the Committee could remove the references to state action except in the definitional part (e). The triggering of the rule would then have to occur in the federal judicial process (much like res judicata). Waiver of state privileges would be affected by the rule, but not disclosures that occurred outside of federal litigation and administrative proceedings. A letter accompanying the rule would indicate the need for separate legislation to deal with disclosure in state court and state administrative or agency situations. Such a rule would probably more comfortably fit in the Federal Rule scheme. But again, we decided to put all the provisions in a single rule at this point, in order to obtain the fullest public comment. Ultimately the most efficient method for binding state courts has to be sorted out by Congress.

B. Enforcing Selective Waiver Even Without a Confidentiality Agreement

As indicated in Part One of this memo, a number of courts enforce selective waiver only if the client has entered into a confidentiality agreement with the government regulator. A few courts enforce selective waiver even without such an agreement. We decided to draft the rule so as not to require confidentiality agreements as a condition for enforcement of selective waiver. We made this decision in part because of a comment received by Judge Levi from Helane Morrison, District Administrator of the San Francisco office of the SEC. Ms. Morrison concludes that a requirement of a confidentiality agreement may not fully implement the policy of encouraging cooperation with government investigations that is the animating principle of the draft rule.

Ms. Morrison first points out that the term "confidentiality agreement" is not self-defining, and that many agreements entered into by the SEC contain only "conditional confidentiality language." The conditions include the possibility that the privileged material will be disclosed to other law enforcement officials, and that confidentiality is maintained "except to the extent that the Staff determines that disclosure is otherwise required by federal law or in furtherance of the Commission's discharge of its duties and responsibilities." Ms. Morrison states that the Commission "has to maintain the leeway" established by this conditional confidentiality language. If that is so, it seems that the confidentiality agreement does not establish very much that is relevant in determining whether to enforce a selective waiver. If the reason for a confidentiality requirement is to limit selective waiver to situations in which there will, by agreement, be a limit on widespread use of the protected material, the conditional confidentiality language cuts against that rationale.

Ms. Morrison also points out that legislation introduced in Congress in 2003 and supported by the Commission (H.R. 1729) "did not require a confidentiality agreement to prevent waiver of the privilege when privileged documents were shared with the Commission." To the extent we are doing Congress's work for them in drafting this rule, we felt that this proposed legislation had some relevance.

Finally, Ms. Morrison points out that a confidentiality agreement requirement "would not protect the privilege in the Commission's examination program, which inspects the books and records of brokerage firms, investment advisers and mutual funds, because examinations are not performed pursuant to confidentiality agreements (as currently handled)." To the extent cooperation with government regulators is to be encouraged by the rule, we determined that the encouragement should apply to all aspects of government regulation.

Fundamentally, we concluded that a confidentiality agreement requirement imposed a formalism that would impede efficient cooperation with the government; and it appears to be a formalism that has very little to do with whether it is fair or appropriate to limit the breadth of a waiver of privilege or work product. Essentially the requirement would create lawyers' work without an apparent corresponding benefit. We explain our reasoning in a paragraph of the draft Committee Note:

> The Committee considered whether the protection of selective waiver should be conditioned on obtaining a confidentiality agreement from the government agency. It rejected that condition for a number of reasons. If a confidentiality agreement were a condition to protection, disputes would be likely to arise over whether a particular agreement was sufficiently air-tight to protect against a finding of a general waiver, thus destroying the predictability that is essential to proper administration of the attorney-client privilege and work product immunity. Moreover, a government agency might need to use the information for some purpose and then would find it difficult to be bound by an air-tight confidentiality agreement, however drafted. If such an agreement were nonetheless required to trigger the protection of selective waiver, the policy of furthering cooperation with and efficiency in government investigations would be undermined. Ultimately, the obtaining of a confidentiality agreement has little to do with the underlying policy of furthering cooperation with government agencies that animates the rule. The Committee found it sufficient to condition selective waiver on a finding that the disclosure is limited to persons involved in the investigation.

* * *

Of course we are aware that selective waiver would be a tough sell if a party gave privileged information to a government regulator with the express agreement that the regulator could and would disseminate it widely — on the news, to friends and family, etc. But this does not mean that a confidentiality requirement is necessary to justify a finding of selective waiver. We chose to address any concerns about widespread disclosure by putting as a condition that disclosure must be "limited to persons involved in the investigation."

If the Committee disagrees with our assessment, however, there is a drafting alternative that would impose a requirement of obtaining a confidentiality agreement before a selective waiver will be found. That drafting alternative was reviewed by the Committee at its last meeting. The change from the draft would be as follows:

(b) Exceptions in general. — A voluntary disclosure does not operate as a waiver if:

(1) the disclosure is itself privileged or protected;

(2) the disclosure is inadvertent and is made during discovery in federal or state litigation or administrative proceedings — and if the holder of the privilege or work product protection took reasonable precautions to prevent disclosure and took reasonably prompt measures, once the holder knew or should have known of the disclosure, to rectify the error, including (if applicable) following the procedures in Fed. R. Civ. P. 26(b)(5)(B); or

(3) the disclosure is made to a federal, state, or local governmental agency during an investigation by that agency, ~~and is limited to persons involved in the investigation~~ under an agreement that preserves the confidentiality of the communications disclosed.

The Committee Note would have to be changed as well:

Selective waiver: Courts are in conflict on whether disclosure of privileged or protected information to a government agency conducting an investigation of the client constitutes a general waiver of the information disclosed. Most courts have rejected the concept of "selective waiver", holding that waiver of privileged or protected information to a government agency constitutes a waiver for all purposes and to all parties. *See, e.g., Westinghouse Electric Corp. v. Republic of the Philippines,* 951 F.2d 1414 (3d Cir. 1991). Other courts have held that selective waiver is enforceable if the disclosure is made subject to a confidentiality agreement with the government agency. *See, e.g., Teachers Insurance & Annuity Association of America v. Shamrock Broadcasting Co.,* 521 F. Supp. 638 (S.D.N.Y.

1981). And a few courts have held that disclosure of protected information to the government does not constitute a general waiver, so that the information remains shielded from use by other parties. *See, e.g., Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977).

The rule rectifies this conflict by providing that disclosure of protected information to an investigating government agency does not constitute a general waiver of attorney-client privilege or work product protection if the holder of the privilege obtains a confidentiality agreement from the agency. A rule protecting selective waiver to investigating government agencies furthers the important policy of cooperation with government agencies, and maximizes the effectiveness and efficiency of government investigations. *See In re Columbia/HCA Healthcare Corp. Billing Practices Litigation,* 293 F.3d 289, 314 (6th Cir. 2002) (Boggs, J., dissenting) (noting that the "public interest in easing government investigations" justifies a rule that disclosure to government agencies of information protected by the attorney-client privilege or work product immunity does not constitute a waiver to private parties). The requirement of obtaining a confidentiality agreement will tend to assure that the client is treating the privilege seriously and is not engaging in widespread disclosure of information that would be inconsistent with the justification for finding a selective waiver.

~~The Committee considered whether the protection of selective waiver should be conditioned on obtaining a confidentiality agreement from the government agency. It rejected that condition for a number of reasons. If a confidentiality agreement were a condition to protection, disputes would be likely to arise over whether a particular agreement was sufficiently air-tight to protect against a finding of a general waiver, thus destroying the predictability that is essential to proper administration of the attorney-client privilege and work product immunity. Moreover, a government agency might need to use the information for some purpose and then would find it difficult to be bound by an air-tight confidentiality agreement, however drafted. If such an agreement were nonetheless required to trigger the protection of selective waiver, the policy of furthering cooperation with and efficiency in government investigations would be undermined. Ultimately, the obtaining of a confidentiality agreement has little to do with the underlying policy of furthering cooperation with government agencies that animates the rule. The Committee found it sufficient to condition selective waiver on a finding that the disclosure is limited to persons involved in the investigation.~~

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE*

Rule 502. Attorney-Client Privilege and Work Product; Waiver By Disclosure

(a) Waiver by disclosure in general. — A person waives an attorney-client privilege or work product protection if that person — or a predecessor while its holder — voluntarily discloses or consents to disclosure of any significant part of the privileged or protected information. The waiver extends to undisclosed information concerning the same subject matter if that undisclosed information ought in fairness to be considered with the disclosed information.

(b) Exceptions in general. — A voluntary disclosure does not operate as a waiver if:

(1) the disclosure is itself privileged or protected;

(2) the disclosure is inadvertent and is made during discovery in federal or state litigation or administrative

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*New material is underlined; matter to be omitted is lined through.

proceedings — and if the holder of the privilege or work product protection took reasonable precautions to prevent disclosure and took reasonably prompt measures, once the holder knew or should have known of the disclosure, to rectify the error, including (if applicable) following the procedures in Fed. R. Civ. P. 26(b)(5)(B); or

(3) the disclosure is made to a federal, state, or local governmental agency during an investigation by that agency, and is limited to persons involved in the investigation.

(c) Controlling effect of court orders. — Notwithstanding subdivision (a), a court order concerning the preservation or waiver of the attorney-client privilege or work product protection governs its continuing effect on all persons or entities, whether or not they were parties to the matter before the court.

(d) Controlling effect of party agreements. — Notwithstanding subdivision (a), an agreement on the effect

of disclosure is binding on the parties to the agreement, but not on other parties unless the agreement is incorporated into a court order.

(e) Included privilege and protection. — As used in this rule:

1) "attorney-client privilege" means the protections provided for confidential attorney-client communications under either federal or state law; and

2) "work product" means the immunity for materials prepared in preparation of litigation as defined in Fed.R.Civ.P. 26 (b) (3) and Fed.R.Crim.P. 16 (a) (2) and (b)(2), as well as the federal common- law and state-enacted provisions or common-law rules providing protection for attorney work product.

Committee Note

This new rule has two major purposes:

1) It resolves some longstanding disputes in the courts about the effect of certain disclosures of material protected by the attorney-client privilege or the work product doctrine— specifically those disputes involving inadvertent disclosure and selective waiver.

2) It responds to the widespread complaint that litigation costs for review and protection of material that is privileged or work product have become prohibitive due to the concern that any disclosure of protected information in the course of discovery (however innocent or minimal) will operate as a subject matter waiver of all protected information. This concern is especially troubling in cases involving electronic discovery. *See, e.g., Rowe Entertainment, Inc. v. William Morris Agency,* 205 F.R.D. 421, 425-26 (S.D.N.Y. 2002) (finding that in a case involving the production of e-mail, the cost of pre-production review for privileged and work product material would cost one defendant $120,000 and another defendant $247,000, and that such review would take months). *See also Report to the Judicial Conference Standing Committee on Rules of Practice and Procedure by the Advisory Committee on the Federal Rules of Civil Procedure,* September 2005 at 27 ("The volume of information and the forms in which it is stored make privilege determinations more difficult and privilege review correspondingly more expensive and time-consuming yet less likely to detect all privileged information."); *Hopson v. City of Baltimore,* 232 F.R.D. 228, 244 (D.Md. 2005) (electronic discovery may encompass "millions of documents" and to insist upon "record-by-record pre-production privilege review, on pain of subject matter waiver, would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation").

The rule seeks to provide a predictable, uniform set of standards under which parties can determine the consequences of a disclosure of information protected by the attorney-client privilege or work product doctrine. As part of that predictability, the rule is intended to regulate the consequences of disclosure of information protected by the attorney-client privilege or work product doctrine at both the state and federal level. Parties to litigation need to know, for example, that if they exchange privileged information pursuant to a confidentiality order, the court's order will be enforceable in both state and federal courts. If a federal court's confidentiality order is not enforceable in a state court (or vice versa) then the burdensome costs of privilege review and retention are unlikely to be reduced.

The Committee is well aware that a privilege rule proposed through the rulemaking process cannot bind state courts, and indeed that a rule of privilege cannot take effect through the ordinary rulemaking process. See 28 U.S.C § 2074(b). It is therefore anticipated that Congress must enact this rule directly, through its authority under the Commerce Clause. Cf. Class Action Fairness Act of 2005, 119 Stat. 4, PL 109-2 (relying on Commerce Clause power to regulate state class actions).

Subdivision (a). This subdivision states the general rule that a voluntary disclosure of information protected by the attorney-client privilege or work product doctrine constitutes a waiver of those protections. *See, e.g., United States v. Newell,* 315 F.3d 510 (5th Cir. 2002) (client waived the privilege by disclosing communications to other individuals who were not pursuing a common interest). The rule provides, however, that a voluntary disclosure generally results in a waiver only of the information disclosed; a subject matter waiver is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information. *See, e.g., In re von Bulow,* 828 F.2d 94 (2d Cir. 1987) (disclosure of privileged

information in a book did not result in unfairness to the adversary in a litigation, therefore a subject matter waiver was not warranted). The rule thus rejects the result in *In re Sealed Case,* 877 F.2d 976 (D.C.Cir. 1989), which held that inadvertent disclosure of documents during discovery automatically constituted a subject matter waiver.

The rule governs only waiver by disclosure. Other common-law waiver doctrines may result in a finding of waiver even where there is no disclosure of privileged information or work product. *See, e.g., Nguyen v. Excel Corp.,* 197 F.3d 200 (5th Cir. 1999) (reliance on an advice of counsel defense waives the privilege with respect to attorney-client communications pertinent to that defense); *Ryers v. Burleson,* 100 F.R.D. 436 (D.D.C. 1983) (allegation of lawyer malpractice constituted a waiver of confidential communications under the circumstances). The rule is not intended to displace or modify federal common law concerning waiver of privilege or work product where no disclosure has been made.

Subdivision (b). This subdivision collects the basic common-law exceptions to waiver by disclosure of attorney-client privilege and work product.

Protected disclosure: Disclosure does not constitute a waiver if the disclosure itself is protected by the attorney-client privilege or work product immunity. For example, if a party privately discloses a privileged communication to another party pursuing a common legal interest, that disclosure is itself protected and the privilege covering the underlying information is not waived. *See, e.g., Waller v. Financial Corp. of America,* 828 F.2d 579 (9th Cir. 1987) (communications by a client to his lawyer remained privileged where the lawyer shared the communications with codefendants pursuing a common defense); *Hodges, Grant & Kaufman v. United States Gov't Dept. of Treasury,* 768 F.2d 719, 721 (5th Cir. 1985) (noting that the

privilege is not waived "if a privileged communication is shared with a third person who has a common legal interest with respect to the subject matter of the communication"). Similarly, the protection of the attorney-client privilege or work product immunity is not waived if protected information is disclosed by one lawyer to another in a law firm.

Inadvertent disclosure during discovery: Courts are in conflict on whether an inadvertent disclosure of privileged information or work product, made during discovery, 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 preserving the privilege and failed to request a return of the information in a timely manner. And a few courts hold that any mistaken disclosure of protected information constitutes 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 privileged or protected information during discovery constitutes a waiver only if the party did not take reasonable precautions to prevent disclosure and did not make reasonable and prompt efforts to rectify the error. This position is in accord with the majority view on whether inadvertent disclosure is a waiver. *See, e.g., Alldread* v. *City of Grenada,* 988 F.2d 1425 (5th Cir. 1993) (governmental attorney-client privilege); *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, information protected by the attorney-client privilege or work product immunity

should not be treated lightly. On the other hand, a rule imposing strict liability for an inadvertent disclosure during discovery threatens to impose prohibitive costs for privilege review and retention, especially in cases involving electronic discovery.

Selective waiver: Courts are in conflict on whether disclosure of privileged or protected information to a government agency conducting an investigation of the client constitutes a general waiver of the information disclosed. Most courts have rejected the concept of "selective waiver", holding that waiver of privileged or protected information to a government agency constitutes a waiver for all purposes and to all parties. *See, e.g., Westinghouse Electric Corp. v. Republic of the Philippines,* 951 F.2d 1414 (3d Cir. 1991). Other courts have held that selective waiver is enforceable if the disclosure is made subject to a confidentiality agreement with the government agency. *See, e.g., Teachers Insurance & Annuity Association of America v. Shamrock Broadcasting Co.,* 521 F. Supp. 638 (S.D.N.Y. 1981). And a few courts have held that disclosure of protected information to the government does not constitute a general waiver, so that the information remains shielded from use by other parties. *See, e.g., Diversified Industries, Inc. v. Meredith,* 572 F.2d 596 (8th Cir. 1977).

The rule rectifies this conflict by providing that disclosure of protected information to an investigating government agency does not constitute a general waiver of attorney-client privilege or work product protection. A rule protecting selective waiver to investigating government agencies furthers the important policy of cooperation with government agencies, and maximizes the effectiveness and efficiency of government investigations. *See In re Columbia/HCA Healthcare Corp. Billing Practices Litigation,* 293 F.3d 289, 314 (6th Cir. 2002) (Boggs, J., dissenting) (noting that the "public interest in easing government investigations" justifies a rule that disclosure to

government agencies of information protected by the attorney-client privilege or work product immunity does not constitute a waiver to private parties).

The Committee considered whether the protection of selective waiver should be conditioned on obtaining a confidentiality agreement from the government agency. It rejected that condition for a number of reasons. If a confidentiality agreement were a condition to protection, disputes would be likely to arise over whether a particular agreement was sufficiently air-tight to protect against a finding of a general waiver, thus destroying the predictability that is essential to proper administration of the attorney-client privilege and work product immunity. Moreover, a government agency might need to use the information for some purpose and then would find it difficult to be bound by an air-tight confidentiality agreement, however drafted. If such an agreement were nonetheless required to trigger the protection of selective waiver, the policy of furthering cooperation with and efficiency in government investigations would be undermined. Ultimately, the obtaining of a confidentiality agreement has little to do with the underlying policy of furthering cooperation with government agencies that animates the rule. The Committee found it sufficient to condition selective waiver on a finding that the disclosure is limited to persons involved in the investigation.

Subdivision (c). Confidentiality orders are becoming increasingly important in limiting the costs of privilege review and retention, especially in cases involving electronic discovery. *See Manual for Complex Litigation Fourth* § 11.446 (Federal Judicial Center2004) (noting that fear of the consequences of waiver "may add cost and delay to the discovery process for all sides" and that courts have responded by encouraging counsel "to stipulate at the outset of discovery to a 'nonwaiver' agreement, which they can adopt as a

case-management order."). But the utility of a confidentiality order in reducing discovery costs is substantially diminished if it provides no protection outside the particular litigation in which the order is entered. Parties are unlikely to be able to reduce the costs of pre-production review for privilege and work product if the consequence of disclosure is that the information can be used by non-parties to the litigation.

There is some dispute on whether a confidentiality order entered in one case can bind non-parties from asserting waiver by disclosure in a separate litigation. *See generally Hopson v. City of Baltimore,* 232 F.R.D. 228 (D.Md. 2005) for a discussion of this case law. The rule provides that such orders are enforceable against non-parties. As such the rule provides a party with a predictable protection that is necessary to allow that party to limit the prohibitive costs of privilege and work product review and retention.

Subdivision (c) contemplates that the court may order production and guarantee confidentiality under criteria different from those providing exceptions to waiver under subdivision (b). For example, the court order may provide for return of documents without waiver irrespective of the care taken by the disclosing party; the rule contemplates enforcement of "claw-back" and "quick peek" arrangements as a way to avoid the excessive costs of pre-production review for privilege and work product..

Subdivision (d). Subdivision (d) codifies the well-established proposition that parties to litigation can enter an agreement to limit the effect of waiver by disclosure between or among them. *See, e.g., Dowd v. Calabrese,* 101 F.R.D. 427, 439 (D.D.C. 1984) (no waiver where the parties stipulated in advance that certain testimony at a deposition "would not be deemed to constitute a waiver of the attorney-client or work product privileges"); *Zubulake*

v. UBS Warburg LLC, 216 F.R.D. 280, 290 (S.D.N.Y. 2003) (noting that parties may enter into "so-called 'claw-back' agreements that allow the parties to forego privilege review altogether in favor of an agreement to return inadvertently produced privilege documents"). Of course such an agreement can bind only the parties to the agreement. The rule makes clear that if parties want protection from a finding of waiver by disclosure in a separate litigation, the agreement must be made part of a court order. *See Hopson v. City of Baltimore,* 232 F.R.D. 228, 238 (D.Md. 2005) (noting that "it is essential to the success of this approach in avoiding waiver that the production of inadvertently produced privileged electronic data must be at the compulsion of the court, rather than solely by the voluntary act of the producing party").

Subdivision (d) contemplates that the parties may agree to production and guarantee confidentiality under criteria different from those providing exceptions to waiver in subdivision (b). For example, the parties may provide for return of documents without waiver irrespective of the care taken by the disclosing party, and may agree to "claw-back" or "quick peek" arrangements to reduce the cost of pre-production review for privilege and work product.

Subdivision (e). This subdivision makes clear that the rule governs waiver by disclosure for the attorney-client privilege and work product immunity under both state and federal law.

The rule's coverage is limited to attorney-client privilege and work product. The limitation in coverage is consistent with the goals of the rule, which are 1) to provide a reasonable limit on the costs of privilege and work product review and retention that are incurred by parties to litigation; and 2) to encourage cooperation with government investigations and reduce the costs of those investigations. These two interests arise mainly, if not exclusively, in the context of disclosure

of 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.

ONE HUNDRED NINTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

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January 23, 2006

Mr. Leonidas Ralph Mecham
Director
Administrative Office of the U.S. Courts
One Columbus Circle, NE
Washington, DC 20544

Dear Ralph:

I write to request that the U.S. Judicial Conference initiate a rule-making on forfeiture of privileges.

I am informed that an absence of clarity on this subject, particularly as it pertains to the attorney-client privilege, is causing significant disruption and cost to the litigation process. I therefore urge the Judicial Conference to proceed with a rule-making that would –

- protect against the forfeiture of privilege where a disclosure in discovery is the result of an innocent mistake;
- permit parties, and courts, to protect against the consequences of waiver by permitting disclosures of privileged information between the parties to a litigation; and
- allow persons and entities to cooperate with government agencies by turning over privileged information without waiving all privileges as to other parties in subsequent litigation.

The expense in reviewing an enormous volume of papers, electronic files, and other materials in intensive discovery cases can represent a major component of litigation costs, which continue to rise. Lawyers are often compelled to expend countless hours screening vast quantities of documents to guarantee that any document produced in response to a discovery request does not include a privileged document for fear that the disclosure will waive the privilege for all other documents dealing with the same subject matter.

Parties occasionally try to facilitate the discovery process by agreeing to make discovery without forfeiting privileges so that any claim of privilege can be selectively asserted at a later date. Sometimes these agreements are approved by court order. Yet these agreements, even with a court

CNG-717

order, do not provide adequate assurances that the privilege will not be deemed waived in other proceedings or in other fora. The same difficulties can arise when disclosure is made voluntarily to a regulatory or governmental agency.

I understand that implementation of such a rule would require approval by an act of Congress in accordance with the Rules Enabling Act. Separate legislation would also be needed to extend the rule's protection to subsequent litigation in state court.

A federal rule protecting parties against forfeiture of privileges in these circumstances could significantly reduce litigation costs and delay and markedly improve the administration of justice for all participants. My Committee looks forward to working with the Judicial Conference on this important matter.

Sincerely,

F. JAMES SENSENBRENNER, JR.
Chairman

FJS/bsm

cc: Chief Judge David F. Levi

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

February 13, 2006

Honorable F. James Sensenbrenner, Jr.
Chairman
Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

Dear Mr. Chairman:

Thank you for your letter of January 23, 2006, requesting the Judicial Conference to initiate the rulemaking process to address litigation costs and burdens arising from the review of attorney-client and work-product information. I have sent your request to the Advisory Committee on Evidence Rules for its consideration.

I understand that the Evidence Rules Committee is planning to hold a mini-conference with attorneys, academics, and judges expert in privilege law at the Fordham University School of Law in New York City on April 24-25, 2006. The Committee will consider a draft proposal that protects parties from waiving attorney-client privilege or work-product protection when information is inadvertently disclosed in discovery, when information is disclosed in accordance with the parties' agreement or a court order, or when information is disclosed by a party cooperating with a government agency in an investigation preceding the litigation. The Committee would welcome you or your staff at the New York City conference. In any event, we will keep you posted of progress on this important issue.

We appreciate your continuing support of the rulemaking process. If you need further assistance in this matter, please contact Cordia A. Strom, Assistant Director, Office of Legislative Affairs at (202) 502-1700.

Sincerely,

Leonidas Ralph Mecham
Secretary

cc: Honorable David F. Levi, Chair,
Committee on Rules of Practice and Procedure
Honorable Jerry E. Smith, Chair,
Advisory Committee on Evidence Rules

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Federal Case Law Development After *Crawford v. Washington*
Date: March 15, 2006

The Committee has directed the Reporter to keep it apprised of case law developments after *Crawford v. Washington*. This memo is intended to fulfill that function. The memo describes the federal case law that discusses the impact of *Crawford* on the Federal Rules of Evidence. The cases are divided along two topics, approximating the open questions left by *Crawford*. First, when is a hearsay statement "testimonial" within the meaning of *Crawford*? Second, if a hearsay statement is not testimonial, what requirements does the Confrontation Clause place on its admissibility? Within those topics, the cases are arranged by circuit.

Summary

A quick summary of results on what has been held "testimonial" and what has not, so far, might be useful:

Statements Found Testimonial:

1. Confession of an accomplice made to a police officer.

2. Grand jury testimony.

3. Plea allocutions of accomplices, even if specific references to the defendant are redacted.

4. Statement of an incarcerated person, made to a police officer, identifying the defendant as taking part in a crime.

5. Report by a confidential informant to a police officer, identifying the defendant as involved in criminal activity.

6. 911 call accusing the defendant of criminal activity, and similar accusations made to officers responding to the call. *(Courts are in conflict about this fact situation, see below).*

7. Statements by a child-victim to a forensic investigator, when the statements are referred as a matter of course by the investigator to law enforcement.

8. Statements made by an accomplice while placed under arrest, but before formal interrogation.

9. False alibi statements made by accomplices to the police (though while testimonial, they do not violate the defendant's right to confrontation because they are not offered for their truth).

Statements Found Not Testimonial:

1. Statement admissible under the state of mind exception, made to friends.

2. Statement made by the defendant to police officers before formal interrogation.

3. Declaration against penal interest implicating both the declarant and the defendant, made in informal circumstances to a friend or loved one (i.e., statements admissible under the Court's interpretation of Rule 804(b)(3) in *Williamson v. United States*).

4. Letter written to a friend admitting criminal activity by the writer and the defendant.

5. Surreptitiously recorded statements of conspirators.

6. Certificate of nonexistence of a record, prepared by government authorities in anticipation of litigation.

7. Statements by coconspirators during the course and in furtherance of the conspiracy, when not made to the police or during a litigation.

8. Statements made for purpose of medical treatment.

9. 911 calls reporting crimes.

10. Statements to law enforcement officers responding to the declarant's 911 call reporting a crime.

11. Accusatory statements in a private diary.

12. Warrants of deportation in immigration cases.

13. Odometer statements prepared before any crime of odometer-tampering occurred.

14. A present sense impression describing an event that took place months before a crime occurred.

15. Business records.

Cases Defining "Testimonial" Hearsay After Crawford

First Circuit

Statement admissible under the state of mind exception is not testimonial: *Horton v. Allen,* 370 F.3d 75 (1st Cir. 2004): Horton was convicted of drug-related murders. At his state trial, the government offered hearsay statements from Christian, Horton's accomplice. Christian had told a friend that he was broke; that he had asked a drug supplier to front him some drugs; that the drug supplier declined; and that he thought the drug supplier had a large amount of cash on him. These statements were offered under the state of mind exception to show the intent to murder and the motivation for murdering the drug supplier. The Court held that Christian's statements were not "testimonial" within the meaning of *Crawford.* The Court explained that the statements "were not ex parte in-court testimony or its equivalent; were not contained in formalized documents such as affidavits, depositions, or prior testimony transcripts; and were not made as part of a confession resulting from custodial examination. . . .In short, Christian did not make the statements under circumstances in which an objective person would reasonably believe that the statement would be available for use at a later trial."

911 call was not testimonial under the circumstances: *United States v. Brito,* 427 F.3d 53 (1st Cir. 2005): The Court affirmed a conviction of firearm possession by an illegal alien. It held that statements made in a 911 call, indicating that the defendant was carrying and had fired a gun, were properly admitted as excited utterances, and that the admission of the 911 statements did not violate the defendant's right to confrontation. The statements were not "testimonial" within the meaning of *Crawford v. Washington.* The Court refused, however, to adopt a categorical rule that an excited utterance could never be testimonial under *Crawford.* The Court declared that the relevant question is whether the statement was made with an eye toward "legal ramifications." The Court noted that under this test, statements to police made while the declarant or others are still in personal danger are ordinarily not testimonial, because the declarant in these circumstances "usually speaks out of urgency and a desire to obtain a prompt response." Once the initial danger has dissipated, however, "a person who speaks while still under the stress of a startling event is more likely able to comprehend the larger significance of her words. If the record fairly supports a finding of comprehension, the fact that the statement also qualifies as an excited utterance will not alter its testimonial nature." In this case the 911 call was properly admitted because the caller stated that she had "just" heard gunshots and seen a man with a gun, that the man had pointed the gun at her, and that the man was still in her line of sight. Thus the declarant was in "imminent personal peril" when the call was made and therefore it was not testimonial. The Court also found that the 911 operator's questioning of the caller did not make the answers testimonial, because "it would blink reality to place under the rubric of interrogation the single off-handed question asked by the dispatcher — a question that only momentarily interrupted an otherwise continuous stream of consciousness."

Defendant's own hearsay statement was not testimonial: *United States v. Lopez,* 380 F.3d 538 (1st Cir. 2004): The defendant blurted out an incriminating statement to police officers after they found drugs in his residence. The court held that this statement was not testimonial under *Crawford.*

The court declared that "for reasons similar to our conclusion that appellant's statements were not the product of custodial interrogation, the statements were also not testimonial." That is, the statement was spontaneous and not in response to police interrogation.

The *Lopez* court probably had an easier way to dispose of the case. Both before and after *Crawford*, an accused has no right to confront himself. If the solution to confrontation is cross-examination, as the Court in *Crawford* states, then it is silly to argue that a defendant has the right to have his own statements excluded because he had no opportunity to cross-examine himself.

Statements made to defendant in a conversation with the defendant were testimonial but were not barred by *Crawford*, as they were admitted to provide context for the defendant's own statements: *United States v. Hansen,* 434 F.3d 92 (1st Cir. 2006): After a crime and as part of cooperation with the authorities, the father of an accomplice surreptitiously recorded his conversation with the defendant, in which the defendant admitted criminal activity. The Court found that the father's statements during the conversation were testimonial under *Crawford* – as they were prepared specifically for use in a criminal prosecution. But their admission did not violate the defendant's right to confrontation. The defendant's own side of the conversation was admissible as a party admission, and the father's side of the conversation was admissible not for truth but to provide context for the defendant's admissions. *Crawford* does not bar the admission of statements not offered for their truth. ***Accord United States v. Walter,*** 434 F.3d 30 (1st Cir. 2006) (*Crawford* "does not call into question this court's precedents holding that statements introduced solely to place a defendant's admissions into context are not hearsay and, as such, do not run afoul of the Confrontation Clause.").

Co-conspirator statement not testimonial: *United States v. Felton,* 417 F.3d 97 (1st Cir. 2005): The Court held that a statement by the defendant's coconspirator, made during the course and in furtherance of the conspiracy, was not testimonial under *Crawford.* **Accord *United States v. Sanchez-Berrios,*** 424 F.3d 65 (1st Cir. 2005) (noting that *Crawford* "explicitly recognized that statements made in furtherance of a conspiracy by their nature are not testimonial.").

Formal statement to police officer is testimonial: *United States v. Rodriguez-Marrero,* 390 F.3d 1 (1st Cir. 2004): The defendant's accomplice gave a signed confession under oath to a prosecutor in Puerto Rico. The Court held that any information in that confession that incriminated the defendant, directly or indirectly, could not be admitted against him after *Crawford.* Whatever the limits of the term "testimonial", it clearly covers sworn statements by accomplices to police officers.

Second Circuit

Statement admissible as a declaration against penal interest, after *Williamson*, is not testimonial: ***United States v. Saget,*** 377 F.3d 233 (2d Cir. 2004): The defendant's accomplice spoke to an undercover officer, trying to enlist him in the defendant's criminal scheme. The accomplice's statements were admitted at trial as declarations against penal interest under Rule 804(b)(3), as they tended to implicate the accomplice in a conspiracy. Under *Williamson v. United States,* statements made by an accomplice to a law enforcement officer while in custody are not admissible under Rule 804(b)(3), because the accomplice may be currying favor with law enforcement. But in the instant case, the accomplice's statement was not barred by *Williamson,* because it was made to an undercover officer—the accomplice didn't know he was talking to a law enforcement officer and therefore had no reason to curry favor by implicating the defendant. For similar reasons, the statement was not testimonial under *Crawford*—it was not the kind of formalized statement to law enforcement, prepared for trial, such as a "witness" would provide. The court elaborated on the *Crawford* test in the following passage:

> *Crawford* at least suggests that the determinative factor in determining whether a declarant bears testimony is the declarant's awareness or expectation that his or her statements may later be used at a trial. The opinion lists several formulations of the types of statements that are included in the core class of testimonial statements, such as "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." All of these definitions provide that the statement must be such that the declarant reasonably expects that the statement might be used in future judicial proceedings. Although the Court did not adopt any one of these formulations, its statement that "[t]hese formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it" suggests that the Court would use the reasonable expectation of the declarant as the anchor of a more concrete definition of testimony. If this is the case, then Beckham's statements would not constitute testimony, as it is undisputed that he had no knowledge of the CI's connection to investigators and believed that he was having a casual conversation with a friend and potential co-conspirator.
>
> We need not attempt to articulate a complete definition of testimonial statements in order to hold that Beckham's statements did not constitute testimony, however, because *Crawford* indicates that the specific type of statements at issue here are nontestimonial in nature. The decision cites *Bourjaily v. United States*, 483 U.S. 171 (1987), which involved a co-defendant's unwitting statements to an FBI informant, as an example of a case in which nontestimonial statements were correctly admitted against the defendant without a prior opportunity for cross-examination. In *Bourjaily*, the declarant's conversation with a confidential informant, in which he implicated the defendant, was recorded without the declarant's knowledge. The Court held that even though the defendant had no opportunity

to cross-examine the declarant at the time that he made the statements and the declarant was unavailable to testify at trial, the admission of the declarant's statements against the defendant did not violate the Confrontation Clause. *Crawford* approved of this holding, citing it as an example of an earlier case that was "consistent with" the principle that the Clause permits the admission of nontestimonial statements in the absence of a prior opportunity for cross-examination. Thus, we conclude that a declarant's statements to a confidential informant, whose true status is unknown to the declarant, do not constitute testimony within the meaning of *Crawford*. We therefore conclude that Beckham's statements to the CI were not testimonial, and *Crawford* does not bar their admission against Saget.

False alibi statements made to police officers by accomplices are testimonial, but admission does not violate the Confrontation Clause because they are not offered for their truth: ***United States v. Logan,*** 419 F.3d 172 (2d Cir. 2005): The defendant was convicted of conspiracy to commit arson. The trial court admitted statements made by his coconspirators to the police. These statements asserted an alibi, and the government presented other evidence indicating that the alibi was false. The Court found no Confrontation Clause violation in admitting the alibi statements. The Court relied on *Crawford* for the proposition that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than proving the truth of the matter asserted." The statements were not offered to prove that the alibi was true, but rather to corroborate the defendant's own account that the accomplices planned to use the alibi. Thus "the fact that Logan was aware of this alibi, and that [the accomplices] actually used it, was evidence of conspiracy among [the accomplices] and Logan."

The *Logan* court declared in dictum that the false alibi statements were testimonial within the meaning of *Crawford.* The statements were made during the course of and in furtherance of a conspiracy, and ordinarily such statements are not testimonial, as the Court stated in *Crawford*. But in this case, the accomplices "made their false alibi statements in the course of a police interrogation, and thus should reasonably have expected that their statements might be used in future proceedings." The court concluded that in light of *Crawford's* "explicit instruction" that statements made during police interrogation are testimonial "under even a narrow standard, the government's contention that these statements were non-testimonial is unconvincing."

Note: 1) The court's not-for-truth analysis is unnecessarily complex. The accomplice statements are not hearsay because they were admitted to show that they were false, as shown by independent evidence. That is enough to take the statements outside the hearsay rule and therefore outside the protections of the Confrontation Clause.

2) The *Logan* court reviewed the defendant's Confrontation Clause argument under the plain error standard. This was because defense counsel at trial objected on grounds of hearsay, but did not make a specific Confrontation Clause objection. This again shows the

need to provide congruence between the hearsay rule and the Confrontation Clause. Otherwise there is a trap for the unwary, possibly resulting in an inadvertent waiver of the protections of the Confrontation Clause. Preventing such a trap was the rationale for proposing the amendment to Rule 804(b)(3). See the memorandum on adding constitutional "warnings" in this agenda book for a further discussion.

Statement found reliable under the residual exception is not testimonial: *United States v. Morgan,* 385 F.3d 196 (2d Cir. 2004): In a drug trial, a letter written by the co-defendant was admitted against the defendant. The letter was written to a boyfriend and implicated both the defendant and the co-defendant in a conspiracy to smuggle drugs. The court found that the letter was properly admitted under Rule 807, and that it was not testimonial under *Crawford.* The court noted the following circumstances indicating that the letter was not testimonial: 1) it was not written in a coercive atmosphere; 2) it was not addressed to law enforcement authorities; 3) it was written to an intimate acquaintance; 4) it was written in the privacy of the co-defendant's hotel room; 4) the co-defendant had no reason to expect that the letter would ever find its way into the hands of the police; and 5) it was not written to curry favor with the authorities or with anyone else. These were the same factors that rendered the hearsay statement sufficiently reliable to qualify under Rule 807.

Co-conspirator statements made to government officials to cover-up a crime (whether true or false) do not implicate *Crawford*: *United States v. Stewart,* 433 F.3d 273 (2d Cir. 2006): In the prosecution of Martha Stewart, the government introduced statements made by each of the defendants during interviews with government investigators. Each defendant's statement was offered against the other. The government offered these statements to prove that the story told to the investigators was a cover-up. The court held that the admission of these statements did not violate *Crawford,* even though they were "provided in a testimonial setting." It noted first that to the extent the statements were false, they did not violate *Crawford* because "*Crawford* expressly confirmed that the categorical exclusion of out-of-court statements that were not subject to contemporaneous cross-examination does not extend to evidence offered for purposes other than to establish the truth of the matter asserted." The defendants argued, however, that some of the statements made during the course of the obstruction were true, and as they were made to government investigators, they were testimonial. The court observed that there is some tension in *Crawford* between its treatment of co-conspirator statements (by definition not testimonial) and statements made to government investigators (by their nature testimonial), where truthful statements are made as part of a conspiracy to obstruct justice. It found, however, that the truthful statements did not violate *Crawford* because they were admitted not for their truth, but rather to provide context for the false statements. The court explained as follows:

> It defies logic, human experience and even imagination to believe that a conspirator bent on impeding an investigation by providing false information to investigators would lace the totality of that presentation with falsehoods on every subject of inquiry. To do so would be to alert the investigators immediately that the conspirator is not to be believed, and the effort

to obstruct would fail from the outset. . . . The truthful portions of statements in furtherance of the conspiracy, albeit spoken in a testimonial setting, are intended to make the false portions believable and the obstruction effective. Thus, the truthful portions are offered, not for the narrow purpose of proving merely the truth of those portions, but for the far more significant purpose of showing each conspirator's attempt to lend credence to the entire testimonial presentation and thereby obstruct justice.

Grand jury testimony and plea allocution statement are both testimonial: ***United States v. Bruno,*** 383 F.3d 65 (2d Cir. 2004): The court held that a plea allocution statement of an accomplice was testimonial, even though it was redacted to take out any direct reference to the defendant. It noted that the Court in *Crawford* had taken exception to previous cases decided by the Circuit that had admitted such statements as sufficiently reliable under *Roberts*. Those prior cases have been overruled by *Crawford.*

Third Circuit

Surreptitiously recorded statements of coconspirators are not testimonial: ***United States v. Hendricks,*** 395 F.3d 173 (3d Cir. 2005): The court found that surreptitiously recorded statements of an ongoing criminal conspiracy were not testimonial within the meaning of *Crawford*. "First and foremost", such statements were not within the examples of statements found testimonial by the Court in *Crawford*—they were not grand jury testimony, prior testimony, plea allocutions or statements made during interrogations. Even under the broadest definition of "testimonial" discussed in *Crawford* — reasonable anticipation of use in a criminal trial or investigation — these statements were not testimonial, as they were informal statements among coconspirators.

Accomplice statement to police officer was testimonial, but did not violate the Confrontation Clause because it was not admitted for its truth: ***United States v. Trala,*** 386 F.3d 536 (3d Cir. 2004): An accomplice made statements to a police officer that misrepresented her identity and the source of the money in the defendant's car. While these were accomplice statements to law enforcement, and thus testimonial, their admission did not violate *Crawford*, as they were not admitted for their truth. In fact the statements were admitted because they were false. Under these circumstances, cross-examination of the accomplice would serve no purpose. ***See also United States v. Lore,*** 430 F.3d 190 (3d Cir. 2005) (relying on *Trala,* the court held that grand jury testimony was testimonial, but that its admission did not violate the Confrontation Clause because the self-exculpatory statements denying all wrongdoing "were admitted because they were so obviously false.").

Fifth Circuit

Certificate prepared by government officials for purposes of litigation is NOT testimonial: ***United States v. Rueda-Rivera,*** 396 F.3d 678 (5th Cir. 2005): The defendant was charged with being found in the United States after deportation, without having obtained the consent of the Attorney General or the Secretary of the Department of Homeland Security. To prove the lack of approval, the government offered a Certificate of Nonexistence of Record (CNR). The CNR was prepared by a government official specifically for this litigation. The Court found that the record was not "testimonial" under *Crawford*, declaring as follows:

> The CNR admitted into evidence in this case, reflecting the absence of a record that Rueda-Rivera had received consent to re-enter the United States, does not fall into the specific categories of testimonial statements referred to in *Crawford*. We decline to extend *Crawford* to reach such a document.

Thus, the Court interpreted *Crawford* to define "testimonial" not in terms of a test, but only to encompass the specific examples of testimonial hearsay described in the opinion, i.e., grand jury testimony, prior testimony, plea allocutions, and statement made during a police interrogation.

Note: The result in *Rueda-Rivera* would also apply to records offered under Rules 803(10) (absence of public record) and 803(6)/902 (affidavits authenticating business records). After *Crawford*, a question has been raised as to whether those exceptions should be amended because they might be unconstitutional as applied, in that the records qualifying under those exceptions would appear to be "testimonial" under some or all of the *Crawford* Court's definitions. But if *Crawford* is read to mean that only types of hearsay specifically mentioned by the Court are in fact "testimonial", then these records-based exceptions will remain constitutional.

Statements made in a civil deposition might be testimonial, but admission does not violate the Confrontation Clause if they are offered to prove they are false: ***United States v. Holmes,*** 406 F.3d 337 (5th Cir. 2005): The defendant was convicted of mail fraud and conspiracy, stemming from a scheme with a court clerk to file a backdated document in a civil action. The defendant argued that admitting the deposition testimony of the court clerk, given in the underlying civil action, violated his right to confrontation after *Crawford*. The clerk testified that the clerk's office was prone to error and thus someone in that office could have mistakenly backdated the document at issue. The Court considered the possibility that the clerk's testimony was a statement in furtherance of a conspiracy, and noted that coconspirator statements ordinarily are not testimonial under *Crawford*. It also noted, however, that the clerk's statement "is not the run-of-the-mill co-conspirator's statement made unwittingly to a government informant or made casually to a partner in crime; rather, we have a co-conspirator's statement that is derived from a formalized testimonial source — recorded and sworn civil deposition testimony." Ultimately the court found it unnecessary

to determine whether the deposition testimony was "testimonial" within the meaning of *Crawford* because it was not offered for its truth. Rather, the government offered the testimony "to establish its *falsity* through independent evidence." Statements that are offered for a non-hearsay purpose pose no Confrontation Clause concerns, whether or not they are testimonial, as the Court recognized in *Crawford.*

Statement admissible as co-conspirator hearsay is not testimonial: *United States v. Robinson*, 367 F.3d 278 (5th Cir. 2004): The Court affirmed a drug trafficker's murder convictions and death sentence. It held that coconspirator statements are not "testimonial" under *Crawford* as they are made under informal circumstances and not for the purpose of creating evidence. ***Accord United States v. Delgado,*** 401 F.3d 290 (5th Cir. 2005).

Accomplice's statements to a friend, implicating both the accomplice and the defendant in the crime, are not testimonial: *Ramirez v. Dretke,* 398 F.3d 691 (5th Cir. 2005): The defendant was convicted of murder. Hearsay statements of his accomplice were admitted against him. The accomplice made statements both before and after the murder that directly implicated the defendant. These statements were made to the accomplice's roommate. The court found that these statements were not testimonial under *Crawford*: "There is nothing in *Crawford* to suggest that 'testimonial evidence' includes spontaneous out-of-court statements made outside any arguably judicial or investigatorial context."

Sixth Circuit

Identification of a defendant, made to police by an incarcerated person, is testimonial: *United States v. Pugh,* 405 F.3d 390 (6th Cir. 2005): In a bank robbery prosecution, the Court found a *Crawford* violation when the trial court admitted testimony from a police officer that he had brought a surveillance photo down to a person who was incarcerated, and that person identified the defendant as the man in the surveillance photo. This statement was testimonial under *Crawford* for the following reasons:

> First, the statement was given during a police interrogation, which meets the requirement set forth in *Crawford* where the Court indicated that the term "testimonial" at a minimum applies to "police interrogations." Second, the statement is also considered testimony under *Crawford's* reasoning that a person who "makes a formal statement to government officers bears testimony." Third, we find that Shellee's statement is testimonial under our broader analysis in *United States v. Cromer,* 389 F.3d 662 (6th Cir. 2004). . . [w]e think that any reasonable person would assume that a statement that positively identified possible suspects in the picture of a crime scene would be used against those suspects in either investigating or prosecuting the offense.

Reporter's Note: In *Cromer,* discussed in *Pugh,* the Sixth Circuit adopted the broad definition of "testimonial" suggested by the petitioner in *Crawford,* i.e., a statement is testimonial if a reasonable person would anticipate that his statement would be used against the accused in either prosecuting or investigating the crime. This test has the potential of expanding the protection of the Confrontation Clause after *Crawford.* In *Cromer,* the Court held that a statement of a confidential informant to police officers, identifying the defendant as being a drug dealer, was testimonial, because it was made to the authorities with the reasonable anticipation that it would be used against the defendant. *See also United States v. Arnold,* 410 F.3d 895 (6th Cir. 2005) (relying on *Cromer* to hold that accusations made in a 911 call, and thereafter to police who arrived in response to the call, were "testimonial":"Gordon could reasonably expect that her statements would be used to prosecute Arnold. Further, her statements, which were made knowingly to authorities, and described criminal activity.")

Declaration against penal interest, made to a friend, is not testimonial: *United States v. Franklin,* 415 F.3d 537 (6th Cir. 2005): The defendant was charged with bank robbery. One of the defendant's accomplices (Clarke), was speaking to a friend (Wright) some time after the robbery. Wright told Clarke that he looked "stressed out." Clarke responded that he was indeed stressed out, because he and the defendant had robbed a bank and he thought the authorities were on their trail. The Court found no error in admitting Clarke's hearsay statement against the defendant as a declaration against penal interest, as it disserved Clark's interest and was not made to law enforcement officers in any attempt to curry favor with the authorities. On the constitutional question, the Court found that Clarke's statement was not testimonial under *Crawford:*

> Clarke made the statements to his friend by happenstance; Wright was not a police officer or a government informant seeking to elicit statements to further a prosecution against Clarke or Franklin. To the contrary, Wright was privy to Clarke's statements only as his friend and confidant.

The court distinguished *Cromer, supra,* in which an informant's statement to police officers was found testimonial: "Because the informant in *Cromer* implicated the defendant in statements to the police, the informant's statements were akin to statements elicited during police interrogation, i.e., the informant could reasonably anticipate that the statements would be used to prosecute the defendant."

See also United States v. Gibson, 409 F.3d 325 (6th Cir. 2005) (describing statements as nontestimonial where "the statements were not made to the police or in the course of an official investigation, nor in an attempt to curry favor or shift the blame.").

Defendant's own statements, reporting statements of another defendant, are not testimonial under the circumstances: *United States v. Gibson,* 409 F.3d 325 (6th Cir. 2005): In a case involving fraud and false statements arising from a mining operation, the trial court admitted

testimony from a witness that Gibson told him that another defendant was planning on doing something that would violate regulations applicable to mining. The court recognized that the testimony encompassed double hearsay, but held that each level of hearsay was admissible as an admission by a party-opponent. Gibson also argued that the testimony violated *Crawford.* But the court held that Gibson's statement and the underlying statement of the other defendant were both casual remarks made to an acquaintance, and therefore were not testimonial.

Crawford* inapplicable where hearsay statements are made by a declarant who testifies at trial: *United States v. Kappell, 418 F.3d 550 (6th Cir. 2005): In a child sex abuse prosecution, the victims testified and the trial court admitted a number of hearsay statements the victims made to social workers and others. The defendant claimed that the admission of hearsay violated his right to confrontation under *Crawford.* But the court held that *Crawford* by its terms is inapplicable if the hearsay declarant is subject to cross-examination at trial. The defendant complained that the victims were unresponsive or inarticulate at some points in their testimony, and therefore they were not subject to effective cross-examination. But the court found this claim foreclosed by *United States v. Owens,* 484 U.S. 554 (1988). Under *Owens*, the Constitution requires only an opportunity for cross-examination, not cross-examination in whatever way the defendant might wish. The defendant's complaint was that his cross-examination would have been more effective if the victims had been older. "Under *Owens,* however, that is not enough to establish a Confrontation Clause violation."

Business records are not testimonial: *United States v. Jamieson,* 427 F.3d 394 (6th Cir. 2005): In a prosecution involving fraudulent sale of insurance policies, the government admitted summary evidence under Rule 1006. The underlying records were essentially business records. The court found that admitting the summaries did not violate the defendant's right to confrontation. The underlying records were not testimonial under *Crawford* because they did not "resemble the formal statement or solemn declaration identified as testimony by the Supreme Court."

Statement by an anonymous coconspirator is not testimonial: *United States v. Martinez,* 430 F.3d 317 (6th Cir. 2005). The court held that a letter written by an anonymous coconspirator during the course and in furtherance of a conspiracy was not testimonial under *Crawford.* The court stated that "a reasonable person in the position of a coconspirator making a statement in the course and furtherance of a conspiracy would not anticipate his statements being used against the accused in investigating and prosecuting the crime."

Seventh Circuit

Odometer statements, prepared before any crime of odometer-tampering occurred, are not testimonial: ***United States v. Gilbertson,*** 435 F.3d 790 (7th Cir. 2006): In a prosecution for odometer-tampering, the government proved its case by introducing the odometer statements prepared when the cars were sold to the defendant, and then calling the buyers to testify that the mileage on the odometers when they bought their cars was substantially less than the mileage set forth on the odometer statements. The defendant argued that introducing the odometer statements violated *Crawford.* He contended that the odometer statements were essentially formal affidavits, the very kind of evidence that most concerned the Court in *Crawford.* But the court held that the concern in *Crawford* was limited to affidavits prepared for trial as a testimonial substitute. This concern did not apply to the odometer statements. The court explained as follows:

> The odometer statements in the instant case are not testimonial because they were not made with the respective declarants having an eye towards criminal prosecution. The statements were not initiated by the government in the hope of later using them against Gilbertson (or anyone else), nor could the declarants (or any reasonable person) have had such a belief. The reason is simple: each declaration was made *prior* to Gilbertson even engaging in the crime. Therefore, there is no way for the sellers to anticipate that their statements regarding the mileage on the individual cars would be used as evidence against Gilbertson for a crime he commits in the future.

Present sense impression, describing an event that occurred months before a crime, is not testimonial: ***United States v. Danford,*** 435 F.3d 682 (7th Cir. 2005): The defendant was convicted of insurance fraud after staging a fake robbery of his jewelry store. At trial, one of the employees testified to a statement made by the store manager, indicating that the defendant had asked the manager how to disarm the store alarm. The defendant argued that the store manager's statement was testimonial under *Crawford,* but the court disagreed. The court stated that "the conversation between [the witness] and the store manager is more akin to a casual remark than it is to testimony in the *Crawford*-sense. Accordingly, we hold that the district court did not err in admitting this testimony under Fed.R.Evid. 803(1), the present-sense impression exception to the hearsay rule."

Accomplice confession to law enforcement is testimonial: ***United States v. Jones,*** 371 F.3d 363 (7th Cir. 2004): An accomplice's statement to law enforcement was offered against the defendant, though it was redacted to take out any direct reference to the defendant. The court found that even if the confession, as redacted, was admissible as a declaration against interest, its admission would violate the Confrontation Clause after *Crawford.* The court noted that even though redacted, the confession was testimonial, as it was made during interrogation by law enforcement. And since the defendant never had a chance to cross-examine the accomplice, "under *Crawford*, no part of Rock's confession should have been allowed into evidence."

Police report offered for a purpose other than proving the truth of its contents is properly admitted even if it is testimonial: ***United States v. Price,*** 418 F.3d 771 (7th Cir. 2005): In a drug conspiracy trial, the government offered a report prepared by the Gary Police Department. The report was an "intelligence alert" identifying some of the defendants as members of a street gang dealing drugs. The report was found in the home of one of the conspirators. The government offered the report at trial to prove that the conspirators were engaging in counter-surveillance, and the jury was instructed not to consider the accusations in the report as true, but only for the fact that the report had been intercepted and kept by one of the conspirators. The court found that even if the report was testimonial, there was no error in admitting the report as proof of awareness and counter-surveillance. It relied on *Crawford* for the proposition that the Confrontation Clause does not bar the use of out-of-court statements "for purposes other than proving the truth of the matter asserted."

Eighth Circuit

911 calls and statements made to officers responding to the calls are not testimonial: ***United States v. Brun,*** 416 F.3d 703 (8th Cir. 2005): The defendant was charged with assault with a deadly weapon. The police received two 911 calls from the defendant's home. One was from the defendant's 12-year-old nephew, indicating that the defendant and his girlfriend were arguing, and requesting assistance. The other call came 20 minutes later, from the defendant's girlfriend, indicating that the defendant was drunk and had a rifle, which he had fired in the house and then left. When officers responded to the calls, they found the girlfriend in the kitchen crying; she told the responding officers that the defendant had been drunk, and shot his rifle in the bathroom while she was in it. All three statements (the two 911 calls and the girlfriend's statement to the police) were admitted as excited utterances, and the defendant was convicted. The court affirmed. The court had little problem in finding that all three statements were properly admitted as excited utterances, and addressed whether the admission of the statements violated the defendant's right to confrontation after *Crawford v. Washington.* The court first found that the nephew's 911 call was not "testimonial" within the meaning of *Crawford*, as it was not the kind of statement that was equivalent to courtroom testimony. It had "no doubt that the statements of an adolescent boy who has called 911 while witnessing an argument between his aunt and her partner escalate to an assault would be emotional and spontaneous rather than deliberate and calculated." The court used similar reasoning to find that the girlfriend's 911 call was not testimonial. The court also found that the girlfriend's statement to the police was not testimonial. It reasoned that the girlfriend's conversation with the officers "was unstructured, and not the product of police interrogation."

Statements made by a child-victim to a forensic investigator are testimonial: ***United States v. Bordeaux,*** 400 F.3d 548 (8th Cir. 2005): In a child sex abuse prosecution, the trial court admitted hearsay statements made by the victim to a forensic investigator. The court reversed the conviction, finding among other things that the hearsay statements were testimonial under *Crawford.* The court likened the exchange between the victim and the investigator to a police interrogation. It elaborated as follows:

> The formality of the questioning and the government involvement are undisputed in this case. The purpose of the interview (and by extension, the purpose of the statements) is disputed, but the evidence requires the conclusion that the purpose was to collect information for law enforcement. First, as a matter of course, the center made one copy of the videotape of this kind of interview for use by law enforcement. Second, at trial, the prosecutor repeatedly referred to the interview as a 'forensic' interview . . . That [the victim's] statements may have also had a medical purpose does not change the fact that they were testimonial, because *Crawford* does not indicate, and logic does not dictate, that multi-purpose statements cannot be testimonial.

Accomplice confession to law enforcement is testimonial: *United States v. Rashid,* 383 F.3d 769 (8th Cir. 2004): The court held that an accomplice's confession to law enforcement officers was testimonial and therefore inadmissible against the defendant, even though the confession did not specifically name the defendant and incriminated him only by inference.

Statements of a victim's state of mind and statements made for medical treatment are not testimonial: *Evans v. Luebbers,* 371 F.3d 438 (8th Cir. 2004): The defendant was tried for murdering his wife. The prosecution admitted hearsay statements of the victim, indicating that she feared that the defendant would hurt her or murder her. Most of these statements were admitted under the state of mind exception, to rebut the defendant's contention that the victim committed suicide. Others were admitted as made for medical treatment. The court found that none of the victim's hearsay statements were testimonial as they did not fit the specific kinds of hearsay statements listed as testimonial by the Court in *Crawford*, i.e., "to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."

Statement admissible as a declaration against penal interest, after *Williamson*, is not testimonial: *United States v. Manfre,* 368 F.3d 832 (8th Cir. 2004): An accomplice made a statement to his fiancee that he was going to burn down a nightclub for the defendant. The court held that this statement was properly admitted as a declaration against penal interest, as it was not a statement made to law enforcement to curry favor. Rather, it was a statement made to loved ones. For the same reason, the statement was not testimonial under *Crawford*; it was a statement made to a loved one and was "not the kind of memorialized, judicial-process-created evidence of which *Crawford* speaks."

Statements by a coconspirator during the course and in furtherance of the conspiracy are not testimonial: *United States v. Lee,* 374 F.3d 637 (8th Cir. 2004): The court held that statements admissible under the coconspirator exemption from the hearsay rule are by definition not testimonial. As those statements must be made during the course and in furtherance of the conspiracy, they are not the kind of formalized, litigation-oriented statements that the Court found to be testimonial in *Crawford.* The court reached the same result on co-conspirator hearsay in ***United States v. Reyes,*** 362 F.3d 536 (8th Cir. 2004).

Ninth Circuit

Certificate prepared by government officials prepared for purposes of litigation is NOT testimonial: ***United States v. Cervantes-Flores,*** 421 F.3d 825 (9th Cir. 2005): The defendant was convicted of being found in the United States after deportation, without permission to re-enter. As evidence that he had not been permitted to re-enter, the government offered a Certificate of Nonexistence of Record, indicating that a search found no indication of permission in the pertinent records. The defendant argued that admitting the CNR violated his confrontation rights after *Crawford,* but the court disagreed and affirmed the conviction. The court recognized that the CNR was prepared in anticipation of litigation, but nonetheless found the evidence not to be testimonial. It explained that while the certificate was prepared for litigation, the underlying records were not. (Though this misses the point that while the underlying records are not testimonial, the certificate as to their existence or non-existence could still be so because the certificate is prepared for purposes of litigation). The court concluded as follows:

> Finally, we note the obvious—that the CNR does not resemble the examples of testimonial evidence given by the Court [in *Crawford*]. "Police interrogations" and "prior testimony at a preliminary hearing, before a grand jury, or at a former trial" all involve live out-of-court statements against a defendant elicited by a government officer with a clear eye to prosecution. Ruth Jones' certification that a particular record does not exist in the INS's files bears no resemblance to these types of evidence.

See also United States v. Bahena-Cardenas, 411 F.3d 1067 (9th Cir. 2005) (a warrant of deportation was non-testimonial "because it was not made in anticipation of litigation, and because it is simply a routine, objective, cataloging of an unambiguous factual matter.").

Note: The result and rationale of *Cervantes-Flores* (like *Rubio-Rivera* in the Fifth Circuit) indicate that hearsay statements offered under Rule 803(10), as well as affidavits authenticating business records under Rules 902(11) and (12), will be considered non-testimonial and therefore admissible even after *Crawford.*

Statements in furtherance of a conspiracy are not testimonial; statements to police officers implicating the defendant in the conspiracy are testimonial: ***United States v. Allen,*** 425 F.3d 1231 (9th Cir. 2005): The court held that "co-conspirator statements are not testimonial and therefore beyond the compass of *Crawford's* holding." In contrast, a statement made by a former coconspirator to a police officer, after he was arrested, identifying the defendant as a person recruited for the conspiracy, was testimonial. There was no error in admitting this statement, however, because the declarant testified at trial and was cross-examined.

Statements made by a child-victim to a detective are testimonial: *Bockting v. Bayer,* 399 F.3d 1010 (9th Cir. 2005): The court found that statements of a child-victim of sexual abuse, made in an interview with a police detective, were testimonial within the meaning of *Crawford*. The court also held that *Crawford* was retroactive to cases on habeas review — a ruling that is contrary to the results reached in every other circuit.

Accomplice statement to law enforcement is testimonial: *United States v. Nielsen,* 371 F.3d 574 (9th Cir. 2004): Nielsen resided in a house with Volz. Police officers searched the house for drugs. Drugs were found in a floor safe. An officer asked Volz who had access to the floor safe. Volz said that she did not but that Nielsen did. This hearsay statement was admitted against Nielsen at trial The court found this to be error, as the statement was testimonial under Crawford, because it was made to police officers during interrogation. The court noted that even the first part of Volz's statement — that she did not have access to the floor safe — violated *Crawford* because it provided circumstantial evidence that Nielsen did have access.

Excited utterance not testimonial under the circumstances, even though made to law enforcement: *Leavitt v. Arave,* 371 F.3d 663 (9th Cir. 2004): In a murder case, the government introduced the fact that the victim had called the police the night before her murder and stated that she had seen a prowler who she thought was the defendant. The court found that the victim's statement was admissible as an excited utterance, as the victim was clearly upset and made the statement just after an attempted break-in. The court held that even if *Crawford* were retroactive, the statement was not testimonial under *Crawford*. The court explained as follows:

> Although the question is close, we do not believe that Elg's statements are of the kind with which *Crawford* was concerned, namely, testimonial statements. While the *Crawford* Court left "for another day any effort to spell out a comprehensive definition of 'testimonial,'" it gave examples of the type of statements that are testimonial and with which the Sixth Amendment is concerned — namely, "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and . . . police interrogations." We do not think that Elg's statements to the police she called to her home fall within the compass of these examples. Elg, not the police, initiated their interaction. She was in no way being interrogated by them but instead sought their help in ending a frightening intrusion into her home. Thus, we do not believe that the admission of her hearsay statements against Leavitt implicate the principal evil at which the Confrontation Clause was directed: the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused.

Thus, the *Leavitt* court holds that some hearsay statements are non-testimonial even though made to law enforcement.

Grand jury testimony is testimonial: *United States v. Wilmore,* 381 F.3d 868 (9th Cir. 2004): The court held, unsurprisingly, that grand jury testimony is testimonial under *Crawford*. It could hardly have held otherwise, because even under the narrowest definition of "testimonial" (i.e.,

the specific types of hearsay mentioned by the *Crawford* Court) grand jury testimony is covered within the definition.

Accusatory statements in a victim's diary are not testimonial: ***Parle v. Runnels,*** 387 F.3d 1030 (9th Cir. 2004): In a murder case, the government offered statements of the victim that she had entered in her diary. The statements recounted physical abuse that the victim received at the hand of the defendant. The defendant argued that the admission of the diary violated his right to confrontation. The court held that even if *Crawford* were retroactive, it would not help the defendant. The victim's diary was not testimonial, as it was a private diary of daily events. There was no indication that it was prepared for use at a trial.

Tenth Circuit

Statement made by an accomplice after arrest, but before formal interrogation, is testimonial: ***United States v. Summers,*** 414 F.3d 1287 (10th Cir. 2005): The defendant's accomplice in a bank robbery was arrested by police officers. As he was walked over to the patrol car, he said to the officer, "How did you guys find us so fast?". The court found that the admission of this statement against the defendant violated his right to confrontation under *Crawford.* The court reviewed the *Crawford* opinion in detail, including the three proffered tests for the term "testimonial" that were discussed by the Court. It stated that "the common nucleus present in the formulations which the Court considered centers on the reasonable expectations of the defendant." It held that "a statement is testimonial if a reasonable person in the position of the declarant would objectively foresee that his statement might be used in the investigation or prosecution of a crime." Thus, the court rejected the view that the term "testimonial" should be limited to the specific examples set forth in *Crawford*, i.e., grand jury testimony, prior testimony, plea allocution, and statements made during police interrogation.

Applying its test to the facts, the Court found that the accomplice's statement, "How did you guys find us so fast?", was testimonial. It explained as follows:

> Although Mohammed had not been read his *Miranda* rights and was not subject to formal interrogation, he had nevertheless been taken into physical custody by police officers. His question was directed at a law enforcement official. Moreover, Mohammed's statement . . . implicated himself and thus was loosely akin to a confession. Under these circumstances, we find that a reasonable person in Mohammed's position would objectively foresee that an inculpatory statement implicating himself and others might be used in a subsequent investigation or prosecution.

Eleventh Circuit

Warrant of deportation prepared by government officials is NOT testimonial: ***United States v. Cantellano,*** 430 F.3d 1142 (11th Cir. 2005): In an illegal reentry case, the defendant argued that the warrant of deportation was testimonial under *Crawford* and therefore his right to confrontation was violated by its admission. The warrant was offered to prove that the defendant left the country. The Court held that the warrant was not testimonial. It reasoned as follows:

> Although the Court in *Crawford* declined to give a comprehensive definition of "testimonial" evidence, non-testimonial evidence fails to raise the same concerns as testimonial evidence. Because non-testimonial evidence is not prepared in the shadow of criminal proceedings, it lacks the accusatory character of testimony. Non-testimonial evidence is not inherently adversarial. We are persuaded that a warrant of deportation does not implicate adversarial concerns in the same way or to the same degree as testimonial evidence. A warrant of deportation is recorded routinely and not in preparation for a criminal trial. It records facts about where, when, and how a deportee left the country. Because a warrant of deportation does not raise the concerns regarding testimonial evidence stated in *Crawford*, we conclude that a warrant of deportation is non-testimonial and therefore is not subject to confrontation.

The court also relied on the fact that the Fifth and the Ninth Circuits have held that certificates of no grant of entry (CNR's) are non-testimonial.

Cases Discussing the Impact of the Confrontation Clause on Non-Testimonial Hearsay After Crawford

Non-testimonial hearsay evaluated under the *Roberts* test: *Horton v. Allen,* 370 F.3d 75 (1st Cir. 2004): The court declared that hearsay statements offered under the state of mind exception were not testimonial. It further held that non-testimonial hearsay should be evaluated under the *Ohio v. Roberts* test to determine whether it violates the defendant's right to confrontation. The court found that the state of mind exception was "firmly-rooted" and therefore the admission of the statements under that exception satisfied the *Roberts* test. ***See also United States v. Felton,*** 417 F.3d 97 (1st Cir. 2005) (statement made during the course and in furtherance of the conspiracy was not testimonial under *Crawford;* no violation of the Confrontation Clause because the statement fell within a firmly rooted exception under *Roberts*).

Non-testimonial hearsay is governed by the *Roberts* test: *United States v. Saget,* 377 F.3d 233 (2d Cir. 2004): As discussed above, an accomplice's statement to an undercover agent was admitted as a declaration against penal interest, and the court found it to be non-testimonial. The court noted that the *Crawford* Court was critical of the *Roberts* reliability test as a way to evaluate hearsay under the Confrontation Clause, and that this critique might well be applicable to non-testimonial hearsay. In the end, however, the court observed that *Crawford* did not explicitly overrule *Roberts* insofar as non-testimonial hearsay was concerned. The court therefore evaluated the admissibility of the accomplice's statement under the *Roberts* test.

The court noted that it had not yet held that declarations against penal interest were firmly rooted under *Roberts*. The question, therefore, was whether the statement carried particularized guarantees of trustworthiness. The court declared as follows:

> Under our precedents, Beckham's statements to the CI were made in circumstances that confer adequate indicia of reliability on the statements. In United States v. Sasso, 59 F.3d 341 (2d Cir. 1995), we explained that "[a] statement incriminating both the declarant and the defendant may possess adequate reliability if . . . the statement was made to a person whom the declarant believes is an ally," and the circumstances indicate that those portions of the statement that inculpate the defendant are no less reliable than the self-inculpatory parts of the statement. Thus, in *Mathews* we concluded that the declarant's statements to his girlfriend were sufficiently reliable to be introduced against the defendant, given the unofficial setting in which the remarks were made and the declarant's friendly relationship with the listener. See *Matthews*, 20 F.3d at 546. Beckham's statements were made under circumstances almost identical to those at issue in *Mathews*, as Beckham believed that he was speaking with a friend - their conversations involved discussions of personal issues such as child support as well as details of the gun-running scheme - in a private setting. See also *Sasso,* 59 F.3d at 349-50 (finding that declarant's statements to his girlfriend were reliable because they were not made in response to questioning or in a coercive atmosphere). Moreover, because Beckham was describing his and Saget's method of buying and

transporting the guns, the majority of his statements were descriptions of acts that he and Saget had jointly committed. Thus, Beckham does not appear to have been attempting to shift criminal culpability from himself to Saget. The statements therefore contained sufficient guarantees of trustworthiness to be introduced against Saget.

The *Roberts* test remains applicable to non-testimonial hearsay: United *States v. Holmes,* 406 F.3d 337 (5th Cir. 2005): The court stated that with respect to nontestimonial hearsay statements, "*Crawford* leaves in place the *Roberts* approach to determining admissibility."

Accomplice's statements to a friend, implicating both the accomplice and the defendant in the crime, are admissible under the *Roberts* test : *Ramirez v. Dretke,* 398 F.3d 691 (5th Cir. 2005): The defendant was convicted of murder. Hearsay statements of his accomplice were admitted against him. The accomplice made statements both before and after the murder that directly implicated the defendant. These statements were made to the accomplice's roommate. The Court found that these statements were not testimonial under *Crawford* because they were "spontaneous out-of-court statements made outside any arguably judicial or investigatorial context." The Court also noted that the statements were not barred under *Roberts* because, unlike the confession to police officers found infirm in *Lilly v. Virginia,* the accomplice's statements in this case were made to a friend under informal circumstances. Thus, they bore particularized guarantees of trustworthiness.

Declaration against penal interest, made to a friend, is admissible under the *Roberts* test as applied to a non-firmly-rooted hearsay exception : *United States v. Franklin,* 415 F.3d 537 (6th Cir. 2005): The defendant was charged with bank robbery. One of the defendant's accomplices (Clarke), was speaking to a friend (Wright) some time after the robbery. Wright told Clarke that he looked "stressed out." Clarke responded that he was indeed stressed out, because he and the defendant had robbed a bank and he thought the authorities were on their trail. The court found no error in admitting Clarke's hearsay statement against the defendant as a declaration against penal interest, as it disserved Clark's interest and was not made to law enforcement officers in any attempt to curry favor with the authorities. On the constitutional question, the court found that Clarke's statement was not testimonial under *Crawford.* But the court noted that "the Supreme Court did not explicitly overrule its prior Confrontation Clause jurisprudence with its holding in *Crawford*" insofar as it applied to nontestimonial hearsay. "Consequently, with respect to non-testimonial hearsay statements, *Roberts* and its progeny remain the controlling precedents."

Applying *Roberts*, the court essentially rejected the government's argument that Rule 804(b)(3) is a firmly-rooted hearsay exception. It found, however, that Clarke's statements carried circumstantial guarantees of trustworthiness sufficient to satisfy the *Roberts* standards as applied to hearsay offered under an exception that is not firmly-rooted:

> First, Clarke made the self-inculpatory statements not to investigators, but to his close friend. Consequently, to the extent the statements inculpated Franklin, there is no basis to conclude that Clarke intentionally did so to curry favor with law enforcement. Further, the

context of Clarke's admissions to Wright was not that of puffing or bragging . . . . In contrast to cases in which a declarant confesses to law enforcement but additionally implicates his accomplice in the crime, this case involves statements the declarant (Clarke) made in confidential exchanges with a long-time friend — a friend he had no reason to conclude would reveal those statements to law enforcement. Moreover, in his statements to Wright, Clarke did not minimize his role in the robbery; the most plausible conclusion to draw from the content of the statements is that Clarke and Franklin each played substantial roles in the commission of the offense. . . . Accordingly, we conclude that Clarke's statements to Wright— which implicated both Clarke and Franklin — bear particularized guarantees of trustworthiness and are therefore admissible under the confrontation clause . . .

Importantly, the *Franklin* Court noted that the constitutional requirement of particularized guarantees of trustworthiness was in addition to the requirements of admissibility under Rule 804(b)(3). As the court put it: "It is with respect to this requirement that the demands of the confrontation clause supplant those of the rules of evidence." Thus, the court is stating that a statement can be admissible under Rule 804(b)(3) and yet admission of that statement can violate the Confrontation Clause. Note that the reason for a proposed amendment to add constitutional "warnings" is to prevent the possibility that a statement could be admissible under the Rule and yet its admission would violate the Confrontation Clause.

Defendant's own statements, reporting statements of another defendant, are not testimonial under the circumstances and bear particularized guarantees of trustworthiness: *United States v. Gibson,* 409 F.3d 325 (6th Cir. 2005): In a case involving fraud and false statements arising from a mining operation, the trial court admitted testimony from a witness that Gibson told him that another defendant was planning on doing something that would violate regulations applicable to mining. The court recognized that the testimony encompassed double hearsay, but that each level of hearsay was admissible as an admission by a party-opponent. Gibson also argued that the testimony violated *Crawford.* Here, Gibson's statement and the underlying statement of the other defendant were both casual remarks made to an acquaintance, and therefore were not testimonial. The court stated that *Crawford* dealt only with testimonial statements and did not disturb the rule that nontestimonial statements are constitutionally admissible if they bear independent and particularized guarantees of trustworthiness. The court found that particularized guarantees of trustworthiness existed in this case: the statements were not made in the course of an official investigation, and Gibson was not attempting to curry favor or shift blame.

Excited utterances are governed by, and properly admitted under, *Roberts*: *United States v. Brun,* 416 F.3d 703 (8th Cir. 2005): The court stated that the constitutional admissibility of non-testimonial hearsay continues to be governed by the *Roberts* reliability-based test, as the Supreme Court in *Crawford* had not abrogated that test insofar as it applies to non-testimonial hearsay. Applying the *Roberts* test to 911 calls as well as statements to responding officers, the court found no constitutional error in admitting the statements, as they were excited utterances that fell within a firmly-rooted hearsay exception.

Accusatory statements in a victim's diary were properly admitted under the *Roberts* analysis: *Parle v. Runnels*, 387 F.3d 1030 (9th Cir. 2004): In a murder case, the government offered statements of the victim that she had entered in her diary. The statements recounted physical abuse that the victim received at the hand of the defendant. The defendant argued that the admission of the diary violated his right to confrontation. As discussed above, the court held that the diary entries were not testimonial. The court applied the *Roberts* analysis to the diary entries. The diary was admitted under a hearsay exception that is something like a residual exception for statements made by victims—called colloquially the "O.J. exception." The court found that the exception was not firmly rooted because it was based on a general trustworthiness standard rather than categorical admissibility requirements. The question therefore was whether the diary entries carried particularized guarantees of trustworthiness. The court found sufficient guarantees to exist. The diary entries were private, they discussed intensely personal and embarrassing information, and so there was no motive to falsify. The diary was regularly kept and recounted parts of the victim's life other than her relationship with the defendant. The court found it "entirely reasonable for the state court to find that Mary's diary was trustworthy because she kept it regularly and in it recorded the everyday experiences of her life."

Preliminary Conclusions on the Crawford Case Law So Far:

1. Differing Views on the Term "Testimonial": Some courts are defining the term "testimonial" more broadly than others. It appears that there are two views. One view is that a statement is testimonial whenever a reasonable person would foresee that the statement might be used in a criminal investigation or prosecution. The more narrow view is that the term is defined by (and limited by) the examples given by the Supreme Court in *Crawford*: prior testimony, grand jury testimony, plea allocutions, and statements made pursuant to police interrogation; under this narrow view a statement, to be testimonial, must either be one of the described kinds of testimony or else very much like one of those types.

2. What Is the Difference Between the Tests as a Practical Matter? Most importantly, the broader test will cover most 911 calls and other statements by victims to law enforcement, finding them inadmissible unless the declarant is cross-examined. Victims who report a crime to law enforcement can anticipate that their statements will be used in a criminal investigation or prosecution; but under the narrow test, these kinds of reports are not equivalent to any of the examples listed by the Court in *Crawford*, and so they would be admissible.. Another important difference is that ministerial affidavits prepared for trial (like a certification that no public record exists, or a certification of business records) are undoubtedly testimonial under the broader test, but at least two courts have held such records not to be testimonial under the narrow test.

3. Statements That Are Clearly Not Testimonial: No matter the test employed, the courts have been clear that certain kinds of hearsay statements will not be considered testimonial. The most important class of non-testimonial statements are those made informally, outside any possible presence of law enforcement. The classic example is a statement by the declarant to his friend, which gives an account of a crime committed by the declarant and the defendant. That statement is admissible as a declaration against penal interest under *Williamson* (because it was not made to law enforcement) and it is non-testimonial for basically the same reason.

4. Continuing Vitality of the Roberts Test As Applied to Non-Testimonial Hearsay: Courts have uniformly held that if a hearsay statement is not testimonial, its admissibility under the Confrontation Clause remains governed by the *Roberts* test. These rulings make eminent sense, because while the Court in *Crawford* intimated that it might someday think about overruling *Roberts* entirely, it would not do so in *Crawford* because that case dealt only with testimonial hearsay. If *Roberts* is to be completely written out, that will have to be done by the Supreme Court. So if the hearsay is non-testimonial, its constitutional admissibility is governed in the first instance by whether it fits within a firmly-rooted hearsay exception. If that is not the case, the statement will still be admissible under the Confrontation Clause if it carries particularized guarantees of trustworthiness (without consideration of any extrinsic corroborating evidence).

5. What Does This All Mean For Rulemaking?

It would not seem to make sense to try to incorporate any definition of "testimonial" into any of the hearsay exceptions, because there is no firm agreement on the term. It is true that some hearsay exceptions are subject to unconstitutional application, especially under the broader test, because they cover some statements that are testimonial. An example is an excited utterance by a victim, identifying the defendant to police officers responding to a 911 call. But it would not be prudent to amend the excited utterance exception at this point, because there is no agreement yet on whether such statements are testimonial.

Nor would it make such sense to add some general language to the hearsay exceptions such as "so long as the statement is not testimonial." It is true that such a generic change would mean that the rules could not be applied unconstitutionally applied; but because there is no agreement on the scope of the term "testimonial", such a change would not in fact be very helpful. Caution in defining or referring to "testimonial" in a rule is especially warranted in light of the fact that the Court has two cases before it involving the meaning of "testimonial."

Rulemaking may, however, be useful at this point to provide a constitutional "warning" that hearsay may be admissible under a Federal Rules hearsay exception and yet its admission may violate the accused's right to confrontation. The idea that the evidence rules might not be consistent with the constitution is counterintuitive; unschooled practitioners may inadvertently waive a valid constitutional argument by making an objection only on hearsay grounds. For more on a possible amendment to provide constitutional "warnings," see the separate memorandum in this agenda book.

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Possible Rule Amendments Noting Constitutional Limitations on Admitting (and Excluding) Hearsay
Date: March 22, 2006

Introduction on the Need for "Constitutional Warnings" in the Hearsay Rule and its Exceptions

In *Crawford v. Washington*, 541 U.S. 36 (2004), the Court held that admission of "testimonial" hearsay by the government in a criminal case violates the accused's right to confrontation unless the declarant is unavailable and has been cross-examined. The Court did not define the term "testimonial." But it is clear that some hearsay that would fall within one of the Federal Rules hearsay exceptions will be considered testimonial under *Crawford*, and its admission would violate the constitutional rights of the accused. For example, grand jury testimony was often admitted under the residual exception (Rule 807) when the court found it reliable. But grand jury testimony is listed as a form of testimonial hearsay in *Crawford*, and therefore its admission today would violate the accused's right to confrontation. Similarly, some statements admissible as excited utterances might be considered testimonial — as indicated in the outline of case law after *Crawford*, included in this agenda book. And certain statements of accomplices to law enforcement might be considered admissible under the exception for declarations against penal interest (at least if they do not specifically identify the accused); but statements made to law enforcement by accomplices are clearly testimonial under *Crawford* whether or not they directly mention the accused.

The Committee has decided against trying to amend the specific hearsay exceptions so that "testimonial" hearsay would not be permitted by any of the exceptions. Thus, the Committee at its last meeting voted not to act on a proposal that would have amended Rule 804(b)(3); that amendment was intended to limit the exception in such a way that it would not allow testimonial hearsay to be admitted. The Committee was concerned that the term "testimonial" had not yet been defined with any precision, and as such any amendment to a specific hearsay exception ran the risk of embracing a definition of "testimonial" that would become undermined or outmoded by

subsequent developments in the case law. Committee members thus determined that it would not make sense to try to define in the rules all of the possible hearsay statements that might be constitutionally problematic after *Crawford*—especially because *Crawford* remains a moving target and the Court has just heard argument in two *Crawford* cases

While the Committee has decided not to propose an amendment to the specific hearsay exceptions, the Committee has expressed concern that hearsay statements admitted under some of the Federal Rules exceptions would violate the right to confrontation after *Crawford*. The Evidence Rules Committee has long taken the position that rules should be amended if they are subject to unconstitutional application; otherwise the rules become a trap for the unwary, as counsel may not make a constitutional objection under the assumption that the rules would never allow admission of evidence that violated a party's constitutional rights. *See, e.g., United States v. Logan,* 419 F.3d 172 (2d Cir. 2005) (*Crawford* objection reviewed for plain error only, because defense counsel made only a hearsay objection at trial); *United States v. Baker,* 432 F.3d 1189 (11th Cir. 2005) (same).

At its last meeting, the Committee tentatively concluded that a generic reference to constitutional requirements might usefully be placed either in the hearsay rule itself (Rule 802), or before each of the rules providing exceptions that might be problematic after *Crawford* (Rules 801(d)(2), 803, 804 and 807). Such a generic reference does not run the risk of being inconsistent with the Supreme Court's subsequent interpretations of the Confrontation Clause. The Reporter noted that there is precedent for generic constitutional "warning" language in the Evidence Rules: Rule 412 provides that evidence must be admitted (despite the exclusionary language in the Rule) where exclusion would violate the constitutional right of the accused.

The Committee directed the Reporter to prepare an amendment that would provide a basic reference to the constitutional rights of the accused with regard to admission of hearsay under the Federal Rules hearsay exceptions. The Reporter stated that he would prepare one model that would be an amendment to Rule 802, the hearsay rule itself, and another model that would amend the hearsay exceptions by providing a reference to the constitutional rights of the accused at the beginning of Rules 801(d)(1)(2), 803, 804 and 807. The Committee agreed to consider these models at the next meeting.

This memo sets forth the models for generic references to constitutional requirements in the hearsay rule and its exceptions.

Suggested Course for Providing Constitutional Warnings

I considered whether to include the generic references only in the hearsay exceptions, or instead only in the hearsay rule itself. It appears, though, that if the Committee decides that such generic references are worthwhile, it makes the most sense to include them *both* in the hearsay exceptions and in the hearsay rule itself. The reasons for this conclusion follow:

The Rule 802 Solution:

Placing constitutional "warnings" language only in Rule 802 will fail to cover the problem that arises when a statement is offered under one of the Rule 801(d) exemptions, and its admission violates the Confrontation Clause after *Crawford.* This is because Rule 802 by definition covers "hearsay," and statements offered under Rule 801(d)(2) are by definition *not* hearsay. Thus, a warning in Rule 802 that hearsay otherwise admissible under an exception could nonetheless violate the constitution does not apply at all to statements that are not hearsay in the first place. This lack of coverage stems from the anomaly in the Federal Rules of defining certain hearsay exceptions (for prior statements of testifying witnesses and party-admissions) as "not hearsay" rather than "hearsay subject to an exception."

It could be argued that any failure to cover the Rule 801(d) exemptions is not problematic because any statement admitted under those exemptions will not violate the defendant's right to confrontation, even after *Crawford* — and so no constitutional warning is necessary. It is true that *most* statements fitting within Rule 801(d)(1) will present no constitutional problem even after *Crawford.* Prior statements of testifying witnesses — covered by Rule 801(d)(1) — will satisfy the Confrontation Clause by definition, because the admissibility requirement for such statements is that the declarant is subject to cross-examination at trial. See note 9 of the majority decision in *Crawford* ("Finally, we reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. *See California v. Green,* 399 U.S. 149 (1970)."). As to party-admissions, it is also true that virtually all of them will be admissible consistently with the Confrontation Clause. The defendant's own statements — either made or adopted — pose no constitutional bar because the defendant can have no right to cross-examine himself. As to co-conspirator statements, the Court in *Crawford* declared that such statements were "by their nature" not testimonial, because to be made during the course of and in furtherance of the conspiracy they would have to be made outside the context of, and not prepared for, litigation. After *Crawford,* lower courts have encountered situations in which statements prepared for litigation were indeed testimonial because they were made in order to influence a litigation improperly. Even these statements did not violate the Confrontation Clause, however, because they were admitted not for their truth but because they were false statements. *See, e.g., United States v. Stewart,* 433 F.3d 273 (2d Cir. 2006) (co-conspirator statements made to government officials to cover-up a crime were testimonial, but not admitted for their truth and so were not barred by *Crawford*).

It appears, nonetheless, that there could be situations in which a statement could be admissible under Rule 801(d)(2), and yet would be testimonial and offered for its truth, so as to violate *Crawford.* Suppose a corporation is suspected of dumping hazardous waste, a criminal offense. The driver who dumped the waste is arrested by police officers and interrogated. He states that corporate policy is to violate the law with impunity and that he knew he had to violate the law to keep his job. That statement to police officers is clearly testimonial under *Crawford,* and the government would clearly seek to offer it for its truth against the corporation. Hence, admission would violate the Confrontation Clause after *Crawford.* And yet, the statement would be admissible

under Rule 801(d)(2) — not as a coconspirator statement (because it doesn't further a conspiracy) but under Rule 801(d)(2)(D) as a statement by an agent about a matter within the scope of his authority. Agents' statements under that subdivision need not be in furtherance of anything. They simply have to be a statement by an agent about a matter within the scope of his authority, and the statement to police officers clearly fits that admissibility requirement. It therefore follows that any plan of providing constitutional "warnings" should not ignore Rule 801(d)(1).

Moreover, it can be argued that placing the warning only in Rule 802 will not provide an effect warning to practitioners of the possible unconstitutionality of otherwise admissible hearsay after *Crawford.* First, it appears that most of the work of practitioners and courts is directed to the hearsay exceptions rather than the hearsay rule itself. Rule 802 is infrequently cited and infrequently relied upon in discussing hearsay questions. For example, the Federal Rules of Evidence Manual has two pages of annotations on Rule 802. In contrast, the Manual has 425 pages of annotations on the hearsay exceptions and exemptions. Indeed, the Supreme Court recognized the focus of courts and lawyers on the exceptions rather than the hearsay rule in *United States v. Owens,* 484 U.S. 554 (1988). *Owens* involved the admissibility of a statement of prior identification. The parties argued about whether the statement was properly admitted under Rule 801(d)(1)(C), and if so whether that admission violated the defendant's right to confrontation. The Court noted:

> This case has been argued, both here and below, as though Federal Rule of Evidence 801(d)(1)(C) were the basis of the challenge. That is substantially but not technically correct. If respondent's arguments are accepted, it is Rule 802 that would render the out-of-court statement inadmissible as hearsay; but as explained in Part III, it is ultimately Rule 801(d)(1)(C) that determines whether Rule 802 is applicable.

In sum, if the idea is to provide notice about a potential constitutional problem in admitting hearsay under the Federal Rules exceptions, it would appear that Rule 802 is not a perfect vehicle for providing notice because it is rarely referred to by courts and litigants, and does not cover Rule 801(d).

The Hearsay Exceptions/Exemptions Solution:

As stated above, it would appear to be more effective to put the "constitutional warning" language in Rules 801(d), 803, 804 and 807, rather than the hearsay rule itself. But it can be argued that if a "constitutional warning" is appropriate, it should be placed not only in the hearsay exceptions but *also* in the hearsay rule; the question is not necessarily either/or, but how to provide the most effective notice of the constitutional problems lurking after *Crawford.*

There are at least two reasons why it may make sense to add constitutional warnings language to Rule 802 as well as the hearsay exceptions. The first is obvious: notice will probably be more effective if it is more widespread. Of course there are limits on that principle; it would appear excessive, for example, to place constitutional warnings about the hearsay rule and its exceptions

in rules that don't even relate to hearsay. But clearly rules 801, 802, 803, 804, and 807 all directly raise the issue of constitutional problems with admissible hearsay after *Crawford*.

The second reason for including Rule 802 as part of a "constitutional warnings" package has nothing to do with *Crawford*, but rather with the converse problem: the *exclusion* of some hearsay offered to exculpate a criminal defendant may violate the defendant's constitutional rights—not the right to confrontation, but the constitutional rights to present favorable witnesses and to due process. In *Chambers v. Mississippi,* 410 U.S. 284 (1972), the Court invalidated a conviction in part on the ground that exculpatory hearsay offered by the defendant was excluded. The Court stated that "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." The Court noted, of course, that an accused does not have a constitutional right to admit whatever exculpatory hearsay is at hand. But in *Chambers*, the hearsay was found to be extremely reliable under the circumstances, as well as critical to the defendant's defense.

It is fair to state that *Chambers* has not been read as a general principle. It has usually been limited to its facts: a case in which one evidence rule prohibited the defendant from calling the person who was probably responsible for the crime, and another (the hearsay rule) prevented the defendant from introducing reliable hearsay from that person. *See, e.g., Dunlap v. Hepp,* 436 F.3d 739, 742 (7th Cir. 2006) (noting that *Chambers* is a "fact-based" decision and refusing to overturn a state conviction in which exculpatory evidence was excluded in a case of child sex abuse). *Grochulski v. Henderson,* 637 F.2d 50, 55 (2d Cir. 1980) (*"Chambers v. Mississippi*, an opinion confined to its facts, may be read to stand for the principle that state evidentiary rules may not unduly intrude into the right to present an effective defense under the Sixth Amendment. In *Chambers*, the Court found that such a denial of a fair trial had occurred when the conjunction of two state evidentiary rules-one prohibiting the impeachment by a party of its 'own' witness, and one prohibiting the admission of any hearsay admissions against penal interest-prevented a criminal defendant from introducing strong evidence that another individual had confessed to the crime for which he was on trial."). A Lexis search indicates that *Chambers* has been distinguished, rather than applied, in 158 reported cases.[1] Yet in the end *Chambers* stands for the proposition that at least in some cases, a criminal defendant will have an argument that statements excluded by the hearsay rule nonetheless must be admitted to comport with the defendant's constitutional right to an effective defense.

If the Committee is in agreement that it is important to notify counsel that there may be a lack of congruence between the hearsay rule and the accused's constitutional rights, then it would appear to make sense to provide notice of the fact that exclusion under the hearsay rule might not be determinative. That "constitutional warning" can only be made in Rule 802, not in the exceptions.

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[1] The Supreme Court this term is hearing a case that raises questions about the scope of *Chambers*. *See State v. Holmes*, 361 S.C. 333 (2004), *cert. granted,* 126 S.Ct. 34 (2005) (challenging exclusion of evidence of third-party guilt as in violation of due process standards set forth in *Chambers*). *Holmes* does not involve a hearsay question.

Accordingly, the models below provide "constitutional warnings" in the hearsay rule as well as the exceptions.

Draft of Constitutional Warnings Language

What follows are possible amendments to the hearsay rule and its exceptions to provide constitutional warnings — including Committee Notes.

Possible Amendment to Rule 801:

Rule 801. Definitions

The following definitions apply under this article:

(a) Statement.—A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant.—A "declarant" is a person who makes a statement.

(c) Hearsay.—"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay.—A statement is not hearsay if—

(1) Prior statement by witness.—The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

(2) Admission by party-opponent.—The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

(e) A statement that is not hearsay under (d) may nonetheless be excluded by Act of Congress, by other rules prescribed by the Supreme Court pursuant to statutory authority, or if its admission would violate the constitutional rights of a criminal defendant.

Committee Note

The amendment recognizes the possibility that the admission of some statements falling within the exemptions to the hearsay rule provided by Rule 801(d) may nonetheless be excluded under other rules, pursuant to statutory authority, and most importantly where admission of a statement would violate the right to confrontation of a criminal defendant. *See Crawford v. Washington,* 541 U.S. 36, 61 (2004) (holding that in the absence of cross-examination, the admission of "testimonial" hearsay violates the criminal defendant's right to confrontation even if the statement fits within a hearsay exception); *United States v. Brito*, 427 F.3d 53 (1st Cir. 2005) (noting that hearsay may be testimonial even though it qualifies for admissibility under the Federal Rules

hearsay exception for excited utterances); *United States v. Summers,* 414 F.3d 1287 (10th Cir. 2005) (holding that a hearsay statement was testimonial and its admission violated the defendant's right to confrontation, even if it would have been admissible under the Federal Rules hearsay exception for present sense impressions).

The amendment does not purport to change the scope of the hearsay exemptions in Rule 801(d), nor to determine what statements are "testimonial" and what statements are not. The intent of the amendment is to notify counsel in criminal cases that statements falling within Rule 801(d) might still be subject to exclusion, most importantly when their admission would violate the criminal defendant's right to confrontation. The amendment is intended to provide a notice function that will protect against the inadvertent waiver of constitutional protections. *See, e.g., United States v. Logan,* 419 F.3d 172 (2d Cir. 2005) (Confrontation Clause objection under *Crawford* was reviewed for plain error only, because defense counsel made only a hearsay objection at trial); *United States v. Baker,* 432 F.3d 1189 (11th Cir. 2005) (same)

Possible Amendment to Rule 802:

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules, ~~or~~ by other rules prescribed by the Supreme Court pursuant to statutory authority, ~~or~~ by Act of Congress, or where exclusion would violate the constitutional rights of the criminal defendant.. A Statement not excluded by the hearsay rule may nonetheless be excluded by other rules prescribed by the Supreme Court pursuant to statutory authority, by Act of Congress, or if its admission would violate the constitutional rights of a criminal defendant.

Committee Note

The amendment recognizes the possibility that hearsay admissible under the rules of evidence may nonetheless violate the right to confrontation of a criminal defendant. *See Crawford v. Washington,* 541 U.S. 36, 61 (2004) (holding that in the absence of cross-examination, the admission of "testimonial" hearsay violates the criminal defendant's right to confrontation even if the statement fits within a hearsay exception); *United States v. Brito*, 427 F.3d 53 (1st Cir. 2005) (noting that hearsay may be testimonial even though it qualifies for admissibility under the Federal Rules hearsay exception for excited utterances); *United States v. Summers,* 414 F.3d 1287 (10th Cir. 2005) (holding that a hearsay statement was testimonial and its admission violated the defendant's right to confrontation, even if it would have been admissible under the Federal Rules hearsay exception for present sense impressions).

The amendment also recognizes the possibility that in some circumstances, exclusion of a hearsay statement proffered by a criminal defendant may violate the defendant's constitutional rights. *See Chambers v. Mississippi,* 410 U.S. 284, 302 (1972) (stating that "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice")

The amendment does not purport to change the scope of the hearsay rule, nor to determine which hearsay statements are "testimonial" and what statements are not. Nor does the amendment purport to determine when the exclusion of hearsay proffered by a criminal defendant will violate that defendant's constitutional right. The intent of the amendment is to notify counsel in criminal cases that hearsay statements admissible under the Federal Rules of Evidence might still be subject to exclusion, and conversely that the Constitution may in some cases mandate admission of hearsay otherwise excluded under those rules. The amendment is intended to provide a notice function that will protect against the inadvertent waiver of constitutional protections. *See, e.g., United States v. Logan,* 419 F.3d 172 (2d Cir. 2005) (Confrontation Clause objection under *Crawford* was reviewed for plain error only, because defense counsel made only a hearsay objection at trial); *United States v. Baker,* 432 F.3d 1189 (11th Cir. 2005) (same)

Possible Amendment to Rule 803:

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness, but such statements may be excluded by Act of Congress, by other rules prescribed by the Supreme Court pursuant to statutory authority, or if their admission would violate the constitutional rights of a criminal defendant:

* * *

Committee Note

The amendment recognizes the possibility that the admission of some statements falling within the exceptions to the hearsay rule provided by Rule 803 may nonetheless be excluded under other rules, pursuant to statutory authority, and most importantly where admission of the hearsay would violate the right to confrontation of a criminal defendant. *See Crawford v. Washington,* 541 U.S. 36, 61 (2004) (holding that in the absence of cross-examination, the admission of "testimonial" hearsay violates the criminal defendant's right to confrontation even if the statement fits within a hearsay exception); *United States v. Brito*, 427 F.3d 53 (1st Cir. 2005) (noting that hearsay may be testimonial even though it qualifies for admissibility under the Federal Rules hearsay exception for excited utterances); *United States v. Summers,* 414 F.3d 1287 (10th Cir. 2005) (holding that a hearsay statement was testimonial and its admission violated the defendant's right to confrontation, even if it would have been admissible under the Federal Rules hearsay exception for present sense impressions).

The amendment does not purport to change the scope of the hearsay exceptions in Rule 803, nor to determine what statements are "testimonial" and what statements are not. The intent of the amendment is to notify counsel in criminal cases that statements falling within a Rule 803 exception might still be subject to exclusion, most importantly when their admission would violate the criminal defendant's right to confrontation. The amendment is intended to provide a notice function that will protect against the inadvertent waiver of constitutional protections. *See, e.g., United States v. Logan,* 419 F.3d 172 (2d Cir. 2005) (Confrontation Clause objection under *Crawford* was reviewed for plain error only, because defense counsel made only a hearsay objection at trial); *United States v. Baker,* 432 F.3d 1189 (11th Cir. 2005) (same)

Possible Amendment to Rule 804:

Rule 804. Hearsay Exceptions; Declarant Unavailable

(a) Definition of unavailability.—''Unavailability as a witness'' includes situations in which the declarant—

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay exceptions.—The following are not excluded by the hearsay rule if the declarant is unavailable as a witness <u>but such statements may be excluded by Act of Congress, by other rules prescribed by the Supreme Court pursuant to statutory authority, or if their admission would violate the constitutional rights of a criminal defendant</u>:

* * *

Committee Note

The amendment recognizes the possibility that the admission of some statements falling within the exceptions to the hearsay rule provided by Rule 804 may nonetheless be excluded under other rules, pursuant to statutory authority, and most importantly where admission of the hearsay would violate the right to confrontation of a criminal defendant. *See Crawford v. Washington,* 541 U.S. 36, 61 (2004) (holding that in the absence of cross-examination, the admission of "testimonial" hearsay violates the criminal defendant's right to confrontation even if the statement fits within a hearsay exception); *United States v. Aguilar,* 295 F.3d 1018, 1021-1023 (CA9 2002) (plea allocution showing the existence of a conspiracy, found admissible under the Federal Rules hearsay exception for declarations against penal interest, held to be testimonial hearsay barred by the

Confrontation Clause in *Crawford*); *United States v. Brito*, 427 F.3d 53 (1st Cir. 2005) (noting that hearsay may be testimonial even though it qualifies for admissibility under the Federal Rules hearsay exception for excited utterances).

The amendment does not purport to change the scope of the hearsay exceptions in Rule 804, nor to determine what statements are "testimonial" and what statements are not. The intent of the amendment is to notify counsel in criminal cases that statements falling within a Rule 804 exception might still be subject to exclusion, most importantly when their admission would violate the criminal defendant's right to confrontation. The amendment is intended to provide a notice function that will protect against the inadvertent waiver of constitutional protections. *See, e.g., United States v. Logan,* 419 F.3d 172 (2d Cir. 2005) (Confrontation Clause objection under *Crawford* was reviewed for plain error only, because defense counsel made only a hearsay objection at trial); *United States v. Baker,* 432 F.3d 1189 (11th Cir. 2005) (same)

Possible Amendment to Rule 807:

Rule 807. Residual Exception

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant. A statement admissible under this rule may nonetheless be excluded by Act of Congress, by other rules prescribed by the Supreme Court pursuant to statutory authority, or if its admission would violate the constitutional rights of a criminal defendant.

Committee Note

The amendment recognizes the possibility that the admission of some statements falling within the exception to the hearsay rule provided by Rule 807 may nonetheless be excluded under other rules, pursuant to statutory authority, and most importantly where admission of the hearsay would violate the right to confrontation of a criminal defendant. *See Crawford v. Washington,* 541 U.S. 36, 61 (2004) (holding that in the absence of cross-examination, the admission of "testimonial" hearsay violates the criminal defendant's right to confrontation even if the statement fits within a hearsay exception); *United States v. Papajohn*, 212 F.3d 1112, 1118-1120 (8th Cir. 2000) (grand jury testimony found admissible under Rule 807, held to be testimonial hearsay barred by the Confrontation Clause in *Crawford*); *United States v. Brito*, 427 F.3d 53 (1st Cir. 2005) (noting that hearsay may be testimonial even though it qualifies for admissibility under the Federal Rules hearsay exception for excited utterances).

The amendment does not purport to change the scope of the hearsay exception in Rule 807, nor to determine what statements are "testimonial" and what statements are not. The intent of the amendment is to notify counsel in criminal cases that statements falling within the Rule 807 exception might still be subject to exclusion, most importantly when their admission would violate the criminal defendant's right to confrontation. The amendment is intended to provide a notice function that will protect against the inadvertent waiver of constitutional protections. *See, e.g., United States v. Logan,* 419 F.3d 172 (2d Cir. 2005) (Confrontation Clause objection under *Crawford* was reviewed for plain error only, because defense counsel made only a hearsay objection at trial); *United States v. Baker,* 432 F.3d 1189 (11th Cir. 2005) (same).

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Proposed Evidence Rule 107 to accommodate electronic evidence.
Date: March 21, 2006

At its last meeting, the Evidence Rules Committee tentatively approved a new Rule 107 — a rule intended to make the language of the Rules compatible with technological developments in the presentation of evidence. The amendment was held back by the Committee until it had a "package" of proposed amendments. At this meeting, the Committee is considering a new Rule 502, as well as amendments to the hearsay rule and its exceptions to conform with constitutional limitations on admitting and excluding hearsay. It is therefore possible that the Committee will approve for public comment one or more amendments to the Evidence Rules; if that is the case then Rule 107 might become part of the package. Accordingly, this memorandum revisits the proposed Rule (with some minor revisions) and submits it for the consideration of the Committee.

This memorandum is in five parts. Part One reviews the "paper-based" language of the Evidence Rules, the need for updating that language, and the problem of directly amending so many rules. Part Two describes the case law on the admissibility of electronic evidence under the Federal Rules. Part Three discusses drafting alternatives. Part Four sets forth the Rule and Committee Note as they were tentatively approved by the Committee at the last meeting (with some modifications made in the interim). Part Five addresses concerns expressed by some Committee members at the last meeting that the Rule might lead to situations in which certain electronic evidence would be self-authenticating even though it might be the kind of evidence that is forged or altered.

It must be emphasized that the proposed rule has a very limited "agenda." There is no intent to change the existing treatment of electronic evidence under the current Evidence Rules and case law. Nor is there a need to make such a change. I have not found a case in which a court refused to admit evidence that it otherwise would have admitted on the ground that the proffered evidence was electronic and therefore was not covered by the wording of an Evidence Rule. The courts are analyzing the admissibility of electronic evidence using the same admissibility rules that are used for any other evidence. Thus, the basic goals of the amendment are simply to update the language

of the Evidence Rules and conform the Rules to the practice that is occurring in federal courts every day. As Greg Joseph (a former member of the Committee and an expert on electronic evidence) says: Rule 107 "is just moving the sidewalk to where the people are already walking."

At its last meeting, the Committee at least tentatively determined that Rule 107, while modest, was worth proposing for the following reasons: 1) an amendment would be a recognition of the ubiquity and importance of electronic evidence, and would indicate that the rulemaking process is cognizant of technological developments affecting the courts; 2) an amendment would be part of the Committee's custodial function, to assure that the language of the Rules does not become outmoded and is in accord with common practice; 3) an amendment would make the Rules more user-friendly; and 4) most importantly, an amendment would protect the unschooled practitioner, whose literal reading of the rules might lead him to conclude that much electronic evidence is not admissible, when in fact it is.

I. Rules That Do Not Explicitly Accommodate Electronic Evidence

Computerized evidence is evidence. Therefore, any reference in the Rules to "evidence" can accommodate any technological change without need for amendment. However, computerized evidence is not necessarily a "document" or a "writing" or a "record" or a "memorandum" or a "publication." That is, any reference to a paper or other tangible product might be considered in tension with evidence that is presented electronically (e.g., a computerized accident reconstruction, a presentation of a web page, etc.). Therefore, any Rule that uses one of those paper-based terms is, at least potentially, a rule that might need to be amended to accommodate electronic evidence. What follows is a list of the Rules containing these potentially problematic terms, with the problematic language in bold.

Note that the references to "writings" and "recordings" in Article 10 are not considered in this section, because those terms are expansively defined in Rule 1001 and 1002 to include "letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other forms of data compilation." This definition has been held expansive enough to cover computer-generated information. See, e.g., United States v. Seifert, 351 F.Supp.2d 926 (D.Minn. 2005) (transfer of a photo from analog to digital format does not violate the best evidence rule because it is a mechanical or electronic rerecording within the meaning of Rule 1002).

Rules With "Paper-Based" Language

1. Rule 106. Remainder of or Related Writings or Recorded Statements

When a **writing** or **recorded** statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other **writing** or **recorded** statement which ought in fairness to be considered contemporaneously with it.

2. Rule 412. Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition

* * *

(c) PROCEDURE TO DETERMINE ADMISSIBILITY –

(1) A party intending to offer evidence under subdivision (b) must –

(A) file a **written** motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and

(B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule the court must conduct a hearing *in camera* and afford the victim and parties the right to attend and be heard. The motion, related **papers**, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

3. Rule 609. Impeachment by Evidence of Conviction of Crime

* * *

(b) *Time limit.* — Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance **written** notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

4. Rule 612. Writing Used to Refresh Memory

Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a **writing** to refresh memory for the purpose of testifying, either —

(1) while testifying, or

(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,

an adverse party is entitled to have the **writing** produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the **writing** contains matters not related to the subject matter of the testimony the court shall examine the **writing** in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a **writing** is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

5. Rule 801. Definitions

The following definitions apply under this article:

(a) *Statement.* — A ``statement'' is (1) an oral or **written** assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) *Declarant.* — A ``declarant'' is a person who makes a statement.

(c) *Hearsay.* — ``Hearsay'' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

6. Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

(5) *Recorded recollection.* — A **memorandum** or **record** concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the **memorandum** or **record** may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) *Records of regularly conducted activity.* — A **memorandum, report, record,** or **data compilation, in any form**, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the **memorandum, report, record, or data compilation**, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term ``business'' as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Note that while Rule 803(6) contains problematic references to memoranda, records and reports, it also includes "data compilations in any form". It is possible, though not certain, that this term is broad enough to cover any computerized evidence that would otherwise be admissible under this Rule. The Uniform Rules proposal would replace the term "data compilation" with the phrase "other technology in perceivable form". The version of Rule 107 approved by the Committee updates the language to refer to any electronically stored information.

(7) *Absence of entry in records kept in accordance with the provisions of paragraph (6).* — Evidence that a matter is not included in the **memoranda, reports, records**, or **data compilations, in any form**, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a **memorandum, report, record, or data compilation** was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

See the note after Rule 803(6).

(8) *Public records and reports.* — **Records, reports**, statements, or **data compilations, in any form**, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

See the note after Rule 803(6).

(9) *Records of vital statistics.* — **Records or data compilations, in any form**, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

See the note after Rule 803(6).

(10) *Absence of public record or entry.* — To prove the absence of a **record, report,** statement, or **data compilation, in any form**, or the nonoccurrence or nonexistence of a matter of which a **record, report,** statement, or **data compilation, in any form,** was regularly made and preserved by a public office or agency, evidence in the form of a **certification** in accordance with rule 902, or testimony, that diligent search failed to disclose the **record, report,** statement, or **data compilation**, or entry.

See the note after Rule 803(6).

(11) *Records of religious organizations.* — Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept **record** of a religious organization.

(12) *Marriage, baptismal, and similar certificates.* — Statements of fact contained in a **certificate** that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) *Family **records**.* — Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

Note: Besides the reference to records in the title, the items described in the rule are physically-oriented. Query whether the language "or the like" would be broad enough to cover electronically stored or generated family records.

(14) ***Records** of documents affecting an interest in property.* — The **record** of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded **document** and its execution and delivery by each person by whom it purports to have been executed, if the **record** is a **record** of a public office and an applicable statute authorizes the recording of **documents** of that kind in that office.

(15) *Statements in **documents** affecting an interest in property.* — A statement contained in a **document** purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the **document**, unless dealings with the property since the **document** was made have been inconsistent with the truth of the statement or the purport of the **document.**

(16) *Statements in ancient **documents**.* — Statements in a **document** in existence twenty years or more the authenticity of which is established.

(17) *Market reports, commercial **publications.*** — Market quotations, tabulations, lists, directories, or other **published** compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) *Learned treatises.* — To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert in direct examination, statements contained in **published treatises, periodicals or pamphlets** on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

* * *

7. Rule 901. Requirement of Authentication or Identification

* * *

(b) *Illustrations.* — By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

* * *

(7) Public **records** or reports. — Evidence that a **writing** authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public **record, report,** statement, or **data compilation,** in any form, is from the public office where items of this nature are kept.

Note that Rule 901(7) also refers to "records" and this could be problematic in light of computerization. However, the word "record" is grouped with "data compilation" and it is at least arguable that this term is comprehensive enough to accommodate advances in technology. The version of Rule 107 approved by the Committee would update the term "data compilation" to encompass any electronically stored information. See the Rule, *infra.*

(8) Ancient **documents or data compilation.** — Evidence that a **document or data compilation,** in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

Again, note that the term "data compilation" may on the one hand render any amendment unnecessary but on the other hand might itself might be considered outmoded. Also note that the hearsay exception for ancient documents refers only to documents and not data compilations--meaning that, under a literal interpretation of the current rules, an electronically generated "ancient" data compilation might be authenticated and yet not admissible if offered for its truth.

8. Rule 902. Self-authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) *Domestic public **documents** under **seal.*** — A **document** bearing a **seal** purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular

possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a **signature** purporting to be an **attestation** or **execution**.

(2) *Domestic public **documents** not under **seal**.* — A **document** purporting to bear the **signature** in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no **seal**, if a public officer having a **seal** and having official duties in the district or political subdivision of the officer or employee **certifies** under **seal** that the **signer** has the official capacity and that the **signature** is genuine.

(3) *Foreign public **documents**.* — A **document** purporting to be **executed** or **attested** in an official capacity by a person authorized by the laws of a foreign country to make the **execution** or **attestation**, and accompanied by a final **certification** as to the genuineness of the **signature** and official position (A) of the **executing** or **attesting** person, or (B) of any foreign official whose **certificate** of genuineness of **signature** and official position relates to the **execution** or **attestation** or is in a chain of **certificates** of genuineness of **signature** and official position relating to the **execution** or **attestation**. A final **certification** may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official **documents**, the court may, for good cause shown, order that they be treated as presumptively authentic without final **certification** or permit them to be evidenced by an **attested** summary with or without final **certification**.

(4) ***Certified copies of public records**.* — A **copy** of an official record or report or entry therein, or of a **document** authorized by law to be **recorded or filed** and actually **recorded or filed** in a public office, including **data compilations in any form**, **certified** as correct by the custodian or other person authorized to make the **certification**, by **certificate** complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.

(5) *Official publications.* — **Books, pamphlets**, or other **publications** purporting to be issued by public authority.

(6) *Newspapers and periodicals.* — **Printed materials** purporting to be news**papers** or **periodicals.**

This rule by its terms limits self-authentication to printed, as opposed to online, materials. It could be argued that an online publication becomes "printed" if it gets printed out. But even then, there may be real-time, streaming-type materials that might never be "printed" out in a conventional sense.

(8) *Acknowledged **documents**.* — **Documents** accompanied by a **certificate** of acknowledgment **executed** in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) *Commercial **paper** and related **documents**.* — Commercial **paper, signatures** thereon, and **documents** relating thereto to the extent provided by general commercial law.

The reference to paper may not be as problematic as it sounds, since the Uniform Commercial Code defines commercial paper with reference to wire and electronic communication.

(10) *Presumptions under Acts of Congress.* — Any **signature, document**, or other matter declared by Act of Congress to be presumptively or *prima facie* genuine or authentic.

9. Rule 903. Subscribing Witness' Testimony Unnecessary

The testimony of a subscribing witness is not necessary to authenticate a **writing** unless required by the laws of the jurisdiction whose laws govern the validity of the **writing**.

Overview of the Possible Need to Modernize the Evidence Rules in Light of Computerization.

There are 30 rules set forth above that, if read literally, could prohibit the admission of at least some electronically stored information. If the term "data compilation" is considered sufficient to cover any kind of electronically generated evidence, then the number of rules that are arguably inhospitable to electronically restored information is reduced to 22. It goes without saying that it would be extremely difficult to make a case for amending 30 or even 22 rules all at once. The Advisory Committee and the Standing Committee have been cautious in proposing amendments to the Evidence Rules, and with good reason; among other things, amendments can upset settled expectations and can create new problems of interpretation. It is fair to state that the Standing Committee to this point has been more cautious about proposing amendments to the Evidence Rules than to any other body of national rules — as indicated by the fact that Civil, Criminal and Appellate rules have been restylized and Evidence Rules have not.

At its last meeting the Committee determined that any problem in the existing rules as applied to electronic evidence would have to be addressed in some way other than proposing to amend more than 20 rules. Instead the Committee approved a single rule that would affect the paper-based language that is found throughout the Evidence Rules. That Rule, new Rule 107, is set forth in Part Four.

II. Case Law on Electronic Evidence

The reported cases indicate that the courts are not having trouble accommodating and regulating electronic evidence under the existing language of the rules. The following discussion describes the current use of electronic evidence, and the treatment of that evidence in the reported federal cases. This discussion is supplemented by Greg Joseph's recently updated article on internet and email evidence, which is attached to this memorandum.

The following are the major questions of admissibility involving electronic evidence:

1. A business or public record is often presented in the form of a computer print-out. Courts have had little problem in using Rules 803(6)/803(8) and 901/902 to rule on the admissibility of computerized business records. Basically, a computerized business record is admissible whenever a comparable hardcopy record would be admissible. They are authenticated as are other records, and no special rule change seems to be required to allow the courts to rule on the admissibility or authenticity of business records. See *United States v. Whitaker,* 127 F.3d 595 (7th Cir. 1997) (authenticity and admissibility of computerized business records is established by general principles applicable to noncomputerized records); *Potamkin Cadillac Corp. v. B.R.I. Coverage Corp.,* 38 F.3d 627 (2d Cir. 1994) (computerized records were not admissible as business records where the underlying information was prepared in anticipation of litigation and would not itself have been admissible). *See also Monotype Corp. v. International Typeface Corp.,* 43 F.3d 443 (9th Cir. 1994) (no error in excluding e-mail from employee of Microsoft to a superior, because such a communication was not regularly conducted activity within the meaning of Rule 803(6)); *DirecTV, Inc., v. Murray,* 307 F.Supp.2d 764 (D.S.C. 2004) (emails admitted as business records, where they were kept in the ordinary course of business and authenticated by an affidavit from a qualified witness).

2. A computerized presentation may be offered as proof of how an event occurred, the most prevalent example being an accident reconstruction. For this purpose, the use of a computer to recreate an event is no different in kind from videotaping a reconstruction of a an accident or a product failure. Courts consistently apply Rule 403 to determine whether the reconstruction is substantially similar to the original conditions. If the conditions are substantially different, the purported reconstruction, computerized or not, is excluded as substantially more prejudicial than probative. See, e.g., *Racz v. R.T. Merryman Trucking, Inc.,* 1994 WL 124857 (E.D.Pa. 1994) (computerized accident reconstruction held inadmissible under Rule 403, because not all data was taken into account). Any problems of authenticating such a computerized demonstration are handled by Rule 901(b)(9), which permits authentication for "[e]vidence describing a process or system used to produce a result and showing that the process or system produces an accurate result."See Greg Joseph, *A Simplified Approach to Computer-Generated Evidence and Animations,* SB67 ALI-ABA 81 (1997) (noting ways in which authentication questions can be easily handled under current Rule 901(b)(9)). There might also be hearsay problems in the preparation of the demonstration, and there might be problems of reliability under *Daubert* due to the probable use of experts in the recreation process. But these problems are dealt with under standard evidentiary principles that apply to

noncomputerized evidence. Fulcher, *The Jury as Witness,* 22 U.Dayton L.Rev. 55 (1996) (noting that the admissibility of computerized recreations can be and has been handled by standard evidentiary principles). *See also Verizon Directories Corp. v. Yellow Book,* 311 F.Supp.2d 136 (E.D.N.Y. 2004) (admitting demonstratives after conducting a Rule 403 analysis).

3. A computerized presentation may be offered to illustrate an expert's opinion or a party's version of the facts. As with any other such illustration, a computerized presentation is admissible if it helps to illustrate the expert's opinion, or a party's version of the facts, and does not purport to be a recreation of the disputed event. Again, standard evidentiary principles such as Rule 403 and Rule 702 have appeared to work well. See *Hinkle v. City of Clarksburg,* 81 F.3d 416 (4th Cir. 1996) (finding no "practical distinction" between computer-animated videotapes and other types of illustrations; computer animation was properly admitted where the jury "fully understood this animation was designed merely to illustrate appellees' version of the shooting and to demonstrate how that version was consistent with the physical evidence."); *Datskow v. Teledyne Corp.,* 826 F.Supp.2d 677 (W.D.N.Y. 1993) (video simulation was properly admitted to illustrate the expert's opinion; jury was instructed that the electronic presentation was not to be used as proof of how the disputed event actually occurred).

4. A computerized presentation may be offered as a pedagogical device, either to illustrate or summarize the trial evidence to the party's advantage, or to aid in the questioning of a witness. For example, a graphic may show how money went from one account to others; or a clause of a contract may be brought out of the text and highlighted. Such computerized presentations are not evidence at all. They are no different in kind from a hardcopy summary or the highlighting of trial testimony or critical language from documents at issue in the case. The question is whether the presentation fairly characterizes the evidence. If the presentation is unfair, computerized or not, it will be prohibited under Rules 403 and 611. See Borelli, *The Computer as Advocate: An Approach to Computer-Generated Displays in the Courtroom,* 71 Ind.L.J. 439 (1996):

> If one treats the [computerized] display as an extension of the attorney's argument, then it should be subject to the same guidelines that govern what an attorney may say. Proper argument is supposed to be confined to facts introduced in evidence, facts of common knowledge, and logical inferences based on the evidence. Similarly, an attorney cannot argue about facts not in the record, misstate testimony, or attribute to a witness testimony not actually given. If the lawyer discloses the display to the opposing counsel and the judge beforehand, which is the recommended procedure anyway, then its basis in the evidence can be verified and the program altered, if need be. If an attorney using a computer display abides by these ground rules, then it should be allowed as a pedagogical device [without any need to change the evidence rules].

5. A computerized presentation might be offered as a summary of otherwise admissible evidence that is too voluminous to be conveniently examined in court. Such a presentation would be treated as a summary under Rule 1006. Computerized summaries are treated no differently from non-computerized summaries for purposes of Rule 1006. *See, e.g., Verizon Directories Corp. v.*

Yellow Book, 311 F.Supp.2d 136 (E.D.N.Y. 2004) (finding that summaries can be admissible under Rule 1006, whether or not they are computerized).

6. Photos, videos and other "original" documents are sometimes digitally enhanced to make them easier to read, view, or hear, or to highlight some aspect that the proponent wishes to emphasize. The courts have held that the admissibility of such enhancements is governed by Rules 403, 901 and 1002, with the basic question being whether it is a fair and accurate depiction of the original. The language of these Rules has not proved an impediment to analyzing electronic enhancements of an original. *See, e.g., United States v. Seifert,* 351 F.Supp.2d 926 (D.Minn. 2005) (digitally-enhanced surveillance videotape admitted because it was "a fair and accurate depiction of the original videotape"); *United States v. Luma,* 240 F.Supp.2d 358 (D.V. I. 2002) (admitting videotapes where enhancements "did not change the substance of the videotape, but merely clarified the tapes."); *United States v. Beeler,* 62 F.Supp.2d 136 (D.Me. 1999) (admitting videotapes where enhancements omitted extraneous frames and made the images larger, clearer, and easier to view).

7. Information found on web pages, and information found in emails, is routinely offered in a trial. As indicated in Greg Joseph's attached article, the admissibility of this electronic information is evaluated under standard evidentiary concepts of hearsay, authenticity, and Rule 403.

8. Sometimes a learned treatise is in electronic form. In this regard, the Second Circuit upheld the admission of a videotape under the learned treatise exception. *Costantino v. Herzog,* 203 F.3d 164 (2d Cir. 2000). The plaintiffs contested admissibility on the ground that the language of Rule 803(18) did not cover electronic information, because it is written in terms of printed publications; the plaintiffs relied on the "plain language" of the Rule and argued that to add electronic evidence to the list set forth in the Rule would constitute "judicial legislation." Judge McLaughlin responded as follows:

> Uttering the dark incantation of "judicial legislation" is to substitute a slogan for an analysis. Indeed, we are exhorted in Rule 102 to interpret the Rules of Evidence to promote the "growth and development of the law ... to the end that the truth may be ascertained."* * *
>
> In this case * * * we agree with [trial court] Judge Gleeson that it is just "overly artificial" to say that information that is sufficiently trustworthy to overcome the hearsay bar when presented in a printed learned treatise loses the badge of trustworthiness when presented in a videotape. We see no reason to deprive a jury of authoritative learning simply because it is presented in a visual, rather than printed, format. In this age of visual communication a videotape may often be the most helpful way to illuminate the truth in the spirit of Rule 102. * * * Accordingly, we hold that videotapes may be considered learned treatises under Rule 803(18).

It should be noted that electronic evidence, like any other evidence, has been excluded in federal courts on a case-by-case basis. But the exclusions have resulted from the application of basic evidentiary principles of Rule 403, hearsay and authenticity, and not because of the paper-based language limitations in the Rules. *See, e.g., United States v. Jackson,* 208 F.3d 633 (7th Cir. 2000) (evidence of a web posting was properly excluded because the defendant did not provide a foundation that it was authentic); *Rotolo v. Digital Equipment Corp.,* 150 F.3d 223 (2d Cir. 1998) (videotape of a conversation, offered to prove that the statements therein were true, held inadmissible hearsay).

Some Problems Not Yet Encountered

It remains possible to think up some situations in which paper-based language in the rules, if interpreted literally, could result in exclusion of electronic evidence. These possibilities remain because they have not yet been encountered in the reported cases.. Some examples follow:

1. A witness refreshes his recollection with a computerized presentation. Must this be produced for inspection and use by the adversary? Rule 612 refers to a "writing" and the argument could be made that a computerized presentation does not fall within that term.

2. A party seeks to admit a portion of a computerized presentation as substantive evidence. Can the adversary admit another portion under the rule of completeness? Like Rule 612, Rule 106 is cast in terms of a "writing", and therefore is at least arguably inapplicable.

3. Computerized information that would otherwise qualify under hearsay exceptions for past recollection recorded, family records, etc. might be argued to be inadmissible if it is in electronic rather than hardcopy form.

4. A party seeks to admit an electronic version of a newspaper or periodical, such as *Slate*. Under the terms of Rule 902(6), an electronic version of a newspaper or periodical would not appear to be self-authenticating, because it is not "printed." It could be argued that the problem could be solved by presenting a printout of the electronic information. A printout sounds like something "printed." But perhaps not, because the rule covers "printed materials purporting to be newspapers or periodicals." This language could be read, literally, to mean newspapers or periodicals that are originally published in printed form — as opposed to a printed out copy of something that was issued originally in electronic form.

With respect to the above four problems (as well as any others) the proposed amendment to Rule 107 would treat electronic information under the same principles of admissibility that apply to paper-based evidence. Given the case law to date on electronic evidence, it is quite likely that courts would come to the same result using the existing language of those four Evidence Rules. Rule 107 would, however, spare the courts from having to twist the existing language to fit questions of admissibility of electronic evidence.

III. Possibilities for Amending the Evidence Rules to Accommodate Electronic Evidence

At its last meeting, the Committee tentatively determined that: 1) the Evidence Rules should be amended to permit, explicitly, the admission of electronically stored information; and 2) directly amending 30 or so individual rules is not a workable solution. The Committee reviewed four possible solutions for an amendment: 1) a simple amendment to Rule 1001; 2) a more detailed amendment to Rule 1001; 3) the addition of a definitions section in the Evidence Rules; and 4) the addition of a new Rule 107. The Committee agreed to propose a new Rule 107. For purposes of a final discussion and vote on Rule 107, this memorandum sets forth briefly the other alternatives and discusses the problems with each of them.

1. The Solution of a Simple Amendment to Rule 1001

It has been suggested that it might be sufficient to expand the definitions set forth in Rule 1001 so that they would apply to all the rules. That simple proposal would look something like this:

Rule 1001. Definitions

For purposes of ~~this article~~ these rules the following definitions are applicable:

(1) *Writings and recordings.* — "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) *Photographs.* — "Photographs" include still photographs, X-ray films, video tapes, and motion pictures.

(3) *Original.* — An "original" of a writing.or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."

(4) *Duplicate.* — A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduce the original.

Reporter's Comment on the Proposal:

This proposal has the virtue of simplicity. But it does not serve the goal of covering all forms of electronic evidence, or of completely updating the paper-based language in the rules. The only term that is usefully modified by this change is the term "writing." The reference in Rule 1001 to "recordings" doesn't match up with the rules, because the rules refer to "records". It is even a fair question whether expanding the definition of "writings" will cover the use of the term "written" in the other rules. For example, Rule 801 defines hearsay as an oral or "written" assertion. Will the definition of "writing" in Rule 1001 cover a "written" assertion? At the very least, the proposal, while simple, would create an ambiguity.

At most, the proposal would affect the rules that refer either to "writing" or to "written." As discussed above, those rules are 106, 412, 609, 612, 801, 901(7) and 903. If "writing" does not cover "written", then Rules 412, 609, and 801 would remain unaffected, leaving only four Rules usefully amended by this expansion of Rule 1001. The rule would not cover terms like "memorandum", "pamphlet", "published", etc.

2. The Solution of a More Expansive Amendment to Rule 1001

Arguably, if it is worth it to amend Rule 1001 at all, it is worth it to amend Rule 1001 to provide greater coverage of the problematic rules. This could be accomplished by adding to and expanding upon the current definitions set forth in Rule 1001. Taking the liberty of borrowing from the Uniform Rules, an amendment might read something like this:

Rule 1001. Definitions

For purposes of ~~this article~~ these rules the following definitions are applicable:

(1) *Writings and recordings.* — "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, ~~magnetic impulse~~, mechanical or electronic recording, or ~~other form of data compilation~~ or any other electronically stored information. "Written" includes any process that results in a writing.

(2) *Photographs.* — "Photographs" are forms of a record that include still photographs, X-ray films, video tapes, and motion pictures.

(3) *Original.* — An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."

(4) *Duplicate.* — A "duplicate" is a counterpart reproduced by any technique that reproduces the original in perceivable form or that is produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduce the original.

(5) *Record, document, memorandum and certificate.* — A "record", "document", "memorandum" or "certificate" includes information that is stored electronically.

(6) *Data Compilation* — A "data compilation" includes any collection or presentation of information stored in electronic form.

(7) *"Publication", "printed material" and material that is "published"* — Information that is a "publication", "printed material," or material that is "published" includes electronically stored information.

(8) *"Certification" and "signature"* — A "certification" and a "signature" includes the necessary information in electronic form.

Reporter's Comment on the Proposal:

The above proposal has a far broader effect than the simple proposal to expand the current 1001 definitions to the other Rules. The proposal has the following possible advantages:

1. It provides a technology-based definition of "record", "certificate" "data compilation", "printed" and "published" materials, and certifications. As such, the effect of the more expansive definitions is extended to virtually all of the rules with paper-based language.

2. The definition of "writings" is modified from the existing Rule 1001, to take account of possible technological advances. The reference in the current rule to "magnetic impulse" is probably outmoded and at least unduly limiting.

3. The term "written" is defined to make it certain that the expansive definition applies to those rules which refer to "written" rather than "writing."

4. Changes are made to the current Rule 1001 definition of "duplicate" to take account of technological advances.

5. The amendment follows the same principle as the simpler proposal addressed above--instead of amending 30 rules, it amends only one.

The proposal has an important disadvantage, however:

The definitional section is placed in the Best Evidence Rule. A lawyer researching the meaning of "writing" in Rule 106, for example, might not think of looking in Rule 1001 for guidance, because an admissibility question concerning electronic evidence will not always, or even

often, present a best evidence question. As indicated in Greg Joseph's attached article, most questions of electronic evidence involve authenticity, reliability, hearsay, etc.; relatively few involve best evidence questions. It simply seems odd and inefficient to treat all electronic evidence questions within the context of the best evidence rule. In contrast, Rule 107 is placed in an article entitled "General Provisions" that clearly applies to all evidentiary issues.

3. The Solution of a Separate "Definitions" Rule:

Another alternative to accommodating electronic evidence — without amending a large number of rules — is to place a separate "definitions" rule in the Federal Rules of Evidence. This might be a daunting task, however. It would seem awkward to set up a new article or rule for "definitions," when the only definitions would deal with computerized evidence. Yet it would be equally problematic to draft a definitions rule that goes beyond computerized evidence to cover other terms that are used in the rules—especially since Rules 401, 801 and 1001 are already definitional rules. What terms should be defined? What would be the benefit of such definitions? Given the entrenched understandings of most of the terms used in the Rules, based on more than 30 years of case law, there is probably little to be gained and much to be lost in adding a full-fledged definitions rule to the Evidence Rules that would somehow complement the definitional rules that currently exist.

4. The Solution of a New Rule 107:

At its last meeting, the Committee opted for a new rule, to be located in a more general article, not placed in the specific context of the best evidence rule. A new rule 107, dealing solely with electronic evidence, has two important advantages when compared to the other solutions discussed above:

1. By its placement in Article One, it would clearly apply to all the rules, therefore avoiding the confusion of placing the amendment in the best evidence rule.

2. It would not be labeled a "definitions" section, avoiding the problem of underinclusiveness on the one hand and the impossibility of drafting all pertinent definitions on the other.

IV. Proposed Rule 107

What follows is the version of a new Rule 107 that was tentatively approved by the Committee. The Rule was changed slightly, however, in light of comments received in the interim. The changes from the draft considered at the previous meeting are as follows:

1. The caption of the rule had read "Evidence in Electronic Form." Greg Joseph pointed out that the rule governs more than "evidence." It also governs whether motions need to be "written," whether declarations need to be "signed", whether material can be electronically filed, etc. So at his suggestion the words "Evidence in" were deleted from the caption.

2. Based on a suggestion from Professor Joe Kimble, the text of the rule was restructured slightly so that it is clear from the beginning that the rule is about electronic form. The definitional terms have also been alphabetized for easier reference. Professor Kimble has approved the draft for style.

3. The second paragraph of the committee note is new, and is attended to address concerns expressed by the Committee at the last meeting that the rule would be used to expand admissibility of electronic evidence even where such expansion is unwarranted under existing case law.

Rule 107. Electronic Form

As used in these rules, the following terms, whether singular or plural, include information in electronic form: "book," "certificate," "data compilation," "directory," "document," "entry," "list," "memorandum," "newspaper," "pamphlet," "paper," "periodical," "printed", "publication," "published", "record," "recorded", "recording," "report," "tabulation," "writing" and "written." Any "attestation," "certification," "execution" or "signature" required by these rules may be made electronically. A certificate, declaration, document, record or the like may be "filed," "recorded," "sealed" or "signed" electronically.

Committee Note

New rule 107 makes clear that the "paper-based" language of the Federal Rules of Evidence is to be construed to permit evidence and other information to be submitted in electronic form when it otherwise meets the requirements of the rules. *See, e.g., Costantino v. Herzog,* 203 F.3d 164 (2d Cir. 2000) (videotape was properly admitted as a learned treatise, even though Rule 803(18) refers only "published treatises, periodicals or pamphlets"). The principal intent of the rule is that electronic evidence is to be governed by the same evidentiary principles as any other evidence. The rule precludes the possibility that electronic evidence will be excluded simply because the Federal Rules of Evidence, as originally drafted, understandably were written to address the admissibility of paper-based evidence.

The rule is not intended to alter the basic standards of admissibility that the courts have applied to electronic evidence. *See, e.g., United States v. Jackson,* 208 F.3d 633 (7th Cir. 2000) (evidence of a web posting was properly excluded because the defendant did not provide a foundation that it was authentic); *DirecTV, Inc., v. Murray,* 307 F.Supp.2d 764 (D.S.C. 2004) (e-mails admitted as business records, where they were kept in the ordinary course of business and authenticated by an affidavit from a qualified witness); *United States v. Seifert,* 351 F.Supp.2d 926 (D.Minn. 2005) (digitally-enhanced surveillance videotape admitted because it was "a fair and accurate depiction of the original videotape").

V. Concerns Expressed About Rule 107 at the Previous Committee Meeting

Some comments at the last meeting indicated concern that Rule 107 might, contrary to its intent, expand the scope of admissibility of electronic evidence in certain situations. The Committee Note has been amended to add language to address this concern. But this memorandum also addresses the specific problem of admissibility raised at the last meeting.

That problem involved Rule 902(6). Rule 902(6) provides that "extrinsic evidence of authenticity as a condition precedent to admissibility is not required" for "printed materials purporting to be newspapers or periodicals." Rule 107 would apply to Rule 902(6) by clarifying that online newspapers and periodicals are subject to self-authentication; online materials can qualify for self-authentication because they would not have to be "printed" in a paper-based sense under Rule 107.

Concern was expressed that a particular version of an online magazine would be self-authenticating even though it could not be replicated in the same way as a hardcopy newspaper. Online newspapers are usually dynamic, not static like a paper-based newspaper or magazine. An opinion was expressed that online magazines and newspapers should not be subject to self-authentication, because the adverse party might not be able to recreate, or refer to other copies of, a dynamic online entry.

The commentary at the last meeting on Rule 902(6), as affected by Rule 107, is correct in the sense that online magazines and newspapers in dynamic form will potentially qualify for self-authentication. But that does not mean that a large door of admissibility has been opened for forged or otherwise inauthentic information.

The concerns expressed about self-authentication of online newspapers can be addressed by the following points:

1. Self-authentication does not mean that the online entry is admissible. It can still be excluded under other rules such as Rule 403, the hearsay rule, etc. Certainly, if the court is concerned about forgery, it would have the authority to exclude a purported online entry as unduly prejudicial. Courts have used Rule 403 when electronic evidence appears to be unreliable, and there is no reason to think that the approach would be different for online newspapers and periodicals. *See, e.g., Racz v. R.T. Merryman Trucking, Inc.*, 1994 WL 124857 (E.D.Pa. 1994) (computerized accident reconstruction held inadmissible under Rule 403, because it was not reliable).

2. According to Mueller and Kirkpatrick, *Federal Evidence* § 544, even if evidence fits within one of the clauses of Rule 902, that does not mean it automatically passes the threshold of authenticity. They state: "As is true generally of the mechanisms for self-authentication, a suspicious appearance provides a reasonable basis for declining to consider a matter to be self-authenticating." Thus, a court has discretion to refuse to find that a purported online newspaper or periodical entry is self-authenticating, if it appears that its

provenance is dubious and its existence cannot be verified in the same manner as a hardcopy version.

3. Courts applying the analogous Rule 902(5) have held that dynamic data on government websites is self-authenticating. *See, e.g., Sannes v. Jeff Wyler Chevrolet, Inc.*, 1999 U.S.Dist.LEXIS 21748 at *10 n. 3 (S.D. Ohio March 31, 1999) ("The FTC press releases, printed from the FTC's government world wide web page, are self-authenticating official publications under Rule 902(5) of the Federal Rules of Evidence"). These holdings have been made even without Rule 107.

4. The issue of self-authentication of online newspapers and magazines certainly does not arise very often; it does not appear to be a problem in practice at all. Indeed, neither I nor Greg Joseph has been able to find a case involving the question, at either the state or the federal level. Probably this is because the online information can be so easily authenticated in any event. As Greg puts it: "authenticity can be established by the testimony of any witness that the witness typed in the URL associated with the website (usually prefaced with www); that he or she logged on to the site and reviewed what was there; and that a printout or other exhibit fairly and accurately reflects what the witness saw." *See, e.g., Hood v. Dryvit Sys., Inc.*, 2005 U.S. Dist. LEXIS 27055, at *6-*7 (N.D. Ill Nov. 8, 2005) (authenticity of information from a website found when witness stated that he retrieved the information off the website on a particular day and that "the web addresses stamped at the bottom of each exhibit were the addresses I retrieved the exhibits from.").

5. Any problems that Rule 107 might create when applied to Rule 902(6) are likely to be minimized by the fact that courts currently give Rule 902(6) a narrow reading. For example, Rule 902(6) has been held inapplicable to books and treatises that are "periodically" updated. The term "periodicals" has been limited to magazines and the like. *See, e.g., Goguen v. Textron, Inc.*, 2006 U.S. Dist. Lexis 10157 (D.Mass.) (regularly updated reference book is not a "periodical" within the ordinary meaning of that term, and therefore is not self-authenticating under Rule 902(6)). And even where Rule 902(6) applies, it does not establish authenticity of the actual statements contained in the newspaper or periodical. *In re Sherman,* 1998 U.S. Dist. Lexis 79 (E.D.Pa.) ("While it is true that newspaper articles do not require extrinsic evidence of authenticity prior to admissibility, there may still remain the questions of authority and responsibility for statements contained therein.").

In sum, it appears that no substantial problem in practice will arise from applying Rule 902(6) to online newspapers and periodicals. Any problem that could arise will undoubtedly be infrequent and can be handled by the court under existing doctrine. Certainly any problems that might arise do not seem to outweigh the advantages provided by Rule 107: recognition of the importance of electronic evidence, user-friendliness, and protection against mistakes by lawyers.

Nor does it appear worth crafting a specific exception for Rule 902(6) in Rule 107. To do so would likely give any remote problem more treatment than it is worth, and it would detract from the basic intent of the rule, which is to update all paper-based language to accommodate technological advances.

At the request of the Committee, I have tried to think about any other situations in which updating the paper-based language of a particular rule will result in a problematic change in or expansion of existing rules of admissibility. I have not been able to think of any other instance in which electronic evidence would be admissible under Rule 107 where it ought not be admissible under existing evidence case law. That is not to say that no such instance exists; it's just that I haven't been able to think of any, and that there is no case law I have found that will be altered by Rule 107.

Internet & Email Evidence

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INTERNET AND EMAIL EVIDENCE

Gregory P. Joseph*

The explosive growth of the Internet and burgeoning use of electronic mail are raising a series of novel evidentiary issues. The applicable legal principles are familiar — this evidence must be authenticated and, to the extent offered for its truth, it must satisfy hearsay concerns. The novelty of the evidentiary issues arises out of the novelty of the media — thus, it is essentially factual. These issues can be resolved by relatively straightforward application of existing principles in a fashion very similar to the way they are applied to other computer-generated evidence and to more traditional exhibits.

I. Internet Evidence

There are primarily three forms of Internet data that are offered into evidence — (1) data posted on the website by the owner of the site ("website data"); (2) data posted by others with the owner's consent (a chat room is a convenient example); and (3) data posted by others without the owner's consent ("hacker" material). The wrinkle for authenticity purposes is that, because Internet data is electronic, it can be manipulated and offered into evidence in a distorted form. Additionally, various hearsay concerns are implicated, depending on the purpose for which the proffer is made.

A. Authentication

Website Data. Corporations, government offices, individuals, educational institutions and innumerable other entities post information on their websites that may be relevant to matters in litigation. Alternatively, the fact that the information appears on the website may be the relevant point. Accordingly, courts routinely face proffers of data (text or images) allegedly drawn from websites. The proffered evidence must be authenticated in all cases, and, depending on the use for which the offer is made, hearsay concerns may be implicated.

The authentication standard is no different for website data or chat room evidence than for any other. Under Rule 901(a), "The requirement of authentication ... is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." *United States v. Simpson,* 152 F.3d 1241, 1249 (10th Cir. 1998); *Johnson-Wooldridge v. Wooldridge*, 2001 Ohio App. LEXIS 3319 at *11 (Ohio App. July 26, 2001).

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In applying this rule to website evidence, there are three questions that must be answered, explicitly or implicitly:

1. **What was actually on the website?**
2. **Does the exhibit or testimony accurately reflect it?**
3. **If so, is it attributable to the owner of the site?**

In the first instance, authenticity can be established by the testimony of any witness that the witness typed in the URL associated with the website (usually prefaced with *www*); that he or she logged on to the site and reviewed what was there; and that a printout or other exhibit fairly and accurately reflects what the witness saw.[1] This last testimony is no different than that required to authenticate a

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See Johnson-Wooldridge v. Wooldridge, 2001 Ohio App. LEXIS 3319 at *11 (Ohio App. July 26, 2001). _See also Perfect 10, Inc. v. Cybernet Ventures, Inc._, 213 F. Supp. 2d 1146, 1154 (C.D. Cal. 2002) (admitting on a preliminary injunction motion copies of pages from defendant's and third party websites (as to the latter of which the furnished "webpages contain[ed] ... the internet domain address from which the image was printed and the date on which it was printed") because "the declarations, particularly in combination with circumstantial indicia of authenticity (such as the dates and web addresses), would support a reasonable juror in the belief that the documents are what [plaintiff] says they are;" noting the "reduced evidentiary standard in preliminary injunction motions"); _Hood v. Dryvit Sys., Inc._, 2005 U.S. Dist. LEXIS 27055, at *6-*7 (N.D. Ill Nov. 8, 2005) (affidavit of counsel on summary judgment motion "stating that

photograph, other replica or demonstrative exhibit.[2] The witness may be lying or mistaken, but that is true of all testimony and a principal reason for cross-examination. Unless the opponent of the evidence raises a genuine issue as to trustworthiness, testimony of this sort is sufficient to satisfy Rule 901(a), presumptively authenticating the website data and shifting the burden of coming forward to the opponent of the evidence. It is reasonable to indulge a presumption that material on a web site (other than chat room conversations) was placed there by the owner of the site.

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he 'retrieved [the documents] off the Dryvit, Inc. corporate website on August 29, 2005.' Counsel also swears that 'the web addresses stamped at the bottom of each exhibit were the addresses I retrieved the exhibits from, respectively.'") (brackets in original; citation omitted.).

2 *See, e.g., Actonet, Ltd. v. Allou Health & Beauty Care*, 219 F.3d 836, 848 (8th Cir. 2000) ("HTML codes may present visual depictions of evidence. We conclude, therefore, that HTML codes are similar enough to photographs to apply the criteria for admission of photographs to the admission of HTML codes").

The opponent of the evidence must, in fairness, be free to challenge that presumption by adducing facts showing that proffered exhibit does not accurately reflect the contents of a website, or that those contents are not attributable to the owner of the site. First, even if the proffer fairly reflects what was on the site, the data proffered may have been the product of manipulation by hackers (uninvited third parties).[3] Second, the proffer may not fairly reflect what was on the site due to modification — intentional or unintentional, material or immaterial — in the proffered exhibit or testimony.

Detecting modifications of electronic evidence can be very difficult, if not impossible. That does not mean, however, that nothing is admissible because everything is subject to distortion. The same is true of many kinds of evidence, from testimony to photographs to digital images, but that does not render everything inadmissible. It merely accentuates the need for the judge to focus on all relevant

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3 *See, e.g., Wady v. Provident Life & Accident Ins. Co. of Am.*, 216 F. Supp. 2d 1060, 1064-1065 (C.D. Cal. 2002) ("Defendants have objected on the grounds that [counsel] has no personal knowledge of who maintains the website, who authored the documents, or the accuracy of their contents" — objections sustained).

circumstances in assessing admissibility under Fed.R.Evid. 104(a)[4] — and to leave the rest to the jury, under Rule 104(b).[5]

In considering whether the opponent has raised a genuine issue as to trustworthiness, and whether the proponent has satisfied it, the court will look at the totality of the circumstances, including, for example:
The length of time the data was posted on the site.
Whether others report having seen it.
Whether it remains on the website for the court to verify.
Whether the data is of a type ordinarily posted on that website or websites of similar entities (*e.g.*, financial information from corporations).
Whether the owner of the site has elsewhere published the same data, in whole or in part.
Whether others have published the same data, in whole or in part.
Whether the data has been republished by others who identify the source of the data as the website in question.

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4 **Fed.R.Evid. 104(a) provides that:**
***Questions of admissibility generally.*—Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.**

5 **Fed.R.Evid. 104(b) provides that:**

A genuine question as to trustworthiness may be established circumstantially. For example, more by way of authentication may be reasonably required of a proponent of Internet evidence who is known to be a skilled computer user and who is suspected of possibly having modified the proffered website data for purposes of creating false evidence.[6]

In assessing the authenticity of website data, important evidence is normally available from the personnel managing the website ("webmaster" personnel). A webmaster can establish that a particular file, of identifiable content, was placed on the website at a specific time. This may be done through direct testimony or through documentation, which may be generated automatically by the software of the web server. It is possible that the content provider — the author of the material appearing on the site that is in issue — will be someone other than the person who installed the file on the web. In that event, this second witness (or set of documentation) may be necessary to reasonably ensure that the content which appeared on the site is the same as that proffered.

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> *Relevancy conditioned on fact.*—When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.
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> *See, e.g., United States v. Jackson,* 208 F.3d 633, 637 (7th Cir. 2000) ("Jackson needed to show that the web postings in which the white supremacist groups took responsibility for the racist mailing actually were posted by the groups, as opposed to being slipped onto the groups' web sites by Jackson herself, who was a skilled computer user.").

Self-Authentication. Government offices publish an abundance of reports, press releases and other information on their official web sites. Internet publication of a governmental document on an official website constitutes an "official publication" within Federal Rule of Evidence 902(5).[7] Under Rule 902(5),official publications of government offices are self-authenticating.[8]

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7 Fed.R.Evid. 902(5) provides that the following are self-authenticating: *Official publications*.--Books, pamphlets, or other publications purporting to be issued by public authority.

8 *See, e.g., Sannes v. Jeff Wyler Chevrolet, Inc.*, 1999 U.S.Dist.LEXIS 21748 at *10 n. 3 (S.D. Ohio March 31, 1999) ("The FTC press releases, printed from the FTC's government world wide web page, are self-authenticating official publications under Rule 902(5) of the Federal Rules of Evidence"). *See also Elliott Assocs., L.P. v. Banco de la Nacion,* 194 F.R.D. 116, 121 (S.D.N.Y. 2000) (discussed below; holding that prime rates published on the Federal Reserve Board website satisfy the hearsay exception of Federal Rule of Evidence 803(17). *But see State v. Davis,* 141 Wash.2d 798, 854, 10 P.3d 977, 1010 (2000) (no abuse of discretion in excluding, in death penalty case, defendant's proffer of state population statistics obtained from official state website; affirming exclusion on hearsay grounds but stating that "[a]n unauthenticated printout obtained from the Internet does not ... qualify as a self authenticating document under ER 902(e) [the Washington State equivalent of Federal Rule of Evidence 902(5)]"). There is reason to believe, however, that *Davis* may be limited to its facts. *See* State v. Rapose, 2004 WL 585856 at *5 (Wash. App. Mar. 25, 2004) (unpublished opinion).

Chat Room Evidence. A proffer of chat room postings generally implicates the same authenticity issues discussed above in connection with web site data, but with a twist. While it is reasonable to indulge a presumption that the contents of a website are fairly attributable to the site's owner, that does not apply to chat room evidence. By definition, chat room postings are made by third parties, not the owner of the site. Further, chat room participants usually use screen names (pseudonyms) rather than their real names.

Since chat room evidence is often of interest only to the extent that the third party who left a salient posting can be identified, the unique evidentiary issue concerns the type and quantum of evidence necessary to make that identification — or to permit the finder of fact to do so. Evidence sufficient to attribute a chat room posting to a particular individual may include, for example:

Evidence that the individual used the screen name in question when participating in chat room conversations (either generally or at the site in question).

Evidence that, when a meeting with the person using the screen name was arranged, the individual in question showed up.

Evidence that the person using the screen name identified him- or herself as the individual (in chat room conversations or otherwise), especially if that identification is coupled with particularized information unique to the individual, such as a street address or email address.

Evidence that the individual had in his or her possession information given to the person using the screen name (such as contact information provided by the police in a sting operation).

Evidence from the hard drive of the individual's computer reflecting that a user of the computer used the screen name in question.

See generally United States v. Tank, 200 F.3d 627, 630-31 (9th Cir. 2000); *United States v. Simpson*, 152 F.3d 1241, 1249-50 (10th Cir. 1998); *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1154 (C.D. Cal. 2002).

Internet Archives. Websites change over time. Lawsuits focus on particular points in time. The relevant web page may be changed or deleted before litigation begins. Various internet archive services exist that provide snapshots of web pages at various points in time. To the extent that those services, in the ordinary course of their business, accurately retrieve and store copies of the website as it appeared at specified points in time, the stored webpages are admissible. *See Telewizja Polska USA, Inc. v. Echostar Satellite Corp.*, 2004 U.S. Dist. LEXIS 20845, at *17-!8 (N.D. Ill. Oct. 15, 2004) (Internet archive evidence properly authenticated via certification of archive employee, presumably offered pursuant to Fed. R. Evid. 902(11)). The certification should contain the same elements as set forth in § I(A)(Website Data), with necessary modifications (*e.g.*, the retrieval process may be automated, requiring authentication the automated function, such as that it is used and relied on in the ordinary course of business and produces reliable results).

Search Engines. The results generated by widely recognized search engines, like Google or Yahoo!, may be pertinent in litigation — *e.g.*, a trademark action to

show dilution of a mark or a privacy/right of publicity action to show appropriation of a likeness. *See, e.g. McBee v. Delica Co*, 417 F.3d 107, 112 (1st Cir. 2005). Proper authentication would consist of testimony — or, under Federal Rule of Evidence 902(11) or (12), a certification — from a witness that the witness typed in the website address of the search engine; that he or she logged on to the site; the precise search run by the witness; that the witness reviewed the results of the search; and that a printout or other exhibit fairly and accurately reflects those results. The witness should be someone capable of further averring that he or she, or the witness's employer, uses the search engine in the ordinary course of business and that it produces accurate results. Further, the testimony or certification should reflect that the witness logged onto some of the websites identified by the search engine to demonstrate, as a circumstantial matter, that the particular search generated accurate results.

B. Hearsay.

Authenticity aside, every extrajudicial statement drawn from a website must satisfy a hearsay exception or exemption if the statement is offered for its truth. *See United States v. Jackson,* 208 F.3d 633, 637 (7th Cir.) ("The web postings were not statements made by declarants testifying at trial, and they were being offered to prove the truth of the matter asserted. That means they were hearsay."), *cert. denied,* 531 U.S. 973 (2000); *Savariego v. Melman,* 2002 U.S. Dist. LEXIS 8563 at *5 (N.D. Tex. 2002) (excluding on summary judgment "unauthenticated hearsay from an Internet search"); *Monotype Imaging,Inc. v Bitstream Inc.*, 376 F. Supp. 2d 877, 884-85 (N.D. Ill 2005) ("The Court refused to admit Exhibits 15 and 17 for the truth of the matter asserted in them because these exhibits are inadmissible hearsay. The Court admitted Exhibits 15 and 17 only for the limited purpose of proving that the diagrams in those exhibits were displayed on the respective websites on the dates indicated on the exhibits").

To establish that material appeared on a website, it is sufficient for a witness with knowledge to attest to the fact that the witness logged onto the site and to describe what he or she saw. That obviates any hearsay issue as to the contents of the site. *Van Westrienen v. Americontinental Collection Corp.*, 94 F.Supp.2d 1087, 1109 (D. Or. 2000) ("The only remaining question is whether the content of the website is hearsay under FRE 801.... Here, [plaintiff], by his own account, personally viewed the website and submitted an affidavit detailing specifically what he viewed. Therefore, the contents of the website are not hearsay for purposes of this summary judgment motion"); *State v. Rapose*, 2004 WL 585856 at *5 (Wash. App. Mar. 25, 2004) (unpublished opinion) (affirming admission of Internet and email documents because "each exhibit was identified and authenticated by the person testifying from personal knowledge of the contents").

Data Entry. Some website data is entered into Internet-readable format in the same way that a bookkeeper may enter numbers into a computer. This act of data entry is an extrajudicial statement — *i.e.*, assertive nonverbal conduct within Rule 801(a) — which means that the product is hearsay, within Rule 801(c). Since

each level of hearsay must satisfy the hearsay rule, under Rule 805 (Hearsay within Hearsay), the act of data entry must be addressed separately from the content of the posted declaration.

Data entry is usually a regularly-conducted activity within Rule 803(6) (or, in the context of a government office, falls within Rule 803(8) (public records exception)). It also often falls within Rule 803(1) (present sense impression exception).

The real question about the data entry function is its accuracy. This is, in substance, an issue of authenticity and should be addressed as part of the requisite authentication foundation whenever a genuine doubt as to trustworthiness has been raised. If the foundational evidence establishes that the data have been entered accurately, the hearsay objection to the data entry function should ordinarily be overruled. *See also* Rule 807 (residual exception).

Much Internet evidence does not involve data entry, in the sense described above. If the webmaster is simply transferring an image or digitally converting an electronic file into web format, that is a technical process that does not involve assertive non-verbal conduct within Rule 801(a) and is best judged as purely an authentication issue. The difference, analytically, is between the grocery store clerk who punches the price into the check-out computer (this is assertive non-verbal conduct), and the clerk who simply scans the price into the computer (non-assertive behavior). Only assertive non-verbal conduct raises hearsay issues and requires an applicable hearsay exception or exemption.

Business and Public Records. Businesses and government offices publish countless documents on their websites in ordinary course. Provided that all of the traditional criteria are met, these documents will satisfy the hearsay exception for "records" of the business or public office involved, under Rules 803(6) or (8). Reliability and trustworthiness are said to be presumptively established by the fact of actual reliance in the regular course of an enterprise's activities. *Johnson-Wooldridge v. Wooldridge*, 2001 Ohio App. LEXIS 3319 at *12-*13 (Ohio App. July 26, 2001) (Internet public record). (Recall that public records which satisfy Rule 803(8) are presumptively authentic under Rule 901(b)(7) (if they derive from a "public office where items of this nature are kept") and even self-authenticating under Rule 902(5) (discussed above in note 6 and the accompanying text).)

As long as the website data constitute business or public records, this quality is not lost simply because the printout or other image that is proffered into evidence was generated for litigation purposes. Each digital data entry contained on the website is itself a Rule 803(6) or (8) "record" because it is a "data compilation, in any form."[9] Consequently, if each entry has been made in conformance with Rule

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[9] *See, e.g., United States v. Sanders*, 749 F.2d 195, 198 (5th Cir. 1984) (dealing with computerized records); *United States v. Catabran*, 836 F.2d 453, 456 (9th Cir. 1988)

803(6) or Rule 803(8), the proffered output satisfies the hearsay exception even if it: (a) was not printed out at or near the time of the events recorded (as long as the entries were timely made), (b) was not prepared in ordinary course (but, *e.g.*, for trial), and (c) is not in the usual form (but, *e.g.*, has been converted into graphic form).[10] If the data are simply downloaded into a printout, they do not lose their business-record character. To the extent that significant selection, correction and interpretation are involved, their reliability and authenticity may be questioned.[11]

While website data may constitute business records of the owner of the site, they are not business records of the Internet service provider (*e.g.*, America Online, MSN, ATT). "Internet service providers...are merely conduits.... The fact that the Internet service provider may be able to retrieve information that its customers posted...does not turn that material into a business record of the Internet service provider." *United States v. Jackson,* 208 F.3d 633, 637 (7th Cir. 2000) ("The Internet service providers did not themselves post what was on [the relevant] web sites. [Defendant] presented no evidence that the Internet service providers even monitored the contents of those web sites.").

(same).

10 *See, e.g., United States v. Russo*, 480 F.2d 1228, 1240 (6th Cir.), *cert. denied,* 414 U.S. 1157 (1973) (dealing with computerized records).

11 *See, e.g., Potamkin Cadillac Corp. v. B.R.I. Coverage Corp.*, 38 F.3d 627, 631, 633 (2d Cir. 1994) (dealing with computerized business records).

Rules 803(6) and (8) effectively incorporate an authentication requirement. Rule 803(6) contemplates the admission of hearsay, if its criteria are satisfied, "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." Rule 803(8) contains substantially identical language. This trustworthiness criterion parallels the Rule 901(a) requirement of "evidence sufficient to support a finding that the matter in question is what its proponent claims." As a result, untrustworthy proffers of business or public records may be excluded on hearsay as well as authenticity grounds.[12]

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12 *United States v. Jackson*, 208 F.3d 633, 637 (7th Cir. 2000) ("Even if these web postings did qualify for the business records hearsay exception, 'the business records are inadmissible if the source of information or the method or circumstances of preparation indicate a lack of trustworthiness'") (citation omitted).

Market Reports & Tables. Rule 803(17) excepts from the hearsay rule "Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations." A number of cases have applied this rule to commercial websites furnishing such data as interest rates[13] and blue-book prices of used cars.[14] This rationale plainly extends to the other sorts of traditional information admitted under Rule 803(17), such as tables reflecting the prices of such items as stock, bonds and currency; real estate listings; and telephone books.

Admissions. Website data published by a litigant comprise admissions of that litigant when offered by an opponent.[15] Accordingly, even if the owner of a website may not offer data from the site into evidence, because the proffer is hearsay when

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13 *Elliott Assocs., L.P. v. Banco de la Nacion,* 194 F.R.D. 116, 121 (S.D.N.Y. 2000) (prime rates published on the Bloomberg website satisfy the hearsay exception of Federal Rule of Evidence 803(17).

14 *See, e.g., State v. Erickstad,* 620 N.W.2d 136, 145 (N.D. 2000) (*citing Irby-Greene v. M.O.R., Inc.*, 79 F.Supp.2d 630, 636 n.22 (E.D.Va. 2000)).

15 *See, e.g., Van Westrienen v. Americontinental Collection Corp.*, 94 F.Supp.2d 1087, 1109 (D. Or. 2000) ("the representations made by defendants on the website are admissible as admissions of the party-opponent under FRE 801(d)(2)(A)"); *Telewizja Polska USA, Inc. v. Echostar Satellite Corp.*, 2004 U.S. Dist. LEXIS 20845, at *16-17 (N.D. Ill. Oct. 14, 2004).

the owner attempts to do so, an opposing party is authorized to offer it as an admission of the owner.[16]

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16 *Potamkin Cadillac Corp. v. B.R.I. Coverage Corp.*, 38 F.3d 627, 631, 633-34 (2d Cir. 1994) (dealing with computerized business records).

Non-Hearsay Proffers. Not uncommonly, website data is not offered for the truth of the matters asserted but rather solely to show the fact that they were published on the web, either by one of the litigants or by unaffiliated third parties. For example, in a punitive damages proceeding, the fact of Internet publication may be relevant to show that the defendant published untruths for the public to rely on.[17] Or, in a trademark action, Internet listings or advertisements may be relevant on the issue of consumer confusion or purchaser understanding.[18] In neither of these circumstances is the website data offered for its truth. Accordingly, no hearsay issues arise.

Judicial Skepticism. As they were with computerized evidence prior to the mid-1990s, some judges remain skeptical of the reliability of anything derived from the Internet.[19] While there is no gainsaying a healthy judicial skepticism of any

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17 *See, e.g., Van Westrienen v. Americontinental Collection Corp.*, 94 F.Supp.2d 1087, 1109 (D. Or. 2000).

18 *See, e.g. ,Microware Sys. Corp. v. Apple Computer, Inc.*, 2000 U.S.Dist.LEXIS 3653 at *7 n.2 (S.D. Iowa March 15, 2000) ("Microware's internet and e-mail submissions are not ideal proffers of evidence since their authors cannot be cross-examined. However, in a case involving an industry where e-mail and internet communication are a fact of life, these technical deficiencies must go to the weight of such evidence, rather than to their admissibility. In any case, to the extent any of these stray comments bear on the issue of confusion, they come in for that purpose...") (citations omitted); *Mid City Bowling Lanes & Sports Palace, Inc. v. Don Carter's All Star Lanes-Sunrise Ltd.*, 1998 U.S.Dist.LEXIS 3297 at *5-*6 (E.D.La. March 12, 1998).

19 *See, e.g., St. Clair v. Johnny's Oyster & Shrimp, Inc.*, 76 F.Supp.2d 773, 774-75 (S.D. Tex. 1999) ("While some look to the Internet as an innovative vehicle for communication, the Court continues to warily and wearily view it largely as one large catalyst for rumor, innuendo, and misinformation.... Anyone can put anything on the Internet. No web-site is monitored for accuracy and nothing contained therein is under oath or even subject to independent verification absent underlying documentation. Moreover, the Court holds no illusions that hackers can adulterate the content on any web-site from any location at any time. For these reasons, any evidence procured off the Internet is adequate for almost nothing, even under the most liberal interpretations of the hearsay exception rules found in Fed.R.Evid. 807"); *Terbush v. United States*, 2005 U.S. Dist. LEXIS 37685, at *16 n.4 (E.D. Cal. Dec. 7, 2005) ("Information on internet sites presents special problems of authentication.... It has been recognized that anyone with sufficient hacking ability can put anything on the internet; no web-site is monitored for accuracy, and nothing contained therein is subject to independent verification absent underlying documentation").

evidence that is subject to ready, and potentially undetectable, manipulation, there is much on the web which is not subject to serious dispute and which may be highly probative. There is very little in the way of traditional documentary or visual evidence that is not subject to manipulation and distortion. As with so many of the trial judge's duties, this is a matter that can only be resolved on a case- by-case basis.

II. Email Evidence

Like Internet evidence, email evidence raises both authentication and hearsay issues. The general principles of admissibility are essentially the same since email is simply a distinctive type of Internet evidence — namely, the use of the Internet to send personalized communications.

Authentication. The authenticity of email evidence is governed by Federal Rule of Evidence 901(a), which requires only "evidence sufficient to support a finding that the matter in question is what its proponent claims." Under Fed.R.Evid. 901(b)(4), email may be authenticated by reference to its "appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." *See generally United States v. Siddiqui*, 215 F.3d 1318, 1322 (11th Cir. 2000); *Bloom v. Comw. of Virginia*, 34 Va. App. 364, 370, 542 S.E.2d 18, 20-21 (2001).

If email is produced by a party from the party's files and on its face purports to have been sent by that party, these circumstances alone may suffice to establish authenticity.[20] Authenticity may also be established by testimony of a witness who sent or received the emails — in essence, that the emails are the personal correspondence of the witness.[21]

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[20] *See, e.g., Superhighway Consulting, Inc. v. Techwave, Inc.*, 1999 U.S.Dist.LEXIS 17910 at *6 (N.D.Ill. Nov. 15, 1999).

[21] *Tibbetts v. RadioShack Corp.*, 2004 U.S. Dist. LEXIS 19835, at *44 (N.D. Ill. Sept. 30, 2004).

It is important, for authentication purposes, that email generated by a business or other entity on its face generally reflects the identity of the organization. The name of the organization, usually in some abbreviated form, ordinarily appears in the email address of the sender (after the @ symbol). This mark of origin has been held to self-authenticate the email as having been sent by the organization, under Fed.R.Evid. 902(7), which provides for self-authentication of: "*Trade inscriptions and the like.*--Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin." *See Superhighway Consulting, Inc. v. Techwave, Inc.*, 1999 U.S.Dist.LEXIS 17910 at *6 (N.D.Ill. Nov. 15, 1999). Where the email reflects the entire email name of a party (and not just the mark of origin), it has been held to comprise a party admission of origin.[22]

Independently, circumstantial indicia that may suffice to establish that proffered email were sent, or were sent by a specific person, include evidence that:
A witness or entity received the email.
The email bore the email address of a particular individual.
The address is consistent with the email address on other emails sent by the same person.[23]
This email contained the typewritten name or nickname of this individual in the body of the email.[24]

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22 *Middlebrook v. Anderson*, 2005 U.S. Dist. LEXIS 1976, at *14 (N.D. Tex. Feb. 11, 2005) (jurisdictional motion).

23 *Shea v. State*, 167 S.W.3d 98, 105 (Tex. App. 2005).

24 *Interest of E.P.*, 878 A.2d 91 (Pa. Super. 2005) ("He referred to himself by his first name"). Thus, too, courts have looked at the "electronic 'signature'" at the end of the email message identifying the name and business affiliation of the sender. *See, e.g.,*

The email recited matters that would normally be known only to the individual who is alleged to have sent it (or to a discrete number of persons including this individual).
Following receipt of the email, the recipient witness had a discussion with the individual who purportedly sent it, and the conversation reflected this individual's knowledge of the contents of the email.
***See generally United States v. Siddiqui*, 215 F.3d 1318, 1322-23 (11th Cir. 2000);**
***Bloom v. Comw. of Virginia*, 34 Va. App. 364, 370, 542 S.E.2d 18, 20-21 (2001);**
***Massimo v. State*, 144 S.W.3d 210, 215-16 (Tex. App. 2004) (unpublished opinion).**

As with all other forms of authentication, the testimony of a witness with knowledge is prerequisite to authenticate email. It is insufficient to proffer email through a witness with no knowledge of the transmissions at issue, unless the witness has sufficient technical knowledge of the process to be in a position to authenticate the email through expert testimony. *See, e.g., Richard Howard, Inc. v. Hogg*, 1996 Ohio App. LEXIS 5533 at *8 (Ohio App. Nov. 19, 1996) (affirming exclusion of email where the authenticating witness "was neither the recipient nor the sender of the E-mail transmissions and he offered no other details establishing his personal knowledge that these messages were actually sent or received by the parties involved. Furthermore, the transmissions were not authenticated by any other means").

***Sea-Land Serv., Inc. v. Lozen Int'l, LLC*, 285 F.3d 808, 821 (9th Cir. 2002) (held, email by one employee forwarded to party opponent by a fellow employee — containing the electronic signature of the latter — constitutes an admission of a party opponent and thus is not hearsay).**

There are a variety of technical means by which email transmissions may be traced. *See, e.g., Clement v. California Dep't of Corrections,* 2002 U.S. Dist. LEXIS 17426 at *32 (N.D. Cal. Sept. 9, 2002) ("major e-mail providers include a coded Internet Protocol address (IP address) in the header of every e-mail.... The IP address allows the recipient of an e-mail to identify the sender by contacting the service provider"). Therefore, if serious authentication issues arise, a technical witness may be of assistance.[25] This may become important, for example, in circumstances where a person or entity denies sending an email, or denies receipt of an email and has not engaged in conduct that furnishes circumstantial evidence of receipt (such as a subsequent communication reflecting knowledge of the contents of the email). *See, e.g., Hood-O'Hara v. Wills,* 873 A.2d 757, 760 & n.6 (Pa. Super. 2005) (authenticity not established where person to whom email name belonged denied sending email and testified that problems in the past had required her to modify her email account on at least one prior occasion); *Ellison v. Robertson,* 189 F.Supp.2d 1051, 1057 n.7 (C.D. Cal. 2002) ("Plaintiff has provided no evidence that AOL actually did receive the email. To the contrary, Plaintiff's former counsel states that while she received an acknowledgment of receipt for her April 17, 2000, email from [a local Internet provider], no such acknowledgment came from AOL"); *Carafano v. Metrosplash.com, Inc.,* 207 F.Supp.2d 1055, 1072 (C.D. Cal. 2002) ("Plaintiff provides no evidence that [defendant Internet service] ever received the reply email in response to its welcome confirmation email").

Absent a showing of reason to disbelieve a sender's or recipient's representations concerning the authenticity of email, the court may decline to permit discovery into the computer system of the sender/recipient in light of the intrusion that forensic discovery would involve. *Williams v. Massachusetts Mutual Life Ins. Co.*, 226 F.R.D. 144, 146 (N.D. Ill 2005).

While it is true that an email may be sent by anyone who, with a password, gains access to another's email account, similar uncertainties exist with traditional documents. Therefore, there is no need for separate rules of admissibility. *See, e.g., Interest of E.P.*, 878 A.2d 91 (Pa. Super. 2005) (just as an email can be faked, a "signature can be forged; a letter can be typed on another's typewriter; distinct letterhead stationary can be copied or stolen. We believe that e-mail messages and similar forms of electronic communication can be properly authenticated within the existing framework of Pa. R.E. 901 and Pennsylvania case law.").

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25 Since authentication issues are decided by the court under Federal Rule of Evidence 104(a), live testimony from such a witness is not essential; an affidavit or declaration may be equally effective. Fed.R.Evid. 104(a) is set forth in n.4, *supra.*

Hearsay. The hearsay issues associated with email are largely the same as those associated with conventional correspondence. An email offered for the truth of its contents is hearsay and must satisfy an applicable hearsay exception. *See, e.g., Hood-O'Hara v. Wills,* 873 A.2d 757, 760 (Pa. Super. 2005). The prevalence and ease of use of email, particularly in the business setting, makes it attractive simply to assume that all email generated at or by a business falls under the business-records exception to the hearsay rule. That assumption would be incorrect.

What Is a Business Record? Or a Present Sense Impression? In *United States v. Ferber*, 966 F.Supp. 90 (D. Mass. 1997), the government offered into evidence a multi-paragraph email from a subordinate to his superior describing a telephone conversation with the defendant (not a fellow employee). In that conversation, the defendant inculpated himself, and the email so reflected. Chief Judge Young rejected the proffer under Fed.R.Evid. 803(6) because, "while it may have been [the employee's] routing business practice to make such records, there was not sufficient evidence that [his employer] required such records to be maintained.... [I]n order for a document to be admitted as a business record, there must be some evidence of a business duty to make and regularly maintain records of this type." *Id.*, 996 F.Supp. at 98. The *Ferber* Court nonetheless admitted the email, but under 803(1), the hearsay exception for present sense impressions.[26] *See also State of New York v. Microsoft Corp.*, 2002 U.S. Dist. LEXIS 7683 at *9 (D.D.C. April 12, 2002) ("While Mr. Glaser's email [recounting a meeting] may have been 'kept in the course' of RealNetworks regularly conducted business activity, Plaintiffs have not, on the present record, established that it was the 'regular practice' of RealNetworks employees to write and maintain such emails.") (separately holding the present sense impression exception inapplicable); *Rambus, Inc. v. Infineon Techs. AG*, 348 F. Supp. 2d 698, 707 (E.D. Va. 2004) ("Email is far less of a systematic business activity than a monthly inventory printout"), quoting *Monotype Corp. v. Intl. Typeface Corp.*, 43 F.3d 443, 450 (9th Cir. 1994).

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26 Fed.R.Evid. 803(1) sets forth the hearsay exception for present sense impressions, which are defined to include any "statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter."

Hearsay within Hearsay. Because business records are written without regard for the rules of evidence, they commonly contain multiple layers of hearsay. Under Federal Rule of Evidence 805,[27] each layer of hearsay must independently satisfy an exception to the hearsay rule. Absent that, any hearsay portion of an email that is offered for the truth[28] will be excluded. *See, e.g., State of New York v. Microsoft Corp.*, 2002 U.S. Dist. LEXIS 7683 at *14 (D.D.C. April 12, 2002) ("'If both the source and the recorder of the information, as well as every other participant in the chain producing the record, are acting in the regular course of business, the multiple hearsay is excused by Rule 803(6). If the source of the information is an outsider, Rule 803(6) does not, by itself, permit the admission of the business record. The outsider's statement must fall within another hearsay exception to be admissible because it does not have the presumption of accuracy that statements made during the regular course of business have'") (citation omitted).

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27 **Fed.R.Evid. 805 provides: "Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules."**

28 **Email communications not offered for the truth are not subject to exclusion as hearsay. *See, e.g., Rombom v. Weberman,* 2002 N.Y. Misc. LEXIS 769 at *20 (Sup. Ct. Kings Cty. June 13, 2002) ("since plaintiff introduced the e-mails to establish their effect upon plaintiff, as opposed to the truth of their content, the e-mails did not constitute inadmissible hearsay").**

Admission of Party Opponent. Under Fed.R.Evid. 801(d)(2),[29] emails sent by party opponents constitute admissions and are not hearsay. *See, e.g., Riisna v. ABC, Inc.*, 2002 U.S. Dist. LEXIS 16969 at *9-*10 (S.D.N.Y. Sept. 11, 2002). The email address itself, which reflects that it originates from a party, may be admissible as a party admission. *Middlebrook v. Anderson*, 2005 U.S. Dist. LEXIS 1976, at *14 (N.D. Tex. Feb. 11, 2005) (jurisdictional motion). Further, an email from a party opponent that forwards another email may comprise an adoptive admission of the original message, depending on the text of the forwarding email. *Sea-Land Serv., Inc. v. Lozen Int'l, LLC*, 285 F.3d 808, 821 (9th Cir. 2002) (one of plaintiff's employees "incorporated and adopted the contents" of an email message from a second of plaintiff's employees when she forwarded it to the defendant with a cover note that "manifested an adoption or belief in [the] truth" of the information

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Fed.R.Evid. 801(d)(2) provides that a statement is not hearsay if:

> The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

contained in the original email, within Fed.R.Evid. 801(d)(2)(B)). If there is not an adoptive admission, however, the forwarded email chain may comprise hearsay-within-hearsay. *Rambus, Inc. v. Infineon Techs. AG*, 348 F. Supp. 2d 698, 707 (E.D. Va. 2004).

Excited Utterance. In dicta, the Oregon Court of Appeals has indicated that, in appropriate circumstances, an email message might fall within the excited utterance exception to the hearsay rule. *State v. Cunningham*, 40 P.3d 1065, 1076 n.8 (2002). (The federal excited utterance exception, contained in Fed.R.Evid. 803(2),[30] is identical to the Oregon exception, Oregon Rule 803(2).)

Non-Hearsay Uses. Not all extrajudicial statements are hearsay or, more precisely, need not be offered for hearsay purposes. The contents of an authenticated email may, for example, constitute a verbal act — *e.g.*, constitute defamation or the offer or acceptance of a contract. *Middlebrook v. Anderson*, 2005 U.S. Dist. LEXIS 1976, at *14 (N.D. Tex. Feb. 11, 2005) (jurisdictional motion); *Tibbetts v. RadioShack Corp.*, 2004 U.S. Dist. LEXIS 19835, at *45 (N.D. Ill. Sept. 30, 2004).

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30 Fed.R.Evid. 803(2) excepts from the hearsay rule "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."