

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