Advisory Committee on Evidence Rules

Minutes of the Meeting of April 24-25, 2006

New York, New York

The Advisory Committee on the Federal Rules of Evidence (the "Committee") met on April 24-25, 2006 at Fordham Law School in New York City.

The following members of the Committee were present:

Hon. Jerry E. Smith, Chair
Hon. Joseph F. Anderson, Jr.
Hon. Robert L. Hinkle
Hon. Andrew D. Hurwitz
Thomas W. Hillier II
Patricia L. Refo, Esq.
Ronald J. Tenpas, 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. Christopher M. Klein, Liaison from the Bankruptcy Rules Committee
Hon. Michael M. Baylson, Liaison from the Civil Rules Committee
Hon. David G. Trager, Liaison from the Criminal Rules Committee
Hon. Lee H. Rosenthal, Chair of the Civil Rules Committee
Professor Edward H. Cooper, Reporter to the Civil Rules Committee
Chilton D. Varner, Esq., Member of the Civil Rules Committee
Daniel Girard, Esq., Member of the Civil Rules Committee
Professor Richard L. Marcus, Consultant to the Civil Rules Committee
Timothy Reagan, Esq., Federal Judicial Center
Brooke Coleman, Esq., Rules Clerk for Judge Levi
Peter G. McCabe, Esq., Secretary, Committee on Rules of Practice and Procedure
John K. Rabiej, Esq., Chief, Rules Committee Support Office
James Ishida, Esq., Rules Committee Support Office
Jeffrey N. Barr, Esq. Rules Committee Support Office
Professor Daniel J. Capra, Reporter to the Evidence Rules Committee
Professor Kenneth S. Broun, Consultant to the Evidence Rules Committee

Opening Business

Judge Smith welcomed the members of the Civil Rules Committee who were attending the meeting in order to provide comment on the proposed rule on waiver of privilege and work product that is being prepared by the Evidence Rules Committee. Judge Smith reported on the actions taken on the proposed amendments to Rules 404, 408, 606(b) and 609, which have been approved by the Supreme Court and are before Congress.

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

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

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

Concerns about the common law of waiver of privilege and work product have been voiced in Congress as well. The Chairman of the House Committee on the Judiciary, by letter dated January 23, 2006, requested the Judicial Conference to initiate the rulemaking process to address the litigation costs and burdens created by the current law on waiver of attorney-client privilege and work product protection. The Chairman recognized that while any rule prepared by the Advisory Committee could proceed through the rulemaking process, it would eventually have to be enacted directly by Congress, as it would be a rule affecting privileges. See 28 U.S.C. § 2074(b).

At the November 2005 Committee meeting, Professor Broun had presented for the

Committee's consideration a draft rule covering 1) inadvertent disclosures; 2) disclosure to government agencies; 3) subject matter waiver; 4) the protective effect of a confidentiality order; and 5) the effect of a confidentiality agreement among the parties. The Committee extensively discussed the draft and provided comments and suggestions at that meeting, and Professor Broun and the Reporter revised the draft rule and added a proposed Committee Note for the consideration of the Committee at the April 2006 meeting. The draft proposed Rule 502 provided for the following:

1. A voluntary disclosure of privilege or work product would operate as a waiver unless an exception could be found in the Rule. But a waiver of privilege would cover only the information disclosed, unless fairness required a broader subject matter waiver.

2. Inadvertent disclosures during discovery in either state or federal court 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.

3. Disclosure of privileged information to a federal or state government agency during an investigation would not constitute a waiver to private parties in either state or federal litigation.

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

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.

The morning of the April 2006 meeting was devoted to a mini-hearing on the proposed rule 502 and Committee Note. The Committee invited the views of a federal judge, a federal magistrate judge, a number of practitioners and two academics. Much of the discussion and controversy was about the merits of the "selective waiver" rule, i.e., the provision that disclosure to a government agency would not constitute a waiver to private parties. Concern was also expressed about the breadth of the proposed rule, insofar as it would alter state law on waiver of privilege and would even provide that a waiver ruling in one state would bind non-parties in a court of a different state.

After the presentations and discussion, Professor Broun and the Reporter revised the proposal for consideration by the Committee in its afternoon session. The basic changes were:

1. The rule would not regulate state-to-state waiver issues, nor would it bind a federal court to a confidentiality order issued by a state court. It would, however, bind state courts to the federal waiver rule with respect to inadvertent disclosure, selective waiver, and federal court confidentiality orders.

2. The rule would not state that a voluntary disclosure constitutes a waiver unless an exception could be found. Rather, the rule would take the law of voluntary disclosure as it found it, and would provide exceptions and limitations whenever a court would otherwise find a waiver.

3. The inadvertent disclosure provision would not be limited to disclosures in discovery, but rather would cover any mistaken disclosure of privilege or work product.

The Committee and its many guests then discussed the text of the proposal at the afternoon session. A number of considerations were raised and discussed concerning, among other things:

1) the breadth of the rule;
2) whether a rule adopting selective waiver made sense in light of the fact that most federal courts had rejected the concept;
3) whether the selective waiver language, which would apply to disclosures "during an investigation" might be overbroad or too vague;
4) whether the rule should include a proviso that it was not intended to regulate the government's disclosure of information to other government agencies or as required by law;
5) whether the rule should cover the effect of a disclosure of information to a state regulator;
6) whether the rule should even cover the question of selective waiver;
7) whether the rule should provide that inadvertent disclosure should always, or never, constitute a waiver;
8) whether the rule should cover unauthorized disclosures; and
9) whether the language providing for confidentiality orders should be narrowed to provide that such an order could only cover confidentiality of material disclosed in connection with litigation pending before the court.

Based on this discussion, the Committee determined that the draft rule before it should be revised as follows:

1. The selective waiver provision would be bracketed, to indicate that the Committee had not determined to approve the provision, but was seeking public comment on its merits.

2. The language in the selective waiver provision concerning disclosures "during an investigation" needed to be narrowed or better defined.

3. The selective waiver provision should specify that it was not intended to cover disclosures to state regulators, nor to affect the government agency's disclosure to other agencies or as required by law.

4. Confidentiality orders should be enforceable only insofar as they covered disclosure of material in the case before the court.

After extensive discussion, the Committee voted unanimously to recommend that a proposed

Rule 502 and Committee Note, as revised during its discussion, be released for public comment. The Reporter and Professor Broun then redrafted the proposed Rule and Committee Note for review by the Committee and its guests the next morning. This redraft addressed all the changes approved by the Committee; and specifically, with respect to the selective waiver language covering disclosures "during an investigation," the drafters borrowed language from the recently amended Rule 408 — language that was previously offered by the Justice Department to cover statements made to government regulators. That language covers disclosures "when made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority."

At the Tuesday morning session, the Committee and its guests reviewed the revised Rule 502 and Committee Note. After a short discussion— including some suggestions on style, which were implemented — the Committee voted unanimously to recommend that the proposed Rule 502 and Committee Note (as set forth below) be released for public comment.

The Rule and Committee Note, as unanimously approved by the Committee for release for public comment, provides as follows:

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

(a) Scope of waiver. — In federal proceedings, the waiver by disclosure of an attorney-client privilege or work product protection extends to an undisclosed communication or information concerning the same subject matter only if that undisclosed communication or information ought in fairness to be considered with the disclosed communication or information.

(b) Inadvertent disclosure. — A disclosure of a communication or information covered by the attorney-client privilege or work product protection does not operate as a waiver in a state or federal proceeding if the disclosure is inadvertent and is made in connection with federal litigation or federal 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).

[(c) Selective waiver. — In a federal or state proceeding, a disclosure of a communication or information covered by the attorney-client privilege or work product protection — when made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority — does not operate as a waiver of the privilege or protection in favor of non-governmental persons or entities. The effect of disclosure to a state or local government agency, with respect to non-governmental persons or entities, is governed by applicable state law. Nothing in this rule limits or expands the authority of a government agency to disclose communications or information to other government agencies or as otherwise authorized or required by law.]

(d) Controlling effect of court orders. — A federal court order that the attorney-client privilege or work product protection is not waived as a result of disclosure in connection with the litigation pending before the court governs all persons or entities in all state or federal proceedings, whether or not they were parties to the matter before the court, if the order incorporates the agreement of the parties before the court.

(e) Controlling effect of party agreements. — An agreement on the effect of disclosure of a communication or information covered by the attorney-client privilege or work product protection is binding on the parties to the agreement, but not on other parties unless the agreement is incorporated into a court order.

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

1) "attorney-client privilege" means the protection provided for confidential attorney-client communications, under applicable law; and

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

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 communications or information covered by the attorney-client privilege or work product protection. 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. For example, if a federal court's confidentiality order is not enforceable in a state court 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).

The rule makes no attempt to alter federal or state law on whether a communication or information is protected as attorney-client privilege or work product as an initial matter. Moreover, while establishing some exceptions to waiver, the rule does not purport to supplant applicable waiver doctrine generally.

The rule governs only certain waivers 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 (a). The rule provides that a voluntary disclosure generally results in a waiver only of the communication or 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 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.

Subdivision (b). Courts are in conflict over whether an inadvertent disclosure of privileged information or work product constitutes a waiver. A few courts find that a disclosure must be intentional to be a waiver. Most courts find a waiver only if the disclosing party acted carelessly in disclosing the communication or information and failed to request its return in a timely manner. And a few courts hold that any 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 in connection with a federal proceeding 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., 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 covered by the attorney-client privilege or work product protection should not be treated lightly. On the other hand, a rule imposing strict liability for an inadvertent disclosure threatens to impose prohibitive costs for privilege review and retention, especially in cases involving electronic discovery.

The rule refers to "inadvertent" disclosure, as opposed to using any other term, because the word "inadvertent" is widely used by courts and commentators to cover mistaken or unintentional disclosures of information covered by the attorney-client privilege or the work product protection. *See, e.g.*, Manual for Complex Litigation Fourth § 11.44 (Federal Judicial Center 2004) (referring to the "consequences of inadvertent waiver"); *Alldread v. City of Grenada*, 988 F.2d 1425, 1434 (5th Cir. 1993) ("There is no consensus, however, as to the effect of inadvertent disclosure of confidential communications.").

Subdivision (c): Courts are in conflict over 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 a federal government agency exercising regulatory, investigative or enforcement authority does not constitute a waiver of attorney-client privilege or work product protection as to non-governmental persons or entities, whether in federal or state court. A rule protecting selective waiver in these circumstances 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 covered by the attorney-client privilege or work product protection does not constitute a waiver to private parties).

The Committee considered whether the shield 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 or be required to use the information for some purpose and then would find it difficult or impossible to be bound by an air-tight confidentiality agreement, however drafted. If a confidentiality 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.

Subdivision (d). 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 Center 2004) (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 when a confidentiality order governing the consequences of disclosure in that case is entered in a federal proceeding, according to the terms agreed to by the parties, its terms are enforceable against non-parties in any federal or state proceeding. 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. 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 (e). Subdivision (e) codifies the well-established proposition that parties 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.

Subdivision (f). 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.

Crawford v. Washington and the Hearsay Exceptions

The Reporter prepared a report for the Committee on case law developments after *Crawford v. Washington*. The Court in *Crawford* held that if hearsay is "testimonial," its admission against an accused violates the right to confrontation unless the declarant is available and subject to cross-examination. The Court 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 Committee is monitoring developments and is awaiting the Supreme Court's decisions in two state cases involving *Crawford's* effect on the admissibility of 911 calls and statements made to responding officers.

The Evidence Rules Committee decided that because of the uncertainty created by *Crawford*, and the pending Supreme Court decisions on the subject, it would be imprudent to propose amendments to specific hearsay exceptions that might be construed to admit testimonial hearsay. Any attempt to determine the correct scope of the term "testimonial" might be undermined by subsequent case law handed down during the time that the rule would be going through the rulemaking process.

At the Fall 2005 meeting, some Committee members suggested 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 Committee directed the Reporter to prepare a draft 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.

At the April 2006 meeting, the Committee considered the draft prepared by the Reporter and resolved not to proceed with any amendment that would provide a reference to constitutional limitations in the hearsay exceptions or the hearsay rule. Committee members stated that such language was not necessary because most counsel are now aware of *Crawford*; an amendment would make the already-long Rules 801, 803 and 804 even longer; and any amendment adding constitutional language would raise the anomaly that other rules, such as perhaps Rule 403 and 404, might be subject to unconstitutional application and yet would not have similar constitutional-warning language. One member dissented from the Committee's determination, on the ground that constitutional-warning language in the hearsay exceptions might provide important notice to counsel who are inexperienced in criminal defense.

Electronic Evidence, and Restylizing the Evidence Rules

At its Fall 2005 meeting the Committee tentatively approved a new Rule 107, an amendment that would make it clear that the Evidence Rules cover evidence presented in electronic form. The proposed Rule 107 would update the "paper-based" language in the Evidence Rules as follows:

> **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.

Upon reconsideration at the April 2006 meeting, the Committee determined unanimously that it would not proceed with the proposed amendment at this time. The Committee noted that courts are not having any trouble in applying the existing, paper-based Evidence Rules to all forms of electronic evidence. One member observed that paper-based language might actually be appropriate in some Rules, such as Rule 612, which requires a "writing" to be produced when it refreshes recollection; if "writing" covers electronic information as well, then the Rule might be read to require production of a telephone call that refreshed a witness's recollection.

Judge Thrash, the liaison from the Standing Committee, observed that the Rule would not really serve a notice function, because counsel would not think to look at a freestanding Rule 107 to determine what "writing" means in, e.g., Rule 902. He concluded that the only way to update the language of the Evidence Rules was to amend each paper-based rule directly.

Judge Thrash's comment led to a discussion of whether the Committee might wish to propose a restylization project for the Evidence Rules. The Committee determined that such a project would be worthy of consideration, so long as it was understood that the project would not result in a major restructuring of the Rules, such as a change of rule numbers.

The Committee directed the Reporter to pick a few rules that are clearly in need of restyling, and to work with Professor Kimble to prepare a restyled version of those rules for the Committee's consideration at the next meeting.

Other Business

Judge Smith noted with regret that the terms of two valued Committee members were expiring. He expressed the Committee's thanks to Trish Refo and Tom Hillier for their stellar

contributions to the work of the Committee.

The meeting was adjourned on Tuesday April 25, with the time and place of the Fall 2006 meeting to be announced.