

**TO:           Honorable Lee H. Rosenthal, Chair  
              Standing Committee on Rules of Practice  
              and Procedure**

**FROM:       Robert L. Hinkle, Chair  
              Advisory Committee on Evidence Rules**

**DATE:       May 12, 2008**

**RE:           Report of the Advisory Committee on Evidence Rules**

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## **I. Introduction**

The Advisory Committee on Evidence Rules (the “Committee”) met on May 1-2, in Boston.

The Committee seeks approval of two proposals, both for release for public comment.

1. Restyled Evidence Rules 101-415 — with the proviso that these rules, if approved, will be held until all the rules are restyled, so that the restyled rules will be released for public comment in a single package.
2. A proposed amendment to Evidence Rule 804(b)(3), the hearsay exception for declarations against penal interest, that would extend the corroborating circumstances requirement — currently applicable only to statements offered by criminal defendants — to statements against penal interest offered by the prosecution.

A complete discussion of these matters can be found in the draft minutes of the Fall 2007 meeting, attached as Appendix C to this Report

## II. Action Items

### A. Restyled Evidence Rules 101-415

At its Fall 2007 meeting the Committee agreed upon a protocol and a timetable for its project to restyle the Evidence Rules. The Committee established a step-by-step process for restyling that is substantially the same as that employed in previous restyling projects. Those steps are: 1) draft by Professor Kimble; 2) comments by the Reporter; 3) response by Professor Kimble and changes to the draft where necessary; 4) expedited review by Advisory Committee members and redraft by Professor Kimble if necessary; 5) review by the Style Subcommittee of the Standing Committee; 6) review by the Advisory Committee; and 7) review by the Standing Committee to determine whether to release the restyled rules for public comment.

The Committee agreed that the Evidence Rules will be divided into three parts, and the process described above will therefore be conducted in three separate stages. The Committee also agreed that the entire package of restyled rules should be submitted for public comment at one time.

The Committee has established a working principle for whether a change is one of “style” (in which event the final determination is made by the Style Subcommittee) or one of “substance” (in which event the final decision is for the Committee). A change is “substantive” if:

1. Under the existing practice in any circuit, it could lead to a different result on a question of admissibility (e.g., a change that requires a court to provide either a less or more stringent standard in evaluating the admissibility of a certain piece of evidence); or
2. Under the existing practice in any circuit, it could lead to a change in the procedure by which an admissibility decision is made (e.g., a change in the time in which an objection must be made, or a change in whether a court must hold a hearing on an admissibility question), or
3. It changes the structure of a rule so as to alter the way in which courts and litigants have thought about, and argued about, questions of admissibility (e.g., merging Rules 104(a) and 104(b) into a single subdivision); or
4. It changes what Professor Kimble has referred to as a “sacred phrase” — “phrases that have become so familiar as to be fixed in cement.”

At the Spring 2008 meeting the Committee reviewed a draft of the first third of the Evidence Rules (Rules 101-415). The draft had been approved by the Style Subcommittee of the Standing Committee.

At the meeting, the Committee reviewed each rule to determine whether any of the proposed changes were of substance rather than style. The Committee also reviewed each rule to determine

whether to recommend that a change, even though one of style, might be reconsidered by the Style Subcommittee of the Standing Committee. The Committee determined that a number of proposed changes were substantive, including some changes to Rules 102, 106, 401, 403, 404, 410, 412, and 413-15. The Committee also made a number of style suggestions to the Rules. A complete description of these changes and suggestions can be found in the Minutes of the Spring 2008 Committee meeting, attached to this Report as Appendix C. The Committee also resolved to maintain a list of “global” questions to maintain consistent terminology. Some of the global questions include how to refer to the government and the defendant in a criminal case, and how to use such terms as “case”, “proceeding” and “action”

After implementing changes of substance and recommending changes of style, the Committee unanimously voted to refer the restyled Rules 101-415 to the Standing Committee, with the recommendation that they be released for public comment when the complete set of Evidence Rules has been restyled.

The proposed restyled Rules 101-415 are attached to this Report as Appendix A — they are presented in a “side-by-side” version, with the existing rule in the left column and the restyled rule in the right

The template Committee Note to each of the restyled rules will read as follows:

#### **Committee Note**

The language of Rule [ ] has been amended as part of the restyling of the [ ] Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The Committee plans to prepare a more detailed Committee Note to Rule 101, which will provide a short description of the process and the goals of restyling. It will be adapted from the Committee Note to the restyled Civil Rule 1.

**Recommendation: The Evidence Rules Committee recommends that the proposed restyled Evidence Rules 101-415 be approved for release for public comment, with the release to occur when all the restyled rules have been prepared.**

## B. Proposed Amendment to Evidence Rule 804(b)(3)

At its Fall 2007 meeting the Evidence Rules Committee voted to consider the possibility of an amendment to Evidence Rule 804(b)(3), the exception to the hearsay rule for declarations against interest. In its current form Rule 804(b)(3) requires an accused to provide corroborating circumstances clearly indicating the trustworthiness of a declaration against penal interest for the hearsay to be admissible, but by its terms the Rule imposes no similar requirement on the prosecution. The Committee reviewed a proposed amendment that would extend the corroborating circumstances requirement to declarations against penal interest offered by the prosecution. The possible need for the amendment arose after the Supreme Court's decision in *Whorton v Bockting*, which held that the Confrontation Clause provides no protection against unreliable hearsay if that hearsay is nontestimonial. If the prosecution has to show only that a declarant made a statement that tended to disserve his interest — i.e., all that is required under the terms of the existing rule — then it might well be that unreliable hearsay could be admitted against an accused.

At the Fall 2007 meeting, the Committee deferred to a request from the Department of Justice representative to wait before proposing an amendment until the Department had time to review the proposal and prepare a position. At the Spring 2008 meeting, the DOJ representative stated that the Department supported publication of an amendment to Rule 804(b)(3) that would extend the corroborating circumstances requirement to declarations against penal interest offered by the government in criminal cases. Committee members accordingly expressed strong interest in proceeding with the amendment to Rule 804(b)(3). Members stated that the rule would provide an important guarantee of reliability in criminal prosecutions, and could rectify confusion and dispute among the courts — because some courts currently apply a corroborating circumstances requirement to statements offered by the government and some do not.

The Committee then discussed whether three issues that had been raised in the case law should be addressed in the text or note to a proposed amendment to Rule 804(b)(3). Those questions are as follows:

1. *Should the corroborating circumstances requirement be extended to civil cases?*

Committee members noted that only one reported decision had extended the corroborating circumstances requirement to civil cases, and that there were no other significant reported cases on the subject. Given the dearth of authority, and the different policy questions that might be raised with respect to declarations against penal interest offered in civil cases, the Committee decided unanimously not to address the applicability of the corroborating circumstances requirement to civil cases.

2. *Should the amendment consider the applicability of the Supreme Court's decision in Crawford v Washington?* Under *Crawford v. Washington*, a declaration against penal interest cannot be admitted against an accused if it is testimonial. Committee members considered whether to provide a textual limitation in Rule 804(b)(3), i.e., that “testimonial”

declarations against penal interest are not admissible against the accused. The Committee determined that this language was unnecessary, because federal courts after *Crawford* have uniformly held that if a statement is testimonial, it by definition cannot satisfy the admissibility requirements of Rule 804(b)(3). A statement is “testimonial” when it is made to law enforcement officers with the primary motivation that it will be used in a criminal prosecution — but such a statement cannot be a declaration against penal interest because the Supreme Court held in *Williamson v United States* that statements made to law enforcement officers cannot qualify under the exception as a matter of evidence law. Because of the fit between the hearsay exception and the right to confrontation, Committee members saw no need to refer to the *Crawford* standard in the text of the rule — especially since to do so could create a negative inference with respect to the hearsay exceptions that are not amended. The Committee agreed, however, to add language to the Committee Note to explain why the text of the Rule does not address *Crawford*.

3 *Should the amendment resolve some disputes in the courts about the meaning of “corroborating circumstances”?* Committee members noted that there are a few decisions that define “corroborating circumstances” as prohibiting any consideration of independent evidence that corroborates the assertions of the hearsay declarant. These courts appear to be relying on pre-*Crawford* Confrontation Clause jurisprudence that is no longer applicable. Members noted, however, that the disagreement in the courts about the meaning of “corroborating circumstances” did not run very deep, and that the few courts that are relying on outmoded constitutional law are likely to change their approach when the issue is directly addressed. Eight members of the Committee voted not to include any definition of corroborating circumstances in the text or Committee Note to the proposed amendment. One member dissented.

After discussion, the Committee voted unanimously to refer the proposed amendment to Rule 804(b)(3), and the Committee Note, to the Standing Committee, with the recommendation that the amendment be released for public comment. Committee members noted that the Rule would have to be restyled as part of the restyling project, but resolved unanimously that the proposed substantive change should proceed on a separate track and timeline. Thus, Rule 804(b)(3), together with its substantive change if approved, will be restyled together with all the other hearsay exceptions in the third part of the restyling project.

The proposed amendment to Evidence Rule 804(b)(3), together with the proposed Committee Note, is attached as Appendix B to this Report.

**Recommendation: The Evidence Rules Committee recommends that the proposed amendment to Rule 804(b)(3) be approved for release for public comment.**

### **III. Information Item**

#### ***Crawford v. Washington* and the Hearsay Exceptions in the Evidence Rules**

The Committee continues to monitor case law developments after the Supreme Court's decision in *Crawford v. Washington*, in which the Court held that the admission of "testimonial" hearsay violates the accused's right to confrontation unless the accused has an opportunity to cross-examine the declarant. Subsequently the Court in *Davis v. Washington* held that a hearsay statement is not testimonial if the primary motivation for making the statement was for some purpose other than for use in a criminal prosecution. And as discussed above, the Court in *Whorton v. Bockting* held that non-testimonial hearsay is unregulated by the Confrontation Clause.

*Crawford* and the subsequent case law raises at least the possibility that some of the hearsay exceptions in the Federal Rules of Evidence might be subject to an unconstitutional application in some circumstances. If that possibility becomes a reality, it may become necessary to propose amendments to bring those hearsay exceptions into compliance with constitutional requirements. At its Fall 2007 meeting, however, the Committee unanimously resolved that there is no need to propose any amendment in response to *Crawford* at this time. It is likely that no amendment will be necessary in any event, because the case law is reaching the result that any hearsay statement admissible under a Federal Rules exception is by that fact non-testimonial and therefore admissible under the Confrontation Clause. The admissibility requirements of the Federal Rules hearsay exceptions are being held to screen out "testimonial" hearsay as that term has been construed in *Davis* and by the lower courts. Even if the Federal Rules hearsay exceptions are not coextensive with the Confrontation Clause, an attempt to codify *Crawford* is unwise at this point, given the rapid development of the case law. The Committee will continue to monitor case law developments under *Crawford* and *Davis*.

### **IV. Minutes of the Spring 2008 Meeting**

The Reporter's draft of the minutes of the Committee's Spring 2008 meeting is attached to this report as Appendix C. These minutes have not yet been approved by the Committee