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OF THE  
JUDICIAL CONFERENCE OF THE UNITED STATES  
WASHINGTON, D.C. 20544

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December 23, 2005

Honorable Chris Cannon  
United States House of Representatives  
2436 Rayburn House Office Building  
Washington, D.C. 20515

RE: *Proposed Rule Amendment Submitted by the Center for Regulatory Effectiveness*

Dear Congressman Cannon:

Thank you for your letter of November 10, 2005, regarding the proposal from the Center for Regulatory Effectiveness to amend Federal Rule of Evidence 803(8) to apply the hearsay exception to public reports that satisfy information quality standards promulgated by federal agencies. At its January 2005 meeting, the Advisory Committee on Evidence Rules, chaired by Judge Jerry E. Smith of the Fifth Circuit Court of Appeals, carefully considered the Center's August 9, 2004, memorandum and the enclosed December 15, 2004, memorandum of the Committee's reporter, Professor Daniel J. Capra. The Committee was persuaded that the rule should not be amended, and it unanimously decided to take no action on the Center's proposal.

The reporter's comprehensive memorandum addresses each of the Center's arguments. At the risk of oversimplifying the reporter's analysis, I have summarized what I believe to be his main points.

First, no real problem in applying the public-report hearsay exception has been demonstrated. The cases cited in the Center's report simply do not hold up under close scrutiny as analyzed fully in the reporter's memorandum. Nor is there a conflict between Rule 803(8) and the law requiring information quality standards or the standards actually issued by federal agencies, which are designed for other purposes. Moreover, in close cases when supposedly marginal public reports have been admitted, the report's reliability can be effectively challenged on cross-examination. Because any amendment of the evidence rules can inject serious cost and uncertainty into the litigation process, the Committee uses a very high standard before going forward with a proposed amendment. That high standard requires a strong showing of a demonstrable problem under the existing rule. Such a showing has not been made here.

Second, at the root of the Center's proposal is its objection to the presumption of admissibility for public reports. That presumption may be rebutted in any particular case, but the Center has not demonstrated that the presumption should be abandoned. Yet this would be the effect of its proposal.

Third, the rule applies to all public reports, not just those issued by the federal government and subject to OMB information quality guidelines. The Center's proposal could lead to the anomaly that reports of federal agencies are excluded whereas comparable reports of state and local agencies are admitted.

Fourth, the amendment would make the rule much more difficult to use. Judges would be forced to consult reliability requirements that are not stated in the rule, that vary from one federal agency to another, and that are not readily available. The evidence rules are consulted by trial judges for the purpose of making immediate decisions in the courtroom. This proposal could impede the speedy resolution of evidentiary objections.

Fifth, the Center's proposal affects one of many hearsay exceptions whose precise contours have become unsettled in light of the Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004). (The Court in *Crawford* held that if hearsay is "testimonial," its admission against the defendant violates the defendant's constitutional right to confrontation, unless the declarant is available and subject to cross-examination.) Lower courts are almost daily examining the extent of specific hearsay exceptions to determine whether they comply with *Crawford*. The issues are complex, and the courts have differed in their opinions on how *Crawford* should be applied depending on the circumstances in the case. Not surprisingly, no real consensus has emerged yet. The Supreme Court has recently granted certiorari to consider two cases involving post-*Crawford* issues that may provide guidance on how to apply the *Crawford* holding. Adopting the Center's proposal now runs the real risk of endorsing a rule amendment that might be unconstitutional. Although *Crawford*'s holding applies only to criminal cases, it would be inappropriate and confusing to propose a rule amendment that addresses the use of public reports only in civil cases.

The Committee concluded that it is premature to consider any amendments to the hearsay exceptions, especially when no real problem has been identified regarding a specific exception, until the courts have had more time to construe and implement the *Crawford* requirements. The Committee is monitoring the developing case law and will revisit the matter at the appropriate time.

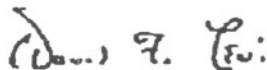
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Although the Committee has declined to adopt the Center's proposal, the Committee would welcome any new information that may call for a reexamination of the matter. I also appreciate your interest in the rulemaking process and this particular topic. Please do not hesitate to call me or Judge Smith, if you or your staff would like to discuss this matter further with either or both of us. I send best wishes.

Sincerely,

A handwritten signature in black ink that reads "David F. Levi". The signature is written in a cursive style with some loops and flourishes.

David F. Levi

Enclosure

cc: Honorable Jerry E. Smith  
Professor Daniel J. Capra