Advisory Committee on Evidence Rules

Minutes of the Meeting of November 13th, 2003

Washington, D.C.

The Advisory Committee on the Federal Rules of Evidence (the "Committee") met on November 13th, 2003 at the Thurgood Marshall Federal Judiciary Building in Washington, D.C..

The following members of the Committee were present:

Hon. Jerry E. Smith, Chair
Hon. Ronald L. Buckwalter
Hon. Robert L. Hinkel
Hon. Jeffrey L. Amestoy
David S. Maring, Esq.
Thomas W. Hillier, Esq.
Stuart A. Levey, Esq., Department of Justice

Also present were:

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. Richard H. Kyle, Liaison from the Civil Rules Committee
Hon. David G. Trager, Liaison from the Criminal Rules Committee
Hon. C. Arlen Beam, Chair of the Drafting Committee for the Uniform Rules of Evidence
Professor Daniel R. Coquillette, Reporter to the Standing Committee on Rules of Practice and Procedure
Peter G. McCabe, Esq., Secretary, Standing Committee on Rules of Practice and Procedure
John K. Rabiej, Esq., Chief, Rules Committee Support Office
James Ishida, Esq., Rules Committee Support Office
Jennifer Marsh, Esq., Federal Judicial Center
Professor Daniel J. Capra, Reporter to the Evidence Rules Committee
Professor Kenneth S. Broun, Consultant to the Evidence Rules Committee
Roger Pauley, Esq., former member of the Evidence Rules Committee
Professor Steven Genzler, Research Fellow, Administrative Office
Peter Freeman, Esq., representative of the ABA Section of Litigation
Professor Liesa Richter, University of Oklahoma School of Law

Opening Business of the Committee Meeting

Judge Smith extended a welcome to those who were attending the Evidence Rules Committee for the first time: Stuart Levey, the new Justice Department representative, and Judge Beam, the Chair of the Drafting Committee for the Uniform Rules of Evidence. Judge Smith asked for approval of the draft minutes of the April 2003 Committee meeting. The minutes were approved unanimously. Judge Smith then gave a short report on the June 2003 Standing Committee meeting. He noted that the Standing Committee was unanimous in approving the proposed amendment to Evidence Rule 804(b)(3). The amendment was thereafter approved by the Judicial Conference and is currently being considered by the Supreme Court.

Judge Smith also noted that the Evidence Rules Committee would participate in the work of the Standing Committee in implementing the privacy provisions of the E-Government Act. Judge Smith announced that he had appointed Judge Hinkel to be the Evidence Rules Committee's representative to the Standing Committee's subcommittee that is considering the privacy requirements mandated by the E-Government Act.

Long-Range Planning –– Consideration of Possible Amendments to Certain Evidence Rules

At its April 2001 meeting, the Committee directed the Reporter to review scholarship, caselaw, and other bodies of evidence law to determine whether there are any evidence rules that might be in need of amendment as part of the Committee's long-range planning. At the April 2002 meeting, the Committee reviewed a number of potential changes and directed the Reporter to prepare a report on a number of different rules, so that the Committee could take an in-depth look at whether those rules require amendment.

At the October 2002 meeting, the Committee began to consider the Reporter's memoranda on some of the rules that have been found worthy of in-depth consideration. The Committee agreed that the problematic rules should be considered over the course of four Committee meetings, and that if any rules are found in need of amendment, the proposals would be delayed in order to package them as a single set of amendments to the Evidence Rules. This would mean that the package of amendments, if any, would go to the Standing Committee at its June 2004 meeting, with a recommendation that the proposals be released for public comment. With that timeline in mind, the Committee considered reports on several possibly problematic Evidence Rules at its April 2003 meeting, and this consideration continued at the Fall 2003 meeting.

1. Rule 404(a)

At its Fall 2002 meeting, the Committee tentatively agreed on language that would amend Evidence Rule 404(a) to prohibit the circumstantial use of character evidence in civil cases. The Committee determined that an amendment is necessary because the circuits are split over whether character evidence can be offered to prove conduct in a civil case. Such a circuit split can cause disruption and disuniform results in the federal courts. Moreover, the question of the admissibility of character evidence to prove conduct arises frequently in section 1983 cases, so an amendment to the Rule would have a helpful impact on a fairly large number of cases. The Committee also concluded that as a policy matter, character evidence should not be admitted to prove conduct in a civil case. The circumstantial use of character evidence is fraught with peril in *any* case, because it could lead to a trial of personality and could cause the jury to decide the case on improper grounds. But the risks of character evidence historically have been considered worth the costs where a criminal defendant seeks to show his good character or the pertinent bad character of the victim. This so-called "rule of mercy" is thought necessary to provide a counterweight to the resources of the government, and is a recognition of the possibility that the accused, whose liberty is at stake, may have little to defend with other than his good name. None of these considerations is operative in civil litigation. In civil cases, the substantial problems raised by character evidence were considered by the Committee to outweigh the dubious benefit that character evidence might provide.

Judge Smith then asked whether any member of the Committee wanted to revisit or to question the amendment to Rule 404(a) that was tentatively approved at the Fall 2002 meeting. The Reporter suggested a technical change that could be made to the draft language intended to clarify that the protections of Rule 412 supersede the provision of Rule 404(a)(2) that permits proof of a victim's character. Committee members agreed that the suggested change was an improvement. No Committee member expressed any other concerns about the working draft of the proposed amendment. The working draft of the proposed amendment to Rule 404(a)(1) provides as follows:

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) Character evidence generally.—Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused.— ~~Evidence~~ <u>In a criminal case, evidence</u> of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(2) Character of alleged victim.— ~~Evidence~~ <u>In a criminal case, and</u>

> <u>subject to the limitations of Rule 412, evidence</u> of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;
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> * * *

The working draft of the Committee Note to the proposed amendment to Rule 404(a) reads as follows:

> The Rule has been amended to clarify that in a civil case evidence of a person's character is never admissible to prove that the person acted in conformity with the character trait. The amendment resolves the dispute in the case law over whether the exceptions in subdivisions (a)(1) and (2) permit the circumstantial use of character evidence in civil cases. *Compare Carson v. Polley*, 689 F.2d 562, 576 (5th Cir. 1982) ("when a central issue in a case is close to one of a criminal nature, the exceptions to the Rule 404(a) ban on character evidence may be invoked"), *with SEC v. Towers Financial Corp.*, 966 F.Supp. 203 (S.D.N.Y. 1997) (relying on the terms "accused" and "prosecution" in Rule 404(a) to conclude that the exceptions in subdivisions (a)(1) and (2) are inapplicable in civil cases). The amendment is consistent with the original intent of the Rule, which was to prohibit the circumstantial use of character evidence in civil cases. *See Ginter v. Northwestern Mut. Life Ins. Co.*, 576 F.Supp. 627, 629-30 (D. Ky.1984) ("It seems beyond peradventure of doubt that the drafters of F.R.Evi. 404(a) explicitly intended that all character evidence, except where 'character is at issue' was to be excluded" in civil cases).
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> The circumstantial use of character evidence is generally discouraged because it carries serious risks of prejudice, confusion and delay. *See Michelson v. United States,* 335 U.S. 469, 476 (1948) ("The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."). In criminal cases, the so-called "mercy rule" permits a criminal defendant to introduce evidence of pertinent character traits of the defendant and the victim; but that is because the accused, whose liberty is at stake, may need "a counterweight against the strong investigative and prosecutorial resources of the government." C. Mueller and L. Kirkpatrick, *Evidence: Practice under the Rules*, pp. 264-5 (2d ed. 1999). See also Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U.Pa.L.Rev. 845, 855 (1982) (the rule prohibiting circumstantial use of character evidence "was relaxed to allow the criminal defendant with so much at stake and so little available in the way of conventional proof to have special dispensation to tell the factfinder just what sort of person he really is.").Those concerns do not apply to parties in civil cases.

> The amendment also clarifies that evidence otherwise admissible under Rule 404(a)(2) may nonetheless be excluded in a criminal case involving sexual misconduct. In such a case, the admissibility of evidence of the victim's sexual behavior and predisposition is governed by the more stringent provisions of Rule 412.

2. Rule 408

The Reporter's memorandum on Rule 408, prepared for the Fall 2002 meeting, noted that the courts are divided on three important questions concerning the scope of the Rule:

> 1) Some courts hold that evidence of compromise is admissible against the settling party in subsequent criminal litigation while others hold that compromise evidence is excluded in subsequent criminal litigation when offered as an admission of guilt.
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> 2) Some courts hold that statements in compromise can be admitted to impeach by way of contradiction or prior inconsistent statement. Other courts disagree, noting that if statements in compromise could be admitted for contradiction or prior inconsistent statement, this would chill settlement negotiations, in violation of the policy behind the Rule.
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> 3) Some courts hold that offers in compromise can be admitted in favor of the party who made the offer; these courts reason that the policy of the rule, to encourage settlements, is not at stake where the party who makes the statement or offer is the one who wants to admit it at trial. Other courts hold that settlement statements and offers are never admissible to prove the validity or the amount of the claim, regardless of who offers the evidence. These courts reason that the text of the Rule does not provide an exception based on identity of the proffering party, and that admitting compromise evidence would raise the risk that lawyers would have to testify about the settlement negotiations, thus risking disqualification.

At the Fall 2002 meeting, the Committee agreed to present, as part of its package, an amendment that would 1) limit the impeachment exception to use for bias, and 2) exclude compromise evidence even if offered by the party who made an offer of settlement. The remaining issue–whether compromise evidence should be admissible in criminal cases–was the subject of extensive discussion at the Spring and Fall 2003 meetings. The Justice Department representative expressed concern that some statements made in civil compromise (e.g., to tax investigators) could be critical evidence needed in a criminal case to prove that the defendant had committed fraud. If Rule 408 were amended to exclude statements made in compromise in criminal cases, then this important evidence would be lost to the government. The DOJ representative recognized the concern that the use of civil compromise evidence in criminal cases would deter civil settlements. But he contended that the Civil Division of the DOJ had not noted any deterrent to civil compromise from such a rule in the circuits holding that civil compromise evidence is indeed admissible in criminal cases.

Other Committee members noted that some courts have held that statements made to internal corporate investigators can qualify for protection under Rule 408; they reasoned that if such statements could not then be admitted in a criminal case, a shield could be placed over the corporation and criminal prosecution might be extremely difficult. In response, one member of the Committee asserted that it was unlikely that such internal corporate statements would even be covered by Rule 408, and adhered to the view that if compromise evidence is admissible in criminal cases, this would significantly diminish the incentive to settle civil litigation.

After extensive argument, the Committee unanimously agreed that Rule 408 should specify, one way or another, whether civil compromise evidence is admissible in subsequent criminal litigation. For one thing, the current split in the circuits makes it impossible for parties to plan in advance on how compromise evidence can be used, and creates disparate results on a critical question of evidence law.

A straw vote was taken and the Committee, with one dissent, agreed to proceed with an amendment providing that the protections of Rule 408 are limited to civil cases only. The Committee agreed unanimously with a suggestion that the Committee Note provide that while Rule 408 will not protect a party in a criminal case, a court might still use Rule 403 to exclude civil compromise evidence on a case-by-case basis.

Further discussion on the Rule indicated Committee dissatisfaction with Rule 408 as originally structured. As it stands, Rule 408 is structured in four sentences. The first sentence states that an offer or acceptance in compromise "is not admissible to prove liability for or invalidity of the claim or its amount." The second sentence provides the same preclusion for statements made in compromise negotiations–an awkward construction because a separate sentence is used to apply the same rule of exclusion applied in the first sentence. The third sentence says that the rule "does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations." The rationale of this sentence, added by Congress, is to prevent parties from immunizing pre-existing documents from discovery simply by bringing them to the negotiating table. The addition of this sentence at this point in the Rule, however, creates a structural problem because the fourth sentence of the rule contains a list of permissible purposes for compromise evidence, including proof of bias. As such, the third sentence provides a kind of break in the flow of the Rule. Moreover, the fourth sentence is arguably completely unnecessary, because none of the permissible purposes involves using compromise evidence to prove the validity or amount of the claim. Because the only impermissible purpose for this evidence is when it is offered to prove the validity or amount of a claim, it is unnecessary to add a sentence specifying certain (though apparently not all) permissible purposes for the evidence.

For the Fall 2003 meeting, the Reporter prepared a restructured Rule 408 for the Committee's consideration. Committee members expressed the opinion that the restructured Rule was easier to read and made it much easier to accommodate an amendment (previously agreed upon by the Committee) that would prohibit the use of compromise statements for impeachment by way of prior inconsistent statement or contradiction.

In the discussion of a restructured Rule 408, the Committee considered whether to retain the language of the existing Rule that evidence "otherwise discoverable" is not excluded merely because it was presented in the course of compromise negotiations. After extensive debate, the Committee agreed with courts, commentators, and rules drafters in several states, and concluded that the "otherwise discoverable" sentence is superfluous. It was added to the Rule to emphasize that pre-existing records were not immunized simply because they were presented to the adversary in the course of compromise negotiations. But such a pretextual use of compromise negotiations has never been permitted by the courts. The Committee therefore agreed, with one dissent, to drop the "otherwise discoverable" sentence from the text of the revised Rule 408, with an explanation for such a change to be placed in the Committee Note.

Finally, the Committee considered whether it was necessary to improve the language that triggers the protection of the amendment: the Rule applies to compromise negotiations as to a "matter which was in dispute." The Reporter prepared a description of the cases and commentary on this question and the Committee determined that it would not be appropriate to change this language, as the courts were not in conflict as to its application.

The working draft of an amendment to Evidence Rule 408, together with the Committee Note, follows immediately below. The Committee will consider at its next meeting whether to change it in any respect and whether to forward it to the Standing Committee for release for public comment.

Rule 408. Compromise and Offers to Compromise

(a) General rule. -- ~~Evidence of~~ The following is not admissible in a civil case on behalf of any party, when offered to prove liability for or invalidity of a claim or its amount or for the impeachment purposes of prior inconsistent statement or contradiction:

(1) Evidence of furnishing or offering or promising to furnish, or ~~(2)~~ accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a civil claim that ~~which~~ was disputed as to either validity or amount.~~, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of~~

(2) Evidence of conduct or statements made in ~~compromise~~ negotiations ~~is likewise not admissible~~ over a civil claim that was disputed as to validity or

<u>amount</u>.

~~This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.~~

<u>**(b) Other purposes. --**</u> This rule ~~also~~ does not require exclusion when the evidence is offered for ~~another purpose, such as~~ <u>a purpose not prohibited by subdivision (a). Examples of permissible uses include:</u> proving bias or prejudice of a witness~~,~~ <u>;</u> negativing a contention of undue delay~~,~~ <u>;</u>~~or~~ <u>and</u> proving an effort to obstruct a criminal investigation or prosecution.

The working draft of the Committee Note to the proposed amendment to Rule 408 reads as follows:

Working Draft of Proposed Committee Note

Rule 408 has been amended to make it easier to read and apply, and to settle some questions in the courts about the scope of the Rule. First, the amendment clarifies that Rule 408 does not protect against the use of compromise evidence when it is offered in a criminal case. *See, e.g., United States v. Logan*, 250 F.3d 350, 367 (6th Cir. 2001) (while the inapplicability of Rule 408 to criminal cases "arguably may have a chilling effect on administrative or civil settlement negotiations in cases where parallel civil and criminal proceedings are possible, we find that this risk is heavily outweighed by the public interest in prosecuting criminal matters"); *Manko v United States*, 87 F.3d 50, 54-5 (2d Cir. 1996) (the "policy favoring the encouragement of civil settlements, sufficient to bar their admission in civil actions, is insufficient, in our view, to outweigh the need for accurate determinations in criminal cases where the stakes are higher"). Statements and offers made in civil compromise negotiations may be excluded in criminal cases where the circumstances so warrant under Rule 403. But there is no absolute exclusion imposed by Rule 408.

Statements and offers made during negotiations to settle a *criminal* case are not protected by Rule 408. *See United States v. Graham*, 91 F.3d 213, 218-219 (D.C. Cir. 1996) (declaring that Rule 408 "does not address the admissibility of evidence concerning negotiations to 'compromise' a criminal case" and that "the very existence" of Rule 410 "strongly support[s] the conclusion that Rule 408 applies only to civil matters").

Statements and offers by a prosecuting attorney during plea negotiations are likewise not protected under Rule 408. Some courts have held that the "principles" of Rule 408 justify protection of such statements and offers. *See United States v. Verdoorn*, 528 F.2d 103, 107 (8th Cir. 1976) (noting that offers by the prosecutor are not protected under Rule 410, but reasoning that the "principles" of Rule 408 warranted exclusion of the government's offers in a criminal case). After considering this case law, the Committee concluded that if any amendment is necessary to protect prosecution statements and offers in guilty plea negotiations, that amendment should be placed in Rule 410 and not Rule 408. Even without a change to Rule 408 or Rule 410, statements and offers by a prosecutor remain subject to exclusion under Rule 403. *See, e.g., United States v. Delgado*, 903 F.2d 1495 (11th Cir. 1990) (plea agreement and statements by the prosecutor cannot be offered as an admission by the government, because the deal may have been struck for reasons other than the government's belief in the innocence of the accused; relying upon Rule 403).

The amendment prohibits the use of statements made in settlement negotiations when offered to impeach by prior inconsistent statement or through contradiction. Such broad impeachment would tend to swallow the exclusionary rule and would impair the public policy of promoting settlements. *See McCormick on Evidence***,** 5th ed. 1999 at 186 ("Use of statements made in compromise negotiations to impeach the testimony of a party, which is not specifically treated in Rule 408, is fraught with danger of misuse of the statements to prove liability, threatens frank interchange of information during negotiations, and generally should not be permitted."). *See also EEOC v. Gear Petroleum, Inc.*, 948 F.2d 1542 (10th Cir.1991). (letter sent as part of settlement negotiation cannot be used to impeach defense witnesses by way of contradiction or prior inconsistent statement; such broad impeachment would undermine the policy of encouraging settlement).

The amendment makes clear that Rule 408 excludes compromise evidence even when a party seeks to admit its own settlement offer or statements made in settlement negotiations. If a party were to reveal its own statement or offer, this could itself reveal the fact that the adversary entered into settlement negotiations. Thus, it would not be fair to hold that the protections of Rule 408 can be waived unilaterally, because the Rule, by definition, protects both parties from having the fact of negotiation disclosed to the jury. Moreover, proof of statements and offers made in settlement would often have to be made through the testimony of attorneys, leading to the risks and costs of disqualification. *See generally Pierce v. F.R. Tripler & Co.*, 955 F.2d 820, 828 (2d Cir. 1992) (settlement offers are excluded under Rule 408 even if it is the offeror who seeks to admit them; noting that the "widespread admissibility of the substance of settlement offers could bring with it a rash of motions for disqualification of a party's chosen counsel who would likely become a witness at trial").

The sentence of the Rule referring to evidence "otherwise discoverable" has been deleted as superfluous. *See, e.g.,* Advisory Committee Note to Maine Rule of Evidence 408 (refusing to include the sentence in the Maine version of Rule 408 and noting that the sentence "seems to state what the law would be if it were omitted"); Advisory Committee Note to Wyoming Rule of Evidence 408 (refusing to include the sentence in Wyoming Rule 408 on the ground that it was "superfluous"). The intent of the sentence was to prevent a party from trying to immunize admissible information, such as a pre-existing document, through the pretense of disclosing it during compromise negotiations. *See Ramada Development Co. v. Rauch,* 644 F.2d 1097 (5th Cir. 1981). But even without the sentence, the Rule cannot be read to protect pre-existing information simply because it was presented to the adversary in discovery.

3. Rule 410

In extensive discussions over the previous two meetings, the Committee concluded that Rule 410 should be amended to protect statements and offers made by prosecuting attorneys**,** to the same extent as the Rule currently protects statements and offers made by defendants and their counsel. A mutual rule of exclusion will encourage a free flow of discussion that is necessary to efficient guilty plea negotiations. The Committee also determined, however, that if an amendment is required to protect government statements and offers in guilty plea negotiations, that amendment should be placed in Rule 410, not Rule 408. The latter Rule by its terms covers statements and offers made in the course of attempting to settle a *civil* claim. Rule 410, which governs efforts to settle criminal charges, is the appropriate place for any amendment that would exclude statements and offers in guilty plea negotiations.

A draft proposal was prepared by the Reporter for the April 2003 meeting that simply added "against the government" to the opening sentence of the Rule, at the same place in which the Rule provides that offers and statements in plea negotiations are not admissible "against the defendant." At that meeting the Committee determined that this would not be a satisfactory drafting solution. If the Rule were amended simply to provide that offers and statements in guilty plea negotiations were not admissible "against the government," this might provide too broad an exclusion. It would exclude, for example, statements made *by the defendant* during plea negotiations that could be offered "against the government," for example, to prove that the defendant had made a prior consistent statement, or to prove that the defendant believed in his own innocence, or was not trying to obstruct an investigation. Thus, the Committee resolved that any change to Rule 410 should specify that the government's protection would be limited to statements and offers *made by prosecutors* during guilty plea negotiations.

At the April 2003 meeting the Committee also determined that the Rule's protection should cover statements and offers made during the course of guilty pleas that are either rejected by the court or vacated on review. Currently the Rule specifically covers only guilty pleas that are "withdrawn".Committee members noted that as a policy matter, there was no basis for distinguishing a withdrawn plea from a plea that is rejected or vacated. In any of these cases, the policy of protecting plea negotiations warrants protection from these subsequent unforeseen developments–otherwise negotiations are likely to be chilled by uncertainty.

Finally, the Committee agreed that the question of whether the protections of Rule 410 can be waived should be addressed in the Committee Note and not in the Rule. The Supreme Court has decided that the defendant can agree that his statements made in plea negotiations can be used to impeach him should he testify at trial, but courts are still working out whether the power to waive the protections of Rule 410 extends to other situations. Thus, it would be counterproductive to codify a waiver rule in the text. But it would be important to acknowledge the waiver rule in the Committee Note, so as to prevent speculation that any amendment was rejecting Supreme Court precedent on the subject.

At its Fall 2003 meeting the Committee considered a draft of an amendment to Rule 410 that was intended to implement the consensus of the Committee. Committee members discussed whether the government should be protected from statements and offers made by the prosecutor in plea negotiations even where the evidence is offered by a different defendant. All Committee members, including the DOJ representative, recognized that a defendant should be able to inquire into a deal struck or to be struck with a former codefendant who is a cooperating witness at the time of the trial–and such inquiry may be pertinent to the bias or prejudice of the cooperating witness even if a deal has not been formally reached or even offered. On the other hand, most Committee members agreed that statements of fact made by a prosecutor in negotiations with one defendant should not be offered as any kind of party-admission by another defendant or in another proceeding. To allow such broad admissibility could tend to chill the open discussions that Rule 410 seeks to promote.

After substantial discussion, a straw vote was taken and the Committee tentatively agreed on language for a proposed amendment to Rule 410 that would provide that statements and offers by prosecutors in the course of plea discussions are not admissible except to prove the bias or prejudice of a witness. The vote was unanimous. The Committee then discussed whether the Rule should be broken down into subdivisions. All agreed that the addition of protection of prosecution statements and offers made it necessary to subdivide the Rule. The alternative (working within the existing Rule) would be a Rule with internal subparts– (1) through (4) – setting forth the evidence that is not admissible against the defendant, followed by a freestanding paragraph providing for exclusion of prosecution statements and offers, followed by another freestanding paragraph setting forth exceptions in which statements otherwise covered by the rule can be admitted against a defendant. The use of two consecutive hanging paragraphs would make the rule difficult to read and is certainly contrary to the working standards of the Style Subcommittee of the Standing Committee. The Evidence Rules Committee therefore agreed unanimously to set forth three subdivisions in its proposed amendment to Rule 410.

The Committee determined that it would revisit the working draft of the proposed amendment to Rule 410 to determine whether it should be forwarded to the Standing Committee for release for public comment. As the proposal currently stands, it reads as follows:

Rule 410. Inadmissibility of Pleas, Plea Discussions, and Related Statements

(a) Against the defendant. – Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(1) a plea of guilty ~~which~~ that was later withdrawn, rejected or vacated;

(2) a plea of *nolo contendere;*

(3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or

(4) any statement made in the course of plea discussions with an attorney for the prosecuting authority ~~which~~ that do not result in a plea of guilty or ~~which~~ that result in a plea

of guilty later withdrawn, rejected or vacated.

(b) Against the government. – Any statement or offer made in the course of plea discussions by an attorney for the prosecuting authority is not admissible against the government in the proceeding in which the statement or offer was made, except as proof of bias or prejudice of a witness.

(c) Exceptions. – ~~However, such a statement~~ A statement described in this rule is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness to be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

The working draft of the Committee Note to the proposed amendment to Rule 410 reads as follows:

Working Draft of Committee Note to Rule 410

Rule 410 has been amended to make the following changes:

1. The government, as well as the defendant, is entitled to invoke the protections of the Rule. Courts have held that statements and offers by prosecutors during guilty plea negotiations are inadmissible, using a variety of theories. See, e.g., *United States v. Verdoorn,* 528 F.2d 103, 107 (8^{th} Cir. 1976) (relying on the "principles" of Rule 408 even though that Rule, by its terms, only governs attempts to compromise a civil claim); *United States v. Delgado,* 903 F.2d 1495 (11^{th} Cir. 1990) (government offer properly excluded under Rule 403 because it would have confused the jury); *Brooks v. State,* 763 So. 2d 859 (Miss. 2000) (relying on the "spirit" of state version of Rule 410 substantively identical to the Federal Rule). The amendment endorses the results of this case law, but provides a unitary source of authority for excluding statements and offers by prosecutors during guilty plea negotiations. Protecting those statements and offers will encourage the unrestrained candor from both sides that produces effective plea discussions. Statements and offers by the prosecution are not excluded by the rule, however, if they are offered by a defendant to prove the bias or prejudice of a witness who may be cooperating with the government as the result of, or in order to obtain, leniency from the government.

2. The protections provided to defendants are extended to statements and offers related to guilty pleas that are rejected by the court or vacated on appeal or collateral attack. Given the policy of the rule to promote plea negotiations, there is no reason to distinguish between guilty pleas that are withdrawn and those that are either rejected by the court or vacated on direct or collateral review.

Nothing in the amendment is intended to affect the rule and analysis set forth in *United States v. Mezzanatto,* 513 U.S. 196 (1995), and its progeny. The Court in *Mezzanatto* upheld an agreement in which the defendant knowingly and voluntarily waived the protections of Rule 410 insofar as his statements made in plea negotiations could be used to impeach him at trial. See also *United States v. Burch,* 156 F.3d 1315 (D.C. Cir. 1998) (reasoning that the holding in *Mezzanatto* logically extends to permit agreements to use the defendant's statements during the prosecution's case-in-chief); *United States v. Rebbe,* 314 F.3d 402 (9th Cir. 2002) (reasoning that the rationale in *Mezzanatto* applies equally to waivers permitting use of the defendant's statements in rebuttal). Nor is the amendment intended to cover the admissibility of the defendant's rejection of an offer of immunity from prosecution, when that rejection is probative of the defendant's consciousness of innocence. In such a case, the important evidence is the defendant's rejection, not the government's offer. *See generally United States v. Biaggi,* 909 F.2d 662, 690 (2d Cir. 1990) ("a jury is entitled to believe that most people would jump at the chance to obtain an assurance of immunity from prosecution and to infer from rejection of the offer that the accused lacks knowledge of wrongdoing").

4. Rule 606(b)

At its April 2002 meeting, the Committee directed the Reporter to prepare a report on a possible amendment to Rule 606(b) that would clarify whether and to what extent juror testimony can be admitted to prove some disparity between the verdict rendered and the verdict intended by the jurors. At its Spring 2003 meeting, the Committee agreed in principle on a proposed amendment to Rule 606(b) that would be part of a possible package of amendments to be referred to the Standing Committee in 2004.

The Committee reviewed the working draft of the proposed amendment at its Fall 2003 meeting. Once again, all Committee members recognized the need for an amendment to Rule 606(b). There are two basic reasons for an amendment to the Rule: 1. All courts have found an exception to the Rule permitting jury testimony on certain errors in the verdict, even though there is no language permitting such an exception in the text of the Rule; and, more importantly, 2. The courts are in dispute about the breadth of that exception. Some courts allow juror proof whenever the verdict has an effect that is different from the result that the jury intended to reach, while other courts follow a narrower exception permitting juror proof only where the verdict reported is different from that which the jury actually reached because of some clerical error. The former exception is broader because it would permit juror proof whenever the jury misunderstood (or ignored) the court's instructions. For example, if the judge told the jury to report a damage award without reducing it by the plaintiff's proportion of fault, and the jury disregarded that instruction, the verdict reported would be a result different from what the jury actually intended, thus fitting the broader exception. But it would not be different from the verdict actually reached, and so juror proof would not be permitted under the narrow exception for clerical errors.

After extensive discussion, the Committee continued to be unanimous in its belief that an amendment to Rule 606(b) is warranted and that the amendment should codify the narrower exception of clerical error. An exception that would permit proof of juror statements whenever the jury misunderstood or ignored the court's instruction would have the potential of intruding into juror deliberations and upsetting the finality of verdicts in a large and undefined number of cases. As such, the broad exception is in tension with the policies of the Rule. In contrast, an exception permitting proof only if the verdict reported is different from that actually reached by the jury does not intrude on the privacy of jury deliberations, as the inquiry only concerns what the jury decided, not why it decided as it did.

The Committee then turned to the working draft of the proposed amendment to consider whether the language accurately captured the narrow exception that should be added to the Rule. The working language permitted juror proof into whether "the verdict reported is the verdict that was agreed upon by the jury." Committee members expressed concern that this language could be too broad. It might be construed, for example, to allow proof from a juror that he never actually "agreed" with the verdict the jury rendered, he only acquiesced because he wanted to make other jurors happy, or because he misunderstood the court's instructions. Thus, the language of the working draft could be read to encompass the broader exception to the Rule currently used by some courts; it could be read to allow an inquiry into jury deliberations, contrary to the policy of Rule 606(b).

The Committee deliberated and voted unanimously to change the language of the working draft to narrow the exception to situations where the verdict reported is "the result of a clerical mistake." Members pointed out that Civil Rule 60(a) uses the same term "clerical mistake" to cover the analogous situation of correcting mistakes in judgments and orders. Committee members recognized that the exception for "clerical mistakes" would rarely apply in practice. But that was considered to be the very reason for adopting the amendment: the "clerical mistake" language would provide a very narrow exception to allow for correction in the rare cases of clerical error, and it would thereby *reject* the broader exception used by those courts permitting juror testimony whenever the jurors misunderstood the impact of the verdict that they actually agreed upon.

The Committee resolved to revisit the proposed amendment at its next meeting, with the goal to finalize it as part of a package to be submitted to the Standing Committee for authorization for public comment. The Reporter was directed to research cases under Civil Rule 60(a) to determine whether helpful comparisons could be drawn between that Rule and the narrow amendment to Evidence Rule 606(b) proposed by the Committee.

The current working draft of a proposed amendment to Rule 606(b) provides as follows:

Rule 606. Competency of Juror as Witness

(a) *At the trial.* — A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting as a juror. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) *Inquiry into validity of verdict or indictment.* — Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith~~,~~ .~~except that~~ But a juror may testify ~~on the question~~ about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) ~~or~~ whether any outside influence was improperly brought to bear upon any juror, or (3) whether the verdict reported is the result of a clerical mistake. ~~Nor may a~~ A juror's affidavit or evidence of any statement by the juror ~~concerning~~ may not be received on a matter about which the juror would be precluded from testifying~~ be received for these purposes~~.

Draft Committee Note

Rule 606(b) has been amended to provide that juror testimony may be used to prove that the verdict rendered was tainted by a clerical error. The amendment responds to a divergence between the text of the Rule and the case law that has established an exception for proof of clerical errors. *See, e.g., Plummer v. Springfield Term. Ry. Co.,* 5 F.3d 1, 3 (1st Cir. 1993) ("A number of circuits hold, and we agree, that juror testimony regarding an alleged clerical error, such as announcing a verdict different than that agreed upon, does not challenge the validity of the verdict or the deliberation of mental processes, and therefore is not subject to Rule 606(b)."); *Teevee Toons, Inc., v. MP3.Com, Inc.,* 148 F.Supp.2d 276, 278 (S.D.N.Y. 2001) (noting that Rule 606(b) has been silent regarding inquiries designed to confirm the accuracy of a verdict). Cf. Fed.R.Civ.P. 60(a) (providing relief from "[c]lerical mistakes in judgments, orders, or other parts of the record . . .").

In adopting the exception for proof of clerical errors, the amendment specifically rejects the broader exception, adopted by some courts, permitting the use of juror testimony to prove that the jurors were operating under a misunderstanding about the consequences of the result that they agreed upon. *See, e.g., Attridge v. Cencorp Div. of Dover Techs. Int'l, Inc.,* 836 F.2d 113, 116 (2d Cir. 1987); *Eastridge Development Co., v. Halpert Associates, Inc.*, 853 F.2d 772 (10th Cir. 1988). The broader exception is rejected because an inquiry into whether the jury misunderstood or misapplied an instruction goes to the jurors' mental processes underlying the verdict, rather than the verdict's accuracy in capturing what the jurors had agreed upon. *See, e.g., Karl v. Burlington Northern R.R. Co.,* 880 F.2d 68, 74 (8th Cir. 1989) (error to receive juror testimony on whether verdict was the result of jurors' misunderstanding of instructions: "The jurors did not state that the figure written by the foreman was different from that which they agreed upon, but indicated that the figure the foreman wrote down was intended to be a net figure, not a gross figure. Receiving such statements violates Rule 606(b) because the testimony relates to how the jury interpreted the court's instructions, and concerns the jurors' 'mental processes,' which is forbidden by the rule."); *Robles v. Exxon Corp.*, 862 F.2d 1201, 1208 (5th Cir. 1989) ("the alleged error here goes to the substance of what the jury was asked to decide, necessarily implicating the jury's mental processes insofar as it questions the jury's understanding of the court's instructions and application of those instructions to the facts of the case"). Thus, the "clerical error" exception to the Rule is limited to cases such as "where the jury foreperson wrote down, in response to an interrogatory, a number different from that agreed upon the by the jury, or mistakenly stated that the defendant was 'guilty' when the jury had actually agreed that the defendant was not guilty." *Id.*

5. Rule 607

At its Spring 2002 meeting the Evidence Rules Committee directed the Reporter to prepare a memorandum to advise the Committee on whether it is necessary to amend Evidence Rule 607. Rule 607 states categorically that a party can impeach any witness it calls. On its face, the Rule permits a party to call a witness solely for the purpose of "impeaching" them with evidence that would not otherwise be admissible, such as hearsay. For example, the Rule would appear to permit a party to call an adverse witness solely to "impeach" the witness with a prior inconsistent statement that would not otherwise be admissible. The purpose of that tactic could well be to evade the hearsay rule in the hope that the jury would ignore the court's limiting instruction and consider the inconsistent statement for its truth.

The Committee wished to consider whether Rule 607 should be amended to prohibit a party from calling a witness for the sole purpose of impeaching that witness with evidence that would not otherwise be admissible. The Reporter's research indicated that the courts have uniformly prohibited this abusive practice even though Rule 607 contains no specific prohibitory language. So the Committee discussed whether the Rule should be amended to "codify" this case law and thereby eliminate the divergence between the case law and the text of the Rule.

In discussion, the Committee was skeptical that any amendment to Rule 607 was necessary. The Committee noted that courts are uniform in prohibiting the abusive practice that any amendatory language would prohibit. The Committee continues to be committed to the principle that an amendment to the Evidence Rules is justified only in extreme circumstances in which courts are in conflict about the meaning of a Rule, or the Rule is creating practical problems of administration or unjust application. None of these conditions exist under Rule 607. .

The Committee also noted that it would be difficult to write an amendment that would fully encompass all the situations in which a party *should* be allowed to call witnesses and impeach them with otherwise inadmissible evidence. New Jersey and Ohio have tried to do so by permitting impeachment when the party is “surprised” by adverse testimony. But this fails to cover all of the situations in which impeachment should be permitted. For example, impeachment should be allowed where a party knows in advance that a witness will give partially favorable and partially unfavorable testimony. A more broadly worded rule permitting a party to call a witness and impeach the witness whenever it is in “good faith” is not very helpful and risks adding confusion to a body of case law that is currently quite understandable and uniform. Thus, the risk of “codification” is that the drafters may not get it completely right, thereby generating confusion and perhaps creating an unintended substantive change.

A vote was taken and the Committee unanimously agreed to terminate the consideration of any amendment to Rule 607.

6. Rule 609

Rule 609(a)(2) provides for automatic impeachment of all witnesses with prior convictions involving “dishonesty or false statement.” Rule 609(a)(1) provides a nuanced balancing test for impeaching witnesses whose convictions do not fall within the definition of Rule 609(a)(2). At its Spring 2002 meeting the Evidence Rules Committee directed the Reporter to prepare a memorandum to advise the Committee on whether it is necessary to amend Evidence Rule 609(a)(2). An investigation into this Rule indicates that the courts are in conflict on how to determine that a certain conviction involves dishonesty or false statement within Rule 609(a)(2). The basic conflict is that some courts determine “dishonesty or false statement” solely by looking at the elements of the conviction for which the witness was found guilty. If none of the elements require proof of falsity or deceit beyond a reasonable doubt, then the conviction must be admitted under Rule 609(a)(1) or not at all. Other courts look behind the conviction to determine whether the witness committed an act of dishonesty or false statement before or after committing the crime. Under this view, for example, a witness convicted of murder would have committed a crime involving dishonesty or false statement if he lied about the crime, either before or after committing it.

After discussion, Committee members unanimously agreed that Rule 609(a)(2) should be amended to resolve the dispute in the courts over how to determine whether a conviction involves dishonesty or false statement. And amendment would resolve an issue on which the circuits are clearly divided. The Committee was further unanimously in favor of an “elements” definition of crimes involving dishonesty or false statement. Committee members noted that requiring the judge to look behind the conviction to the underlying facts could (and often does) impose a burden on trial judges. Moreover, the inquiry is indefinite because it is impossible to determine, simply from a guilty verdict, what facts of dishonesty or false statement the jury might have found. Most importantly, whatever additional probative value there might be in a crime committed deceitfully, it is lost on the jury assessing the witness's credibility when the elements of the crime do not in fact require proof of dishonesty or false statement. This is because when the conviction is introduced to impeach the witness, the jury is told only about the conviction, not about its underlying facts.

Committee members noted that the "elements" approach to defining crimes that fall within Rule 609(a)(2) is litigant-neutral, in that it would apply to all witnesses in all cases. It was also noted that if a crime not involving false statement as an element (e.g., murder or drug dealing) were inadmissible under Rule 609(a)(2), it might still be admitted under the balancing test of Rule 609(a)(1); moreover, if such a crime *were* committed in a deceitful manner, the underlying facts of deceit might still be inquired into under Rule 608. Thus, the costs of an "elements" approach are low as it would not result in an unjustified loss of evidence pertinent to credibility; and its benefits in judicial efficiency seem obvious.

A vote was taken and the Committee unanimously resolved to continue with an amendment to Rule 609(a)(2) that would use an "elements" approach to define the crimes that are automatically admissible for impeachment under Rule 609(a)(2). It was noted that an "elements" approach to the Rule would be consistent with the recently approved amendments to the Uniform Rules of Evidence. The Committee agreed to reconsider the working draft of the amendment and the Committee Note, with the view to finalizing it as part of a package of amendments to be sent to the Standing Committee in June, 2004.

The Working Draft of the Proposed Amendment to Rule 609 reads as follows:

Rule 609. Impeachment by Evidence of Conviction of Crime

(a) *General rule*.—For the purpose of attacking the ~~credibility~~ <u>character for truthfulness</u> of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted ~~if it involved dishonesty or false statement,~~ regardless of the punishment <u>if the statutory elements of the crime necessarily involve dishonesty or false statement</u>.

(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.

(c) *Effect of pardon, annulment, or certificate of rehabilitation.* — Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime ~~which~~ <u>that</u> was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) *Juvenile adjudications.* — Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) *Pendency of appeal.* — The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

The working draft of the proposed Committee Note to Rule 609 reads as follows:

Proposed Committee Note to Working Draft

The amendment provides that a conviction is not automatically admissible under Rule 609(a)(2) unless the statutory elements of the crime for which the witness was convicted necessarily involves proof beyond a reasonable doubt that the witness committed an act of dishonesty or false statement. The Rule prohibits the court from determining that a conviction is "automatically admissible" by inquiring into the underlying facts of the crime. Such facts are often difficult to determine. *See Emerging Problems Under the Federal Rules of Evidence* at 173 (2d ed. 1998) ("The difficulty of ascertaining [facts underlying a conviction] especially from the records of out-of-state proceedings might make the broad approach operate unevenly and feasible only for local convictions. . . . A simple, almost mechanical, rule that only those convictions for crimes whose *statutory elements* include deception, untruthfulness or falsehood under Rule 609(a)(2) arguably would result in a more efficient, predictable proceeding.") (emphasis in original). See also Uniform Rules of Evidence, Rule 609(a)(2) (adopting an "elements" approach). Moreover, the probative value of the underlying facts of a conviction, when the conviction is offered to impeach the witness's character for truthfulness, is lost on the jury because the jury is not informed about the details of a conviction under Rule 609. *See, e.g., United States v. Beckett*, 706 F.2d 519 at n.1 (5th Cir. 1983) (a testifying witness is required "to give answers only as to whether he has been previously convicted of a felony, as to what the felony was, and as to when the conviction was had"); *Radtke v. Cessna Aircraft Co.*, 707 F.2d 999 (8th Cir. 1983) (impeachment with a prior conviction is limited to the recitation of the conviction itself).*See also* C. Mueller & L. Kirkpatrick, *Federal Evidence* at 742 (2d ed. 1999) ("Scrutiny of underlying facts seems vaguely inconsistent with allowing inquiry only on the essentials of convictions (name of crime, punishment imposed, time, and sometimes place) with further details kept off limits: If the jury hears only the basics, why should the judge consider an elaboration of factual detail in deciding whether to permit the questioning?").

The legislative history of Rule 609 indicates that the automatic admissibility provision of Rule 609(a)(2) was to be narrowly construed. This amendment comports with that intent. See Conference Report to proposed Rule 609, at 9 ("By the phrase 'dishonesty and false statement' the Conference means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the [witness's] propensity to testify truthfully.").

It should be noted that while the facts underlying a conviction are irrelevant to the admissibility of that conviction under Rule 609(a)(2), those underlying facts might be a proper subject of enquiry under Rule 608. *See* e.g., *United States v. Hurst*, 951 F.2d 1490 (6th Cir. 1991) (underlying facts of a conviction were the proper subject of inquiry under Rules 403 and 608 where they were probative of the defendant's character for untruthfulness and not unduly prejudicial).

The amendment also substitutes the term "character for truthfulness" for the term "credibility" in the first sentence of the Rule. The limitations of Rule 609 are not applicable if a conviction is admitted for a purpose other than to prove the witness's character for untruthfulness. *See, e.g., United States v. Lopez,* 979 F.2d 1024 (5th Cir. 1992) (Rule 609 not applicable where the conviction was offered for purposes of contradiction). The use of the term "credibility" in subsection (d) is retained, however, as that subdivision is intended to govern the use of a juvenile adjudication for any type of impeachment.

7. Rule 613(b)

Rule 613(b) provides that a prior inconsistent statement can be admitted without giving the witness an opportunity to examine it in advance of admission. The witness simply must be given an opportunity at some point in the trial to explain or deny the statement. The Rule thus rejects the common-law rule under which the proponent was required to lay a foundation for the prior inconsistent statement at the time the witness testified. Despite the language of the Rule and Committee Note, however, some courts have reverted to the common-law rule, and most lawyers continue to lay a foundation for a prior inconsistent statement when the witness testifies.

At its April 2002 meeting, the Committee directed the Reporter to prepare a report on any conflict in the case law in interpreting Rule 613(b), so that the Committee could determine whether an amendment to the Rule would be necessary. At the Fall 2003 meeting the Reporter reported orally that he would have a complete report ready by the next meeting, but that his research had indicated that the Rule did not appear to create problems for courts or litigants. Courts use their discretion to control the order of proof to prohibit the admission of a witness's inconsistent statement *before* the witness testifies. And prudent counsel are unlikely to wait to introduce the statement *after* the witness leaves the stand, because counsel would thereby assume the risk that the witness might not be available to explain or deny the statement. After discussion, Committee members agreed that any conceptual problems in the Rule largely have been solved by the proper use of judicial discretion and by prudent practice of counsel. Members expressed concern that a proposal to amend Rule 613(b) would not rise to the same level of necessity as exists in the proposals to amend the other Rules that are part of the tentative package to be presented to the Standing Committee. A vote was taken and the Committee unanimously determined that it would not proceed with an amendment to Rule 613(b).

8. Rule 704(b)

Rule 704(b) would seem to prohibit all expert witnesses from testifying that a criminal defendant either did or did not have the requisite mental state to commit the crime charged. It states that "[n]o expert witness . . . may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto." Some courts have held (and others have implied) that the Rule is applicable only to mental health experts, and therefore does not prohibit intent-based testimony from such witnesses as law enforcement agents testifying about the narcotics trade. At a previous meeting, the Reporter was directed to prepare a report on whether it might be necessary to propose an amendment to Rule 704(b). At the Fall 2003 meeting, the Reporter indicated that while some courts have questioned the applicability of Rule 704(b) to non-mental health experts, the Rule in fact imposes few limitations on proof in criminal cases even if it is applied to all experts. As construed by the courts, the Rule simply prohibits an expert from opining, in a conclusory fashion, that the defendant either did or did not intend to commit the crime charged. It does not prohibit testimony about facts or opinions that might be indicative of a mental state. In essence, the Rule prohibits only the expert testimony that would not assist the jury because it would be nothing more than a conclusion of law. In that sense, Rule 704(b) simply emphasizes the point made by Rule 702: that expert testimony is inadmissible unless it assists the jury.

The Committee considered whether to continue with an amendment that would not solve any problems in practice. Members were mindful that the Rule was directly enacted by Congress. A vote was taken and the Committee agreed unanimously that it would not propose any amendment to Rule 704(b).

9. Rule 706

Judge Gettleman has requested that the Committee consider an amendment to Rule 706 that would make stylistic changes and that also would dispense with the requirement of an order to show cause before an expert is appointed. Courts and commentators have raised other problems in the administration of the Rule, including allocation of the costs of an expert, the process of appointment, deposition of court-appointed experts, and instructions to the jury. The Committee agreed that it would consider a report on Rule 706 at the next Committee meeting, to determine whether an amendment to the Rule should be included as part of the package to be sent to the Standing Committee.

10. Rule 801(d)(1)(B)

At the request of Judge Bullock, the Committee considered a proposal to amend Rule 801(d)(1)(B), the hearsay exception for prior consistent statements. Prior consistent statements are admissible to rehabilitate a declarant in at least three situations: 1) to rebut a charge of recent fabrication or bad motive, when made before the motive arose; 2) to explain away an apparent inconsistency; and 3) to rebut a charge of bad memory. The problem raised by Judge Bullock is that Rule 801(d)(1)(B) permits prior consistent statements to be used substantively in only one situation–where they rebut a charge of recent fabrication or bad motive and are made before the motive arose. Thus the Rule mandates a dichotomy where some prior consistent statements are admissible only for rehabilitation and others are admissible for their truth. Judge Bullock contends that the distinction between substantive and rehabilitation use of a prior consistent statement is one that is lost on jurors and on counsel.

The Committee considered the merits of proposing an amendment to Rule 801(d)(1)(B) to provide that a prior consistent statement would be substantively admissible whenever it could be admitted to rehabilitate the witness's credibility. The Judges on the Committee uniformly contended that the amendment was unnecessary. The case law is basically uniform in its distinction between substantive and rehabilitation use of prior consistent statements. Courts are reaching the correct results. Committee members recognized that the instruction to use a prior consistent statement for rehabilitation and not for its truth is one that jurors will find difficult to follow. But this difficulty is not enough to justify an amendment. The general assumption is that jurors follow instructions, except in extreme situations (e.g., *Bruton*), and the Committee did not see Rule 801(d)(1)(B) as presenting such an exceptional situation. Other Committee members were concerned that an amendment could send the wrong signal–it might be seen as an invitation toward broader admissibility and therefore broader use of prior consistent statements, contrary to the Supreme Court's admonition in *Tome v. United States* that the exception is to be narrowly construed.

After extensive discussion, the Committee agreed unanimously that it would not propose an amendment to Rule 801(d)(1)(B).

11. Rule 803(3)

Rule 803(3) incorporates the famous *Hillmon* doctrine, providing that a statement reflecting the declarant's state of mind can be offered as probative of the declarant's subsequent conduct in accordance with that state of mind. The Rule is silent, however, on whether a declarant's statement of intent can be used to prove the subsequent conduct of someone other than the declarant. The original Advisory Committee Note refers to the Rule as allowing only "evidence of intention as tending to prove the act intended"– implying that the statement can be offered to prove how the declarant acted, but cannot be offered to prove the conduct of a third party. The legislative history is ambiguous. The case law is conflicted. Some courts have refused to admit a statement that the declarant intended to meet with a third party as proof that they actually did meet. Other courts hold such statements admissible if the proponent provides corroborating evidence that the meeting took place.

The Committee directed the Reporter to prepare a report on Rule 803(3), analyzing whether the conflict in the case law warrants a possible amendment to the Rule to clarify whether statements can be admitted to prove the conduct of someone other than the declarant. The Reporter stated that the report would be ready for the Spring 2004 meeting so that if the Committee did find it necessary to propose an amendment, the proposal could be placed with the rest of the package that would be submitted to the Standing Committee.

12. Rule 803(8)

The Committee engaged in a preliminary consideration of Rule 803(8), the hearsay exception for public reports. Committee members noted that the Rule is subject to several drafting problems. It is divided into three subdivisions, each defining admissible public reports, but the subdivisions are overlapping. Subdivisions (B) and (C) exclude law enforcement reports in criminal cases from the exception, but courts have held that these exclusions are not to be applied as broadly as they are written. The exceptions are intended to protect against the admission of unreliable public reports, but this concern might be better stated if the exception were written simply to admit a public report unless the court finds it to be untrustworthy under the circumstances. The Uniform Rules have departed from the Federal model, as have many States.

The Committee directed the Reporter to prepare a report on whether it is necessary to amend Rule 803(8) to clarify that a public report is admissible unless the court finds it to be untrustworthy under the circumstances. The Reporter stated that the report would be ready for the Spring 2004 meeting so that if the Committee did find it necessary to propose an amendment, the proposal could be placed with the rest of the package that would be submitted to the Standing Committee.

13. Rule 803(18)

Rule 803(18) provides a hearsay exception for "statements contained in published treatises, periodicals, or pamphlets" if they are "established as a reliable authority" by the testimony or admission of an expert witness or by judicial notice. This "Learned Treatise" exception does not on its face permit evidence in electronic form, such as a film or video. The Committee considered whether the Reporter should be directed to prepare a report on the necessity of an amendment to Rule 803(18) that would cover electronic evidence explicitly.

The Reporter noted that there was only one reported Federal case on the matter, and that in that case the court had no trouble finding that learned treatises could be admitted even if in electronic form. There is no reported decision that *excludes* a learned treatise on the ground that it is electronic form. Committee members noted that in the absence of any conflict in the courts, and given the dearth of case law, an amendment to Rule 803(18) was not justified at this point. The Committee unanimously agreed that it would not propose an amendment to Rule 803(18) as part of any package of amendments to be submitted to the Standing Committee in June 2004.

14. Rule 806

At its Fall 2002 meeting the Committee directed the Reporter to prepare a memorandum on the advisability of amending Evidence Rule 806, the Rule permitting impeachment of hearsay declarants under certain conditions. Rule 806 provides that if a hearsay statement is admitted under a hearsay exception or exemption, the opponent as a general rule may impeach the hearsay declarant to the same extent as if the declarant were testifying in court. The courts are in dispute, however, on whether a hearsay declarant's character for truthfulness may be impeached with prior bad acts under Rule 806. If the declarant were to testify at trial, he could be asked about pertinent bad acts, but no evidence of those acts could be proffered—Rule 608(b) prohibits extrinsic evidence of bad acts offered to impeach the witness's character for truthfulness. For hearsay declarants, however, ordinarily the only way to impeach with bad acts is to proffer extrinsic evidence, because the declarant is not on the stand to be asked about the acts. Rule 806 does not explicitly say that extrinsic evidence of bad acts is allowed. Two circuits prohibit bad acts impeachment of hearsay declarants, and one permits it

The Committee reviewed the Reporter's report and discussed whether the problems raised by Rule 806 were serious enough to justify the substantial costs of an amendment. Several members opined that the Rule, fairly read, prohibits the use of extrinsic evidence to impeach a hearsay declarant, for the reasons expressed by the Third Circuit in *United States v. Saada*, 212 F.3d 210, 221-22 (3d Cir. 2000). If Congress had wanted to permit the use of extrinsic evidence to impeach a hearsay declarant, it certainly could have said so (as it had with inconsistent statements, by dispensing with the foundation requirement that is applied for in-court witnesses). Committee members expressed concern that an amendment permitting extrinsic evidence to impeach a hearsay declarant's character for truthfulness could be subject to abuse. It could lead to drawn-out proceedings and hearings on collateral matters–with little benefit given the fact that the only purpose would be to show that the hearsay declarant committed some act that had some bearing on the declarant's character for truthfulness. Members also noted that if the declarant were to testify, extrinsic evidence would be inadmissible under Rule 608(b), for the very reason that the delay and confusion resulting from proving up extrinsic evidence is not worth the attenuated benefit of impeaching the witness with a bad act. Committee members saw no justification for permitting proof of extrinsic evidence when it would not be permitted were the witness to testify.

The Committee resolved by unanimous vote to reject any proposed amendment to Rule 806.

PROJECT ON PRIVILEGES

At its Fall 2002 meeting, the Evidence Rules Committee decided that it would not propose any amendments to the Evidence Rules on matters of privilege. The Committee determined, however, that it could – under the auspices of its Reporter and consultant on privileges, Professor Broun – perform a valuable service to the bench and bar by giving guidance on what the federal common law of privilege currently provides. This could be accomplished by a publication outside the rulemaking process, such as has been previously done with respect to outdated Advisory Committee Notes and caselaw divergence from the Federal Rules of Evidence. Thus, the Committee agreed to continue with the privileges project and determined that the goal of the project would be to provide, in the form of a draft rule and commentary, a "survey" of the existing federal common law of privilege. This essentially would be a descriptive, non-evaluative presentation of the existing federal law, not a "best principles" attempt to write how the rules of privilege "ought" to look. Rather, the survey would be intended to help courts and lawyers determine what the federal law of privilege actually is and where it might be going. The Committee determined that the survey of each privilege will be structured as follows:

1. The first section for each rule would be a draft "survey" rule that would set out the existing federal law of the particular privilege. Where there is a significant split of authority in the federal courts, the draft would include alternative clauses or provisions.

2. The second section for each rule would be a commentary on existing federal law. This section would provide case law support for each aspect of the survey rule and an explanation of the alternatives, as well as a description of any aberrational caselaw. This commentary section is intended to be detailed but not encyclopedic. It would include representative cases on key points rather than every case, and important law review articles on the privilege, but not every article.

3. The third section would be a discussion of reasonably anticipated choices that the federal courts, or Congress if it elected to codify privileges, might take into consideration. For example, it would include the possibility of different approaches to the attorney-client privilege in the corporate context and the possibility of a general physician-patient privilege. This section, like the project itself, will be descriptive rather than evaluative.

At the Fall 2003 meeting, Professor Broun presented, for the Committee's information and review a draft of the survey rule, commentary, and future developments discussion with respect to the psychotherapist-patient privilege. Committee members commended Professor Broun on his excellent work product and provided commentary and suggestions. Some suggestions included the need to consider the relevance of statutory reporting requirements; the scope of waiver (which will be dealt with in a separate waiver rule); and whether the privilege should apply when confidential communications are released without the patient's authorization. Professor Broun noted that these suggestions were quite helpful and he would consider how to incorporate them in the working draft.

Professor Broun informed the Committee that he was beginning to work on the attorney-client privilege and that he would submit a progress report for the Spring 2004 meeting. After discussion, it was resolved that the survey project would cover those privileges and rules that were covered in the original Advisory Committee's draft of privileges.

NEXT MEETING

The next meeting of the Advisory Committee on Evidence Rules is scheduled for April 29th and 30th, 2004.

The meeting was adjourned at 3:30 p.m., November 13.

Respectfully submitted,

Daniel J. Capra
Reed Professor of Law
Reporter