# Advisory Committee on Evidence Rules

Minutes of the Meeting of April 28th, 2005

Phoenix, Arizona

The Advisory Committee on the Federal Rules of Evidence (the "Committee") met on April 28th 2005 in Phoenix, Arizona, with a subsequent electronic vote on a proposed amendment taken during the week of May 9-13.

*The following members of the Committee were present:*

Hon. Robert L. Hinkle, Acting Chair
Hon. Andrew D. Hurwitz
Patricia Refo, Esq.
William W. Taylor III, Esq.
John S. Davis, Esq., Department of Justice

*Also present were:*

Hon. David F. Levi, Chair of the Standing Committee on Rules of Practice and Procedure
Hon. Thomas W. Thrash, Jr., Liaison from the Standing Committee on Rules of Practice and Procedure
Hon. Christopher M. Klein, Liaison from the Bankruptcy Rules Committee
Hon. Thomas B. Russell, Liaison from the Civil Rules Committee
Robert Fisk, Esq., Liaison from the Criminal Rules Committee
Hon. Jeffrey L. Amestoy, former member of the Evidence Rules Committee
John K. Rabiej, Esq., Chief, Rules Committee Support Office
James Ishida, Esq., Rules Committee Support Office
Professor Daniel J. Capra, Reporter to the Evidence Rules Committee
Professor Kenneth S. Broun, Consultant to the Evidence Rules Committee

## Opening Business

Judge Hinkle served as Acting Chair at the request of Judge Smith, who could not attend due to a death in the family. Judge Hinkle asked for approval of the minutes of the January 2005 Committee meeting. The minutes were approved.

## Proposed Amendments to the Evidence Rules That Have Been Issued for Public Comment

The Standing Committee issued for public comment four proposed amendments to the Evidence Rules—Rules 404(a), 408, 606(b), and 609. At the April 2005 meeting, the Committee reviewed the public comments and considered whether the proposals should be approved as issued for public comment, approved as amended, or deferred.

## 1. Rule 404(a)

Over the course of several meetings the Committee tentatively agreed to propose an amendment to 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 have long been split over whether character evidence can be offered to prove conduct in a civil case. The question of the admissibility of character evidence to prove conduct arises frequently in cases brought under 42 U.S.C. § 1983, 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 can lead to a trial of personality and can cause the jury to decide the case on improper grounds. 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. But 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.

At the Spring 2004 meeting, the Committee approved an amendment to Rule 404(a) to be released for public comment, and the Standing Committee released that proposal. Only a few public comments were received. Most were positive, and the ones that were critical mistook the proposal as one that would affect character evidence when offered to prove a character trait that is actually in dispute in the case (e.g., in a case brought for defamation of character). Rule 404(a) by its terms does not apply when character is "in issue", and the proposed amendment does not change that fact. Another comment argued that the amendment might create the inference that Rule 404(b) was no longer applicable to civil cases. While Committee members did not believe such an inference could fairly be derived from the amendment, they resolved to add a sentence to the Committee Note to express the point that nothing in the amendment was intend to affect the admissibility of evidence under Rule 404(b).

**A motion was made and seconded to approve the proposed amendment to Evidence Rule 404(a), together with the Committee Note, and to recommend to the Standing Committee that the proposal be approved and sent to the Judicial Conference. The motion was approved by a unanimous vote. The proposed amendment is set forth in an appendix to these minutes.**

## 2. Rule 408

Over the course of several meetings, Committee members determined that the courts have been long-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.

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.

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 2003 meetings, at the Spring 2004 meeting, and finally at the meetings of January and April 2005. At all of these 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 a crime. The DOJ contended that if Rule 408 were amended to exclude such statements in criminal cases, then this probative and 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.

But other Committee members argued for a distinction between statements made in settlement negotiations and the offer or acceptance of the settlement itself. It was noted — from the personal experience of several lawyers — that a defendant may decide to settle a civil case even though it strenuously denies wrongdoing. These Committee members argued that in such cases the settlement should not be admissible in criminal cases because the settlement is more a recognition of reality than an admission of criminality. Moreover, if the settlement itself could be admitted as evidence of guilt, defendants may choose not to settle, and this could delay needed compensation to those allegedly injured by the defendant's activities.

Committee members noted that the DOJ's concerns about admissibility of compromise evidence were essentially limited to statements of fault made in compromise negotiations; such direct statements of criminality might be relevant to subsequent criminal liability, but the same does not apply to the settlement agreement itself. At the April 2004 meeting, a majority of the Committee voted to release a proposed amendment to Rule 408 that would exclude offers and acceptances of settlement in criminal cases, but that would admit in such cases conduct and statements made in the course of settlement negotiations. The Standing Committee approved the proposal for release for public comment.

The public comment on the proposed amendment to Rule 408 was uniformly negative. Criticisms included: 1) the rule would deter settlement discussions; 2) it would create a trap for the poorly counseled and the otherwise unwary, who might not know that statements of fault made in a settlement of a civil case might later be used against them in a criminal case; 3) it would allow private parties to abuse the rule by threatening to give over to the government alleged statements of fault made during private settlement negotiations; 4) it would result in attorneys having to become witnesses against their civil clients in a subsequent criminal case, as a lawyer may be called to testify about a statement that either the lawyer or the client made in a settlement negotiation; and 5) it would raise a problematic distinction between protected offers and unprotected statements and conduct—a distinction that was rejected as unworkable when Rule 408 was originally enacted. The public comment supported a rule providing that both statements and offers made during compromise negotiations are never admissible in a subsequent criminal case when offered to prove the validity or amount of the claim.

At the April 2005 meeting, most of the Committee members expressed significant concern over and sympathy with the negative public comment. But the DOJ representative argued at length that the comment was misguided. He made the following points: 1) the comment overstates the protection of the existing rule, which prohibits compromise evidence in criminal cases only when it is offered to prove the validity or amount of the claim; 2) the comment fails to note that several circuits already employ a rule that admits compromise evidence in criminal cases even when offered as an admission of guilt; 3) the comment fails to take account of the fact that many statements made to government enforcement officials in an arguable effort to settle a civil regulatory matter are essential for proving the defendant's guilt in a subsequent criminal case—the primary example being

a statement to a revenue agent that is later critical evidence against the defendant in a criminal tax prosecution; 4) the rule preferred by the public comment would allow a defendant to make a statement in compromise and later testify in a criminal case inconsistently with that statement, free from impeachment.

Extensive discussion ensued in response to the DOJ representative's presentation in favor of the proposed amendment as issued for public comment. Several committee members were sympathetic to the government's position that statements of fault made to government regulators would provide critical evidence of guilt in a subsequent criminal prosecution. They noted, however, that the government's concerns did not apply to statements made in compromise between private parties. The practicing lawyers on the Committee noted that it was often necessary for a client to apologize to a private adversary in order to obtain a favorable settlement. If that apology could later be referred to the government and used as an admission of guilt, it is highly likely that such an apology would never be made, and many cases could not be settled. In light of this concern, a Committee member proposed a compromise provision that would permit statements in compromise to be admitted as evidence of guilt, *but only when made in a civil action brought by a government regulatory agency.*

Committee members recognized that the proposed compromise would require some work on the language of the proposal, and moreover that it would be inappropriate to vote as a final matter on the compromise in the absence of the Chair. The Committee therefore resolved to allow the Reporter to prepare language that would permit statements of compromise to be admitted in criminal cases only when made in an action brought by a government regulatory agency. That language would be reviewed by the Chair and if the Chair approved, the proposal could be sent out for an electronic vote by the Committee members.

**On May 9, 2005 the Committee Chair issued to the Committee for consideration a proposed amendment to Rule 408 that would permit statements of compromise to be admitted in criminal cases only if made in cases brought by a government regulatory agency. A motion to approve the amendment for consideration by the Standing Committee, with the recommendation that it be approved by that Committee and referred to the Judicial Conference, was made and seconded by e-mail. An e-mail vote was taken and the proposed amendment was approved by a 5-2 vote. The proposed amendment and Committee note are set forth in an appendix to these minutes.**

## 3. 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, for release for public comment in 2004.

Committee members recognized the need for an amendment to Rule 606(b) because 1) all courts have found an exception to the Rule permitting juror testimony on certain errors in the verdict, even though there is no language permitting such an exception in the text of the Rule, and 2) the circuits have long been 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.

The proposed amendment to Rule 606(b) that was released for public comment in 2004 added an exception permitting juror proof that "the verdict reported is the result of a clerical mistake." The Committee determined that a broader exception permitting 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. The broad exception would be 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 would 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 note to the proposed amendment emphasized that Rule 606(b) does not bar the court from polling the jury and from taking steps to remedy any error that seems obvious when the jury is polled.

Only a few public comments were received on the proposed amendment to Rule 606(b). The comments were largely positive; but one comment contended that the term "clerical mistake" was vague and could be interpreted to provide an exception for juror proof that was broader than that intended by the Committee

For the April 2005 meeting, the Reporter prepared language for the amendment to Rule 606(b) in response to the public comment. This language was intended to sharpen and narrow the "clerical mistake" exception that was released for public comment. The language would permit juror proof to determine "whether there was a mistake in entering the verdict onto the verdict form." Committee members unanimously agreed that this language was an improvement on the language of the amendment that was released for public comment.

**A motion was made and seconded to approve an amendment to Evidence Rule 606(b) permitting juror proof to determine "whether there was a mistake in entering the verdict onto**

**the verdict form," together with the Committee Note. The motion was to recommend to the Standing Committee that the proposed amendment be approved and sent to the Judicial Conference. The motion was approved with one dissenting vote. The proposed amendment to Rule 606(b)is set forth in an appendix to these minutes.**

## 4. Rule 609

Rule 609(a)(2) provides for automatic impeachment of all witnesses with prior convictions that "involved dishonesty or false statement." Rule 609(a)(1) provides a nuanced balancing test for impeaching witnesses whose felony convictions do not fall within the definition of Rule 609(a)(2). At its Spring 2004 meeting the Evidence Rules Committee approved an amendment to Evidence Rule 609(a)(2) that was intended to resolve the long-standing conflict in the courts over how to determine whether a conviction involves dishonesty or false statement within the meaning of that Rule. 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 requires proof of falsity or deceit beyond a reasonable doubt, then the conviction must be admitted under Rule 609(a)(1) or not at all. Most courts, however, 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.

Throughout the Committee's consideration of Rule 609(a)(2), most Committee members have favored an "elements" definition of crimes involving dishonesty or false statement. These 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, it is often impossible to determine, solely 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 general nature of the conviction, not about its underlying facts. Finally, if a crime not involving false statement as an element (e.g., murder or drug dealing) is found inadmissible under Rule 609(a)(2), it is still likely to be admitted under the balancing test of Rule 609(a)(1). Thus, the costs of an "elements" approach would appear to be low–all that is lost is automatic admissibility.

The Department of Justice, however, has opposed a strict "elements" test. The DOJ representative on the Committee emphasized that the Department was not in favor of an open-ended rule that would require the court to divine from the record whether the witness committed some deceitful act in the course of a crime. But the Department was concerned that certain crimes that should be included as *crimina falsi* would not fit under a strict "elements" test. The prime example is obstruction of justice. It may be plain from the charging instrument that the witness committed

obstruction by falsifying documents, and it may be evident from the circumstances that this fact was determined beyond a reasonable doubt. And yet deceit is not an absolutely necessary element of the crime of obstruction of justice; that crime could be committed by threatening a witness, for example.

The Department recognized that Rule 609(a)(2) is not the only avenue for admitting a conviction committed through deceit even though the elements do not require proof of receipt. Such a conviction could be offered under the Rule 609(a)(1) balancing test. But the Department's response was that Rule 609(a)(1) would not apply if the conviction is a misdemeanor; and moreover the balancing test of Rule 609(a)(1) might lead to a judge excluding the conviction even though it should really have been admitted under Rule 609(a)(2) (though there is little support for this latter argument in the cases). The Department also recognized that the deceitful conduct could itself be admissible as a bad act under Rule 608(b). But the Department's response was that Rule 608(b) would not permit extrinsic evidence if the witness denied the deceitful conduct.

After extensive discussion over several meetings, the Committee as a whole determined that there was no real conflict within the Committee about the basic goals of an amendment to Rule 609. Those goals are: 1) to resolve a long-standing dispute among the circuits over the proper methodology for determining when a crime is automatically admitted under Rule 609(a)(2); 2) to avoid a mini-trial into the facts supporting a conviction; and 3) to limit Rule 609(a)(2) to those crimes that are especially probative of the witness's character for untruthfulness.

The proposal released for public comment provided for automatic impeachment with any conviction "that readily can be determined to have been a crime of dishonesty or false statement." The public comment on the proposed amendment was largely negative. Public commentators generally favored a strict "elements" test. They contended that anything broader would lead to difficulties of application, and the very kind of mini-trial into the facts of a conviction that the Committee sought to avoid. Public comments also noted that the term "crime of dishonesty or false statement" was undefined, and that this would lead to disputes in the courts over its meaning.

At the April 2005 meeting Committee members considered the public comment. The Department of Justice remained opposed to a strict "elements" test for Rule 609(a)(2). The DOJ representative did not disagree, however, with Committee members' comments that the term "crime of dishonesty or false statement" should be clarified to provide courts and counsel with a better indication of when it is permissible to go behind the elements of the conviction. After extensive discussion, one Committee member agreed that more precise language was necessary to define and limit the potential scope of Rule 609(a)(2). A Committee member proposed that the language be changed to provide for mandatory admission of a conviction "if it readily can be determined that the elements of the crime, as proved or admitted, required an act of dishonesty or false statement by the witness." This language would permit some limited inquiry behind the conviction, but would provide for automatic admissibility only where it is clear that the jury had to find, or the defendant had to admit, that an act of dishonesty or false statement occurred that was material to the conviction. The language had the additional benefit of specifically encompassing convictions that resulted from guilty pleas.

The Committee discussed this alternative and all members agreed that it better captured what the Committee had agreed was necessary for an amendment to Rule 609(a)(2)—to limit enquiry behind the judgment to those cases where it can be determined easily and efficiently that an act of dishonesty or false statement was essential to the conviction. All members of the Committee — including the DOJ representative — were in favor of this change to the proposal issued for public comment.

**A motion was made and seconded to approve an amendment to Evidence Rule 609 (together with the Committee note) that would provide among other things for mandatory admission of a conviction "if it readily can be determined that the elements of the crime, as proved or admitted, required an act of dishonesty or false statement by the witness." The motion was to recommend to the Standing Committee that the proposed amendment be approved and sent to the Judicial Conference. The motion was approved unanimously. The proposed amendment to Rule 609 is set forth in an appendix to these minutes.**

## Privileges

Professor Ken Broun, the consultant to the Evidence Rules Committee on the privileges project, reported on the status of the project. The goal of the privileges project is to prepare a document for publication. There is no intent to propose the codification of the federal law of privilege. For each privilege, the project will draft 1) a survey rule, equivalent to a restatement of the federal law of privilege; 2) commentary on the federal case law bearing on the respective privilege; and 3) a section addressing future developments and special issues such as circuit splits. The Committee has already reviewed the project's work on the medical privilege, which has been completed. The attorney/client privilege section of the report is virtually completed. Professor Broun presented for the Committee's review new material on the crime-fraud exception.

At previous meetings, Committee members noted a number of problems with the current law governing the waiver of privilege. In complex litigation the lawyers spend significant amounts of time and effort to preserve the privilege, even when many of the documents are of no concern to the producing party. The reason is that if a privileged document is produced, there is a risk that a court will find a subject matter waiver that will apply not only to the instant case but to other cases as well. An enormous amount of expense is put into document production in order to protect waiver. Moreover, the fear of waiver leads to extravagant claims of privilege. Members observed that if there was a way to produce documents in discovery without risking subject matter waiver, the discovery process could be streamlined.

At the April 2005 Committee meeting, Professor Broun presented for the Committee's consideration a draft statute that would treat the question of inadvertent disclosure of privileged

material. The Committee agreed to review the draft statute at the next meeting and consider whether to take action on the subject of waiver of attorney-client privilege. Judge Hinkle expressed his thanks to Professor Broun for all of his hard work on the privilege project.

Respectfully submitted,

Daniel J. Capra
Reporter