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(Mag Judge)
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To Peter McCabe/DCA/AO/USCOURTS@USCOURTS
cc Aaron Goodstein/WIED/07/USCOURTS@USCOURTS
Subject Comments regarding the Class 2006 proposed Amendments

Dear Mr. McCabe,

On behalf of the Federal Magistrate Judges Association (FMJA), and as Chair of the FMJA Rules Committee, I attach a letter from the FMJA President and the comments of the FMJA Rules Committee regarding the Class of 2006 proposed amendments. These attachments will also be submitted by FedEx. Please feel free to contact me should there be any questions regarding the FMJA comments.

Best Regards,

Barry M. Kurren

Rules Report to Peter Mc.wpd 2004 FMJA Rules Committee Report.wpd

04-CV-127

04-CR-002

04-EV-007

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FMJA
FEDERAL MAGISTRATE JUDGES ASSOCIATION
43rd Annual Convention - Orlando, Florida
July 6 - July 8, 2005

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February 3, 2005

Peter McCabe, Secretary
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

Re: Comments on Proposed Amendments to Federal Rules of Civil and Criminal Procedure and Evidence (Class of 2006)

Dear Mr. McCabe:

The Federal Magistrate Judges Association (FMJA) submits the following comments to the Rules Advisory Committee. The comments were first considered by the Standing Rules Committee of the FMJA chaired by the Honorable Barry M. Kurren (District of Hawaii). The committee members are:

Honorable S. Allan Alexander, Northern District Mississippi
Honorable Hugh W. Brennenman Jr., Western District Michigan
Honorable Joe B. Brown, Middle District Tennessee
Honorable William E. Callahan, Jr., Eastern District Wisconsin
Honorable B. Waugh Crigler, Western District Virginia
Honorable Morton Denlow, Northern District Illinois
Honorable Paul Komives, Eastern District Michigan
Honorable Malachy E. Mannion, Middle District Pennsylvania
Honorable Michael Merz, Southern District Ohio
Honorable Mary Pat Thynge, District of Delaware
Honorable Andrew Wistrich, Central District California

Based on the variety of their respective districts and duties, the committee is representative of magistrate judges as a whole. Many of the committee members consulted with their colleagues in the course of preparing these comments. The comments were then reviewed and, unanimously approved by the Officers and Directors of the FMJA.

The comments reflect the considered position of the membership of the FMJA. We have also encouraged individual magistrate judges to forward comments to you. We are pleased to have this opportunity to present written comments, and we welcome the opportunity to testify.

Sincerely yours,

Aaron Goodstein
President, Federal Magistrate Judges Association

COMMENTS OF FEDERAL MAGISTRATE JUDGES ASSOCIATION RULES COMMITTEE ON PROPOSED CHANGES TO THE FEDERAL RULES OF CIVIL PROCEDURE, CRIMINAL PROCEDURE, AND EVIDENCE (Class of 2006)

I. PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

(A) PROPOSED RULES RELATING TO ELECTRONIC DISCOVERY

COMMENT: The FMJA Rules Committee ("FMJA") agrees that amendments to the Federal Rules of Civil Procedure relating to the discovery of electronically stored information are necessary because the present discovery rules do not adequately address issues arising from the increasingly frequent use of discovery of electronic information. The FMJA supports the proposed amendments to Rules 26(f) and 16(b) which would require litigants early in litigation to address issues relating to electronic discovery, including the form of production and preservation of electronically stored information, and to consider an approach to discovery that protects against privilege waiver. The FMJA also supports the proposed changes to Rules 33 and 34 which are designed to adapt the rules to discovery of electronically stored information. The proposed amendments would (1) distinguish between electronically stored information and documents, (2) clarify that an answer to an interrogatory involving records should also include a search of electronically stored information, (3) allow a responding party to substitute access to electronically stored data for an answer only if the burden of deriving an answer is substantially the same for both sides, (4) allow parties seeking discovery to specify the form of production for electronic information and allow those disclosing to object to the form, (5) provide that where there is no request, agreement or court order specifying the form of production, a producing party would be allowed to produce information either in the form it is originally maintained or in an electronically searchable form, and (6) clarify that the obligation to produce for testing and sampling also applies to non-electronic discovery.

The FMJA recommends, however, that further consideration be given to proposed Rules 26(b)(5)(B) and 45(d)(2)(B) which set up a procedure for a party to assert that it has produced privileged information, Rules 26(b)(2) and 45(d)(1)(C) which address the discovery of electronically stored information that is not reasonably accessible, and Rule 37(f) which would create a "safe harbor" against sanctions involving electronically stored information.

DISCUSSION: (1) Amendments Relating to Privilege Waiver

Proposed amended Rule 16(b) addresses the topics to be included in the court's scheduling and case management order. The amendment adds language in subsection (b)(6) that would allow the court to adopt in its scheduling/case management order any agreement reached by the parties during their Rule 26(f) conference which (1) grants protection against inadvertent waiver of privilege and (2) has been conveyed in the parties' Rule 26(f) report to the court.

The FMJA concurs in the proposed amendment. The thorny problem of privilege and waiver is one that the parties themselves are often better suited than the court to address and resolve, and to the extent that the amended language of Rule 16(b)(6) contemplates acceptance of the parties' reasonable proposal, the interest of judicial efficiency will be served. While the proposed amendment does not confer authority upon the court to impose a privilege protection order without agreement by the parties, neither does it prohibit the court from imposing such an order in an appropriate case.

Rules 26 and 45 – which contain virtually identical language – set out the procedures by which the producing party or Rule 45 nonparty may protect itself against inadvertent waiver of privilege when it has produced privileged information to the requesting party without intending to do so. The proposed amendments are not limited to production of electronically stored information, and they presumably are intended to apply in any case where privileged information has been produced in any form. The first sentences of both amended Rule 26(b)(5)(B) and amended Rule 45(d)(2)(B) provide that a party or person who, in responding to discovery requests, "produces information without intending to waive a claim of privilege . . . may, within a reasonable time, notify any party that received the information of its claim of privilege." The following sentences of each rule then require the receiving party to take certain actions to contain or remedy the effects of an inadvertent disclosure pending a ruling by the court if the claim of privilege is disputed.

The FMJA questions the need to codify a generalized "inadvertent production" rule. The commentary to the proposed changes indicate the cost of conducting a privilege review before producing

voluminous amounts of electronically-stored information is a significant concern. That concern is addressed by the proposed addition of Rules 16(b)(5)-(6) and 26(f)(3)-(4), which permit parties to agree and a court to order that production of those materials *without a prior review* will not constitute a waiver of privilege. The inadvertent production rules set forth in proposed Rules 25(b)(5)(B) and 45(d)(2)(B) do not address that concern, but rather deal with an entirely different situation: the production of privileged materials *after – and despite – a prior review*. The commentary correctly notes that "courts have developed principles for determining whether waiver results from inadvertent production of privileged information." The FMJA does not believe there has been adequate explanation as to the need for, or wisdom of, new rules to address what already is being handled satisfactorily under the common law.

That said, in the event that Rules 26(b)(5)(B) and 45(d)(2)(B) are not removed from the draft, the FMJA suggests one change to the proposed language of those rules.

The FMJA is concerned that without further restriction, the amendments allowing a producing party or person "a reasonable time" to notify other parties of an inadvertent disclosure of privileged matter will promote laxity on the part of the respondent in timely screening disclosed information for privileged matter. Moreover, these provisions are necessary only in the exceptional case, but because the rules now apply to all "information" produced, persons or parties may be discouraged from conducting a careful privilege evaluation before producing information in all of the other types of cases which comprise the vast majority of cases in federal court where such provisions are neither necessary nor helpful. Application of the amendment in such cases may undermine the obligation traditionally placed upon the producing party to safeguard its privileged material rather than raise the issue when disclosure becomes inconvenient or prejudicial. It is difficult to "unscramble the egg" in any case, whether the case involves large volumes of information or not. *See Carter v. Gibbs*, 909 F.2d 1450, 1451 (Fed. Cir. 1990) (an inadvertent disclosure automatically waives the attorney work product privilege, because to do otherwise "would do no more than seal the bag from which the cat has already escaped."). Because litigation of these issues is very expensive and time-consuming, the rule should make clear that a person may not wait to act on a claim of privilege until, for example, the receiving party has relied upon the information in

formulating or refining its claims or defenses or has used the information against the producing party, before invoking a claim of privilege for the first time. *See, e.g., Bowles v. National Ass'n of Home Builders*, 2004 WL 2203831 (D.C. Cir. 2004), where the court held that a failure to act after 15 months where the defendant had actual knowledge that opposing party had possession of privileged documents waived the privilege. The FMJA suggests insertion of a specific time limitation, such as a thirty-day deadline for notification of inadvertent disclosures, with extensions allowed only with court approval upon a showing of good cause.

(2) Discovery of Electronically Stored Information that is Not Reasonably Accessible

The proposed amendment to Rule 26 would add the following language to paragraph (b)(2).

> A party need not provide discovery of electronically stored information that the party identifies as not reasonably accessible. On motion by the requesting party, the responding party must show that the information is not reasonably accessible. If that showing is made, the court may order discovery of the information for good cause and may specify the terms and conditions for such discovery.

The proposed amendment to Rule 26 would add similar language to paragraph 45(d)(1)(C), but it substitutes "person" for "party" and omits from the third sentence the phrase "and may specify terms and conditions for such discovery."

Because the proposed amendments are flawed, they should not be adopted at this time.

The proposed change is reminiscent of the 2000 Amendment to Fed. R. Civ. P. 26(b)(1), in which the scope of discovery was narrowed from "relevant to the subject matter involved in the action" to "relevant to the claim or defense of any party," with the broader scope available only on a showing of "good cause." The proposed amendment represents a further narrowing of discovery from all relevant electronically stored information to only that which is "reasonably accessible," with discovery of information that is not "reasonably accessible" available only on a showing of good cause. The following are a few of the more serious concerns about the amendments.

First, the term "reasonably accessible" is not adequately defined, leading to a great potential for confusion. The Advisory Committee Note says that the meaning of the term "may depend on a variety of circumstances" and provides some useful examples of information that "ordinarily" would not be considered reasonably accessible. However, the Note also indicates that if the responding party routinely accesses or uses the electronically stored information, then the information "would ordinarily be considered reasonably accessible," but at the same time states that if the responding party does not routinely access or use the information, that does not necessarily mean that the information is not "reasonably accessible." In the end, the Note suggests that the governing criterion is whether "access requires substantial effort or cost." Regardless, one salient fact trumps these "guidelines": if the information was "actually accessed," then it is "reasonably accessible." These are just a few examples of the ambiguities and confusion the term "reasonably accessible" as used in proposed Rule 26(b)(1) may engender.

Second, the proposed amendment is potentially redundant. Under the proposed amendment, if a court determines that information is *not* "reasonably accessible," the court "may nevertheless order discovery if the requesting party shows good cause." The Note explains that "[t]he good-cause analysis would balance the requesting party's need for the information and the burden on the responding party." This sounds similar to the analysis already conducted under Rule 26(b)(2)(iii), which requires that the court limit discovery of relevant information if it determines that "the burden or expense of the proposed discovery outweighs the likely benefit, taking into account the needs of the case, the amount in controversy, the party's resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues." However, because Rule 26(b)(2)(iii) does not use the term "good cause," it is unclear whether the good-cause analysis is intended to be something different than what courts already are doing under Rule 26(b)(2)(iii).

Third, although the responding party still has the burden of demonstrating that the electronically stored information is not reasonably accessible, there is no longer any presumption of discoverability to overcome. Thus, the requesting party would bear the burden of persuasion on the issue of good cause. This shifting of the burden to the requesting party rather than the producing

party may well lead to more, not fewer, discovery disputes than already arise from the present rule.

Finally, the proposed amendment places too much control in the hands of the responding party in that it may encourage parties who believe that they might be sued to make some electronically stored information inaccessible as rapidly as possible in the normal course of business, such as by using a program that automatically deletes all email after 30 days, or to keep in reasonably accessible form only information which they think will be helpful to them.

Insofar as the proposed amendment to Rule 45(d)(1)(C) is concerned, the same comments apply. In addition, it is not clear why the last phrase of the proposed amendment to Rule 26(b)(2) was omitted from the proposed amendment to Rule 45(d)(1)(C). Although it would be best to omit it in both places, if it is included in one, it should be included in the other as well.

In sum, the proposed amendment is unhelpful. It adds needless complexity, introduces ambiguity and confusion, creates the potential for unfairness, and may reduce the quantity of relevant evidence available in the long run. The proposed amendment also is unnecessary. It accomplishes almost nothing that cannot already be accomplished more simply under the existing versions of Rules 26(b)(2)(iii) and Rule 26(c).

It would be better if the proposed amendment simply said that in making a determination under either Rule 26(b)(2)(iii) or Rule 26(c) about what electronically stored information should be produced, and if so, at whose cost, the court should consider whether the electronically stored information is not reasonably accessible for reasons beyond the reasonable control of the producing party, and if so, to consider whether it should be produced in light of Rule 26(b)(2)(iii). The proposed amendment also could offer a more complete definition of "reasonably accessible." A parallel provision or a cross-reference could be added to Rule 45(d)(1)(c).

(3) Rule 37 Limitation on Sanctions

Proposed Rule 37(f) reads as follows:

> **(f) Electronically stored information.** Unless a party violated an order in the action requiring it to preserve

electronically stored information, a court may not impose sanctions under these rules on the party for failing to provide such information if

(a) the party took reasonable steps to preserve the information after it knew or should have known the information was discoverable in the action; and

(b) the failure resulted from loss of the information because of the routine operation of the party's electronic information system.

The FMJA opposes the adoption of a new rule that attempts to create a "safe harbor" against sanctions involving electronically stored information. The FMJA recommends that no special "safe harbor" rule be adopted for electronically stored information because the current Rule 37 procedures are adequate and the proposed rule creates as many questions as it does answers.

The proposed amendment to Rule 37 provides a narrow "safe harbor" to a party that fails to provide electronically stored information where the party "took reasonable steps to preserve the information after it knew or should have known the information is discoverable in the action" and "the failure resulted from loss of the information because of the routine operation of the party's electronic information system." The FMJA does not believe that a special "safe harbor" provision is necessary because if these two elements were met, one would not expect sanctions to be imposed under current Rule 37 procedures.

For example, if a party were to seek sanctions under current Rule 34(d), the respondent could avoid sanctions by demonstrating that the "failure was substantially justified or that other circumstances make an award of expenses unjust." It is not logical to think that under the circumstances presented in the proposed rule that a court would impose sanctions under existing practice. To the extent that the concepts raised by proposed Rule 37(f) are deemed significant, these concepts should be reflected in the final Committee Notes to proposed new provisions to Rules 26(b)(1) and 26(b)(2). Proposed Rule 37(f) refers to steps that are often called a "litigation hold." The reasonableness of a "litigation hold" is related to the proposed new provision in Rule 26(b)(2), which states that electronically stored information not reasonably accessible is discoverable only on court order, for good cause. Therefore, the scenario represented

in proposed Rule 37(f) could be included in the Committee's discussion of what constitutes reasonably accessible information.

Furthermore, the language of Rule 37(f) creates as many questions as answers, and thereby defeats the purpose of a "safe harbor." The terms "reasonable steps to preserve the information," "knew or should have known the information was discoverable," and "routine operation of the party's electronic information system" all invite disputes over their meaning. It makes more sense to see how the case law develops before trying to craft a proposed "safe harbor" provision that is neither "safe" nor a "harbor."

(B) PROPOSED SUPPLEMENTAL RULE G (FORFEITURE ACTIONS IN REM)

COMMENT: The FMJA supports the proposed addition of Supplemental Rule G.

DISCUSSION: The proposed new Supplemental Rule G was proposed by the Advisory Committee on Civil Rules to create a free-standing rule on in rem forfeiture actions brought by the United States. At present, the procedure for such actions is handled under various supplemental rules which were designed for admiralty cases. The proposed new Supplemental Rule G consolidates the forfeiture procedure and takes account of the changes in forfeiture practice occasioned by enactment of the Civil Asset Forfeiture Reform Act of 2000.

(C) PROPOSED AMENDMENT TO RULE 50 (JUDGMENT AS A MATTER OF LAW IN JURY TRIALS: ALTERNATIVE MOTION FOR A NEW TRIAL; CONDITIONAL RULINGS)

COMMENT: The FMJA supports the amendment to Rule 50.

DISCUSSION: The proposed amendment to Rule 50 would allow a party that makes a motion for judgment as a matter of law at some time during trial (classically at the conclusion of the plaintiff's case) to renew that motion within ten days after trial without having first renewed it at the close of all the evidence. The present Rule is a trap for the unwary, requiring a motion for "directed verdict" to be renewed at a time in the trial when counsel are focused on admission of exhibits, jury instructions, and so forth, and may easily forget the formality of renewing the motion. The proposed amendment eliminates what is usually just a formality, but which

can result in a harsh result. Several courts of appeals have been relaxing the current rule to avoid that result, while others have held firm to the text of the present Rule. Since the motion can only be renewed, not added to, there is no unfairness to the party opposing the motion.

II. PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

(A) PROPOSED RULE 5 (INITIAL APPEARANCE; PROPOSED AMENDMENT REGARDING USE OF ELECTRONIC MEANS TO TRANSMIT WARRANT)

COMMENT: The FMJA supports the proposed amendment of Rule 5. Under the proposal, there would be stricken from Rule 5(c)(3)(d)(i) the following language: "a facsimile of either" and "other appropriate." Under the proposal, the following language would be substituted for the stricken language: "a reliable electronic."

DISCUSSION: The FMJA is in agreement that the broad term "electronic form" includes facsimiles. More significantly, the amendment reflects the current state of technology in the courts. Indeed, many courts already require that certain documents be filed electronically.

(B) PROPOSED RULE 32.1(a) (INITIAL APPEARANCE; PROPOSED AMENDMENT REGARDING USE OF ELECTRONIC MEANS TO TRANSMIT CERTAIN DOCUMENTS)

COMMENT: The FMJA supports the proposed amendment of Rule 32.1. Under the proposal, the following language would added to Rule 32.1(a)(5)(B)(i): "or copies of those certified documents by reliable electronic means."

DISCUSSION: The FMJA is in agreement that the rule should be amended to permit the magistrate judge to accept a judgment, warrant, and warrant by reliable electronic means. Once again, the amendment reflects the current advanced state of technology in the courts in terms of the acceptance of electronic filings.

(C) PROPOSED RULE 40 (ARREST FOR FAILING TO APPEAR IN ANOTHER DISTRICT)

COMMENT: The FMJA supports the proposed amendment of Rule 40. The proposed amendment would empower a magistrate judge in the

district in which a defendant has been arrested to set conditions of release for a person brought before that magistrate judge, regardless of whether the basis for the arrest was a failure to appear in the district of prosecution or a violation of any other condition of release.

DISCUSSION: The FMJA is in agreement that the rule should be amended in the manner proposed. Currently, the rule specifies that it deals only with persons failing to appear in the district of prosecution as required by the previous order setting conditions of release. The proposed amendment would clearly state that an arrested person must be taken without unnecessary delay before a magistrate judge in the district of arrest in either situation, that is, without regard to whether the arrest warrant issued in the district of prosecution asserts that the defendant failed to appear or that the defendant was believed to have violated some other condition or release. The FMJA is in agreement with the Advisory Committee's note that it makes no sense for a magistrate judge to be empowered to release (or set conditions of release) for a person who failed to appear in the district of prosecution but to be precluded from doing so for a person who violated some less serious condition of release.

(D) PROPOSED RULE 41 (OBTAINING AND ISSUANCE OF A SEARCH WARRANT)

COMMENT: The FMJA supports the proposed amendments of Rule 41. Rule 41(d)(3)(A) currently allows a magistrate judge to issue a search warrant that is based on information communicated by telephone or "other appropriate means, including facsimile transmission." The proposed amendment would strike the words "appropriate means, including facsimile transmission" and substitute the words "reliable electronic means." Furthermore, the proposed amendment to subsection (e)(3) would make clear the process for issuing the warrant that had been applied for by use of reliable electronic means.

DISCUSSION: The FMJA is in agreement that the rule should be amended in the manner proposed. Once again, the proposed amendments reflect the current advanced state of technology when it comes to the reliability of electronic transmission of information. At present, the magistrate judge must enter the contents of a proposed duplicate original which has been read over the telephone into an

original warrant for the magistrate judge's signature. The proposed amendment would allow the applicant to transmit the contents "by reliable electronic means" and would allow that transmission to serve "as the original warrant." The magistrate judge, in the amended version of this rule, would retain the power to modify "the original warrant" but would be required either "to transmit any modified warrant to the applicant by reliable electronic means" or direct the applicant to modify the proposed duplicate original warrant "accordingly." Finally, if the magistrate judge determines to issue the warrant, the magistrate judge, after signing and dating the original warrant, must either "transmit it by reliable electronic means to the applicant or direct the applicant to sign the judge's name on the duplicate original warrant."

(E) PROPOSED CHANGES TO RULES 5 AND 58 TO ELIMINATE A CONFLICT BETWEEN RULES 5.1 AND 58

COMMENT: The FMJA supports the proposed amendments to Rules 5 and 58.

DISCUSSION: At present, Rule 5(c)(3)(C) requires a magistrate judge to conduct a preliminary hearing "if required by Rule 5.1 or Rule 58(b)(2)(G)[.]" The amendment would strike this reference to Rule 58 because the Committee also proposes to amend Rule 58(b)(2), which at present requires a defendant making an initial appearance on either a petty offense or other misdemeanor charge to be advised of a right "to a preliminary hearing under Rule 5.1." By striking the phrase which begins subsection (b)(2)(G), that is, "if the defendant is held in custody and charged with a misdemeanor other than a petty offense" and substituting therefor the word "any," the rule will now require that any defendant, whether or not "held in custody and charged with a misdemeanor other than a petty offense," will simply be advised of "any right to a preliminary hearing under Rule 5.1."

III. PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

(A) PROPOSED AMENDMENT TO FED. R. EVID. 404(a)

COMMENT: The FMJA supports the proposed amendment to Rule 404(a).

DISCUSSION: The proposed amendment to Rule 404(a) is to address inconsistencies in the courts regarding the admissibility of

character evidence in a civil case. Unlike criminal cases where the character of the accused may be the only defense available, the admission of character evidence as circumstantial proof of conduct in a civil case is fraught with substantial risks of prejudice, confusion and delay and may lead to a trial on personality rather than on the relevant issues. The proposed rule reinforces the original intent of the Rule to prohibit the circumstantial use of character evidence in civil cases. It also clarifies that Fed. R. Evid. 404(a)(2) is subject to the more stringent limitations of Fed. R. Evid. 412 regarding the use of character evidence of a victim.

(B) PROPOSED AMENDMENT TO FED. R. EVID. 408

COMMENT: The FMJA supports the proposed amendments to Rule 408, with one critical exception. The Committee does not support that proposed amendment which would bar for use only in civil cases the conduct or statements of a party made in compromise negotiations.

DISCUSSION: The proposed amendment to Rule 408(a)(2) would make it clear that Rule 408(a)(2) only applies in civil cases. In other words, under the proposed amendment "conduct or statements made in compromise negotiations" would be admissible against a party in a subsequent criminal proceeding. A majority of commentators and a majority of the courts have opined that current Rule 408 applies to both civil and criminal cases. See: When Two Worlds Collide: Examining the Second Circuit's Reasoning in Admitting Evidence of Civil Settlements in Criminal Trials, 67 Brok. L. Rev. 527 (2001). This Committee believes that the public interest in resolving and settling disputes outweighs the need for such evidence to be admissible in criminal prosecutions.

The justification for the proposed change in the rule is not made clear by the Judicial Conference Rules Committee. The two reasons seem to be that there is some confusion in the circuits over the matter and that "this position is taken in deference to the Justice Department's arguments that such statements can be critical evidence of guilt." Yet, there is nothing in the materials provided that demonstrates this is a serious problem in connection with the Justice Department's efforts to ferret out crime. On the other hand, this Committee fears that such a rule change could, at least in some instances, hamper the efforts of civil litigants' legal counsel and those serving as mediators to successfully resolve civil disputes during the course of settlement conferences. In the end,

absent more persuasive justification for the proposed amendment of Rule 408(a)(2), this Committee opposes the same.

(C) PROPOSED AMENDMENT TO FED. R. EVID. 606(b)

COMMENT: The FMJA supports the proposed amendment to Rule 606(b).

DISCUSSION: The proposed amendment to Rule 606(b) deals with whether statements from jurors can be admitted to prove a disparity between the verdict rendered and the verdict intended by jurors. The proposed rule addresses the incongruity between the Rule and case law and addresses court-drafted exceptions, which run the gamut from being limited to clerical error to permitting proof of juror statements whenever the jury misunderstood or ignored the court's instructions. The proposed amendment limits the exception to clerical error and thereby preserves the sanctity of juror deliberations and the finality of jury verdicts. However, the proposed changes do not prevent the court from polling the jury and taking steps to remedy any obvious errors evident from that poll.

(D) PROPOSED AMENDMENT TO FED. R. EVID. 609

COMMENT: The FMJA supports the proposed amendment to Rule 609.

DISCUSSION: The proposed amendment to Rule 609 addresses how to determine whether a conviction involves dishonesty or false statement within the parameters of Rule 609(a)(2). Presently, Rule 609(a)(1) requires a balancing test for impeaching witnesses whose felony convictions do not fall within the definition of Rule 609(a)(2), while Rule 609(a)(2) allows the automatic impeachment of witnesses with prior convictions that "involved dishonesty to false statement." The proposed changes are substituting "credibility" with "character for truthfulness" and substituting "involved" with "readily can be determined." The intent is to clearly limit the Rule to the admission of convictions that only involve an act of dishonesty or false statement.