Advisory Committee on Evidence Rules

Minutes of the Meeting of April 25th, 2003

Washington, D.C.

The Advisory Committee on the Federal Rules of Evidence (the "Committee") met on April 25th, 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. Hinkle
David S. Maring, Esq.
Patricia Lee Refo, Esq.
Thomas W. Hillier, Esq.
Christopher A. Wray, Esq.

Also present were:

Hon. Milton I. Shadur, former Chair of the Evidence Rules Committee
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. Lee H. Rosenthal, representing the Civil Rules Committee
Hon. David G. Trager, Liaison from the Criminal Rules Committee
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

Witnesses at the public hearing were:

Professor Richard Friedman
David Romine, Esq.

Public Hearing on the Proposed Amendment to Evidence Rule 804(b)(3)

The Committee began its meeting by hearing from two witnesses on the proposed amendment to Evidence Rule 804(b)(3), the hearsay exception for declarations against interest. Only two witnesses requested to be heard on the amendment, and for purposes of economy, the Committee decided to combine its Spring meeting with a public hearing on the amendment.

The first witness, Professor Richard Friedman, applauded the impetus behind the proposed amendment to Rule 804(b)(3), but suggested several ways in which he thought the amendment should be improved. Professor Friedman made the following suggestions, among others: 1) The corroborating circumstances requirement, applicable to statements against penal interest offered by the accused, should be deleted; 2) The particularized guarantees of trustworthiness requirement, applicable under the amendment to statements offered by the prosecution (and codifying current Supreme Court cases on the right to confrontation) should be scrapped in favor of a rule that precludes all statements made to law enforcement officers; 3) The amendment should specify that the trustworthiness of the in-court witness who relates the hearsay statement is irrelevant to the reliability of the hearsay itself; and 4) The amendment should contain language that overrules the Supreme Court's decision in *Williamson v. United States*. As will be seen below, the Committee considered but ultimately rejected each of Professor Friedman's suggestions, most of which called for costly and unnecessary changes in settled law.

The second witness, David Romine, Esq., urged the Committee to delete the proposed amendment's extension of the corroborating circumstances requirement to civil cases. This suggestion was echoed by several public comments received by the Committee. As will be seen below, the Committee, after consideration, agreed with the suggestion of Mr. Romine and others.

Opening Business of the Committee Meeting

Judge Smith extended a welcome to those who were attending the Evidence Rules Committee for the first time: Judge Thrash, the new liaison from the Standing Committee, and Judge Rosenthal, representing the Civil Rules Committee. He also welcomed Judge Shadur, the former Chair of the Committee, who was unable to attend the Fall 2002 meeting in Seattle. Judge Smith asked for approval of the draft minutes of the October 2002 Committee meeting. The minutes were approved unanimously. Judge Smith then gave a short report on the January 2003 Standing Committee meeting. The Evidence Rules Committee presented no action items at that meeting.

Committee Consideration of the Proposed Amendment to Rule 804(b)(3)

The Committee began discussion on the public comment and public testimony concerning the proposed amendment to Evidence Rule 804(b)(3). The proposal released for public comment would make two basic changes to the Rule: 1) It would require a party proffering a declaration against penal interest in a civil case to show that the statement carries "corroborating circumstances" that clearly indicate the trustworthiness of the statement (extending to civil cases the evidentiary requirement that is currently applicable to statements offered by the accused); and 2) It would codify a constitutional standard imposed by the Supreme Court on declarations against penal interest offered by the prosecution, i.e., that the statement carry "particularized guarantees of trustworthiness."

The Committee first considered the substantial public commentary that was critical of the proposed extension of the corroborating circumstances requirement to civil cases. Some Committee members noted that there is a justification for distinguishing between civil and criminal cases insofar as the corroborating circumstances requirement is concerned. The corroborating circumstances requirement in criminal cases resulted from a considered decision by Congress. Congress was concerned that a criminal defendant could engineer a hearsay statement from an associate; that statement might admit responsibility for the crime and so would be technically "against penal interest" but under the circumstances the associate might not in fact be subject to a real risk of prosecution. Consequently, the corroborating circumstances requirement was added to alleviate concern over the potential unreliability of statements that were merely against the declarant's penal interest. That corroborating circumstances requirement in criminal cases has been applied in hundreds of cases over 30 years. In contrast, the extension of the corroborating circumstances requirement to civil cases would not adhere to the original intent of the Rule. To the contrary, the original intent of the Rule was to provide a clear distinction between criminal cases, in which the accused might generate an unreliable exculpatory statement, from civil cases, in which no such threat was perceived.

Committee members noted that the Advisory Committee, in its first proposal to amend Rule 804(b)(3), reasoned that extending the corroborating circumstances requirement to civil cases would provide for unitary treatment for all declarations against penal interest, no matter the case, no matter by whom offered. But the unitary treatment rationale no longer supports the extension of the corroborating circumstances requirement to civil cases. This is because the revised proposed amendment that was issued for a new round of public comment does not provide for unitary treatment of all declarations against penal interest. It provides different admissibility requirements for statements offered by the prosecution and those offered by the accused. Committee members also noted that the only civil case with any discussion of the corroborating circumstances requirement–the *Fishman* case, relied upon in the Committee Note–justifies extension of the corroborating circumstances requirement to civil cases solely on the ground that unitary treatment would be desirable. Thus, the only case providing a considered holding on the matter relies on a rationale that is undermined by the current proposed amendment. Committee members believed that, under these circumstances, the costs of an amendment (in upsetting settled precedent and in making it more difficult to bring some civil cases) outweighed whatever benefits the amendment would provide.

A motion was made and seconded to delete the proposed extension of the corroborating circumstances requirement to civil cases. That motion was passed by a unanimous vote.

The Committee next discussed the proposed amendment's codification of the particularized guarantees of trustworthiness requirement for statements against penal interest offered by the prosecution. The reason for including this language in the proposal issued for public comment was to codify the protections imposed by the Confrontation Clause. The Supreme Court has held that the hearsay exception for declarations against penal interest is not a "firmly-rooted" hearsay exception, meaning that a statement fitting within the exception does not automatically satisfy the defendant's right to confrontation. The Court has further held that for a hearsay statement offered under a non-firmly rooted exception to satisfy the Confrontation Clause, the prosecution must show that the statement carries "particularized guarantees of trustworthiness" that are inherent in the circumstances under which the statement is made. Thus, the current state of affairs is that a declaration against penal interest offered by the prosecution may satisfy Rule 804(b)(3), and yet violate the Confrontation Clause. The Evidence Rules Committee found it unacceptable that a rule of evidence could be unconstitutional in its application.

The Reporter suggested, based on the public comment, that there were three alternatives for the Committee to consider to address the potential unconstitutionality of the current Rule 804(b)(3). The most elaborate solution would be to define the terms "corroborating circumstances" (applicable to statements offered by the accused) and "particularized guarantees of trustworthiness" (applicable to statements offered by the prosecution) in the text of the Rule. The most flexible would be to simply state that a statement offered by the prosecution would not be admissible if it would violate the accused's right to confront adverse witnesses. A compromise approach would be the one chosen in the version issued for public comment: providing some specificity by codifying the term "particularized guarantees of trustworthiness" while avoiding an elaborate textual distinction between "corroborating circumstances" and "particularized guarantees."

The Department of Justice representative commented that the Department had a strong preference for the alternative chosen by the Committee in the proposal issued for public comment. That proposal was a good compromise in that it provided more guidance than a simple reference to the Constitution would provide, and yet avoided the pitfalls of a lengthy description of applicable standards in the text of the Rule.

The liaison from Criminal Rules suggested that as a trial judge, he would prefer having more explication in the Rule. The distinction between "corroborating circumstances" and "particularized guarantees" is that the former standard permits (and in some courts requires) a showing of independent corroborating evidence indicating that the hearsay statement is true, while the latter standard *prohibits* any reference to corroborating evidence. This distinction is not evident in the nature of the terms used, and so it could be helpful to provide such a distinction in the text. Other Committee members noted, however, the peril of adding such language to the Rule, including the danger of freezing common law development, and the danger of misdescription and over- and under-

inclusiveness. They noted that any distinction between the two standards could be clarified in the Committee Note. The Reporter offered to write a paragraph to add to the Committee Note clarifying the distinction between the two standards, and that the Committee could review this language later in the meeting.

One Committee member suggested that general constitutional language would have the virtue of flexibility if the Supreme Court ever decided to change its approach to the Confrontation Clause. But after discussion, Committee members generally agreed that the chances of such a change were remote, especially if the particularized guarantees language were added to the text of Rule 804(b)(3). Moreover, the application of a particularized guarantees requirement was considered correct on the merits, as it added an important guarantee of reliability to statements that are often unreliable.

The Committee then reviewed a paragraph prepared by the Reporter that could be added to the Committee Note to explain the distinction between corroborating circumstances and particularized guarantees of trustworthiness. All Committee members agreed that it accurately and concisely set forth the distinction between the two standards.

The liaison from the Standing Committee observed that while most parts of the proposed Committee Note provided helpful guidance concerning the intent of the amendment, the last passage of the Note, describing the existing case law applying the corroborating circumstances requirement, might be more in the nature of explaining current law than in explaining or justifying the amendment. After discussion about the proper role of Committee Notes, it was determined that the questioned passage did more than explain current law. It was also important for drawing the distinction between corroborating circumstances and particularized guarantees, and as such was an important explication of the intent of the amendment.

A motion was made and seconded to approve the proposed amendment to Rule 804(b)(3) and refer it to the Standing Committee, with two changes from the version issued for public comment: 1) deletion of the corroborating circumstances requirement as applied to civil cases; and 2) addition of a paragraph to the Committee Note that would explain the difference between "corroborating circumstances" and "particularized guarantees of trustworthiness." This motion was approved unanimously.

The following is the text of the proposed amendment and Committee Note that will be

referred to the Standing Committee with the recommendation that it be approved and forwarded to the Judicial Conference:

(3) Statement against interest. – A statement ~~which~~ that was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. But in a criminal case a ~~A~~ statement tending to expose the declarant to criminal liability ~~and offered in a criminal case to exculpate the accused~~ is ~~not~~ admissible ~~unless~~ under this subdivision in the following circumstances only:

(A) if offered to exculpate an accused, it is supported by corroborating circumstances that clearly indicate ~~the~~ its trustworthiness ~~of the statement~~.; or
(B) if offered to inculpate an accused, it is supported by particularized guarantees of trustworthiness.

* * *

COMMITTEE NOTE

The Rule has been amended to confirm the requirement that the prosecution provide a showing of "particularized guarantees of trustworthiness" when a declaration against penal interest is offered against an accused in a criminal case. This standard is intended to assure that the exception meets constitutional requirements, and to guard against the inadvertent waiver of constitutional protections. *See Lilly v. Virginia,* 527 U.S. 116, 134-138 (1999) (holding that the hearsay exception for declarations against penal interest is not "firmly-rooted"and requiring a finding that hearsay admitted under a non-firmly-rooted exception must bear "particularized guarantees of trustworthiness" to be admissible under the Confrontation Clause).

The amendment distinguishes "corroborating circumstances that clearly indicate" trustworthiness (the standard applicable to statements offered by the accused) from "particularized guarantees of trustworthiness" (the standard applicable to statements offered by the government). The reason for this differentiation lies in the guarantees of the Confrontation Clause that are applicable to statements against penal interest offered against the accused. The "particularized guarantees" requirement cannot be met by a showing that independent corroborating evidence indicates that the declarant's statement might be true. This is because under current Supreme Court Confrontation Clause jurisprudence, the hearsay exception for declarations against penal interest is not considered a "firmly rooted" exception (*see Lilly v. Virginia, supra*) and a hearsay statement admitted under an exception that is not "firmly rooted" must "possess indicia of reliability by virtue of its inherent trustworthiness,

not by reference to other evidence at trial." *Idaho v. Wright*, 497 U.S. 805, 822 (1990). In contrast, "corroborating circumstances" can be found, at least in part, by a reference to independent corroborating evidence that indicates the statement is true.

The "particularized guarantees" requirement assumes that the court has already found that the hearsay statement is genuinely disserving of the declarant's penal interest. *See Williamson v. United States*, 512 U.S. 594, 603 (1994) (statement must be "squarely self-inculpatory" to be admissible under Rule 804(b)(3)). "Particularized guarantees" therefore must be independent from the fact that the statement tends to subject the declarant to criminal liability. The "against penal interest" factor should not be double-counted as a particularized guarantee. *See Lilly v. Virginia*, *supra*, 527 U.S. at 138 (fact that statement may have been disserving to the declarant's interest does not establish particularized guarantees of trustworthiness because it "merely restates the fact that portions of his statements were technically against penal interest").

The amendment does not affect the existing requirement that the accused provide corroborating circumstances for exculpatory statements. The case law identifies some factors that may be useful to consider in determining whether corroborating circumstances clearly indicate the trustworthiness of the statement. Those factors include (*see, e.g., United States v. Hall*, 165 F.3d 1095 (7th Cir. 1999)):

(1) the timing and circumstances under which the statement was made;

(2) the declarant's motive in making the statement and whether there was a reason for the declarant to lie;

(3) whether the declarant repeated the statement and did so consistently, even under different circumstances;

(4) the party or parties to whom the statement was made;

(5) the relationship between the declarant and the opponent of the evidence; and

(6) the nature and strength of independent evidence relevant to the conduct in question.

Other factors may be pertinent under the circumstances. The credibility of the witness who relates the statement in court is not, however, a proper factor for the court to consider in assessing corroborating circumstances. To base admission or exclusion of a hearsay statement on the credibility of the witness would usurp the jury's role in assessing the credibility of testifying witnesses.

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. The Committee's decision to investigate those rules further was not intended to indicate that the Committee had actually agreed to propose any amendments. Rather, the Committee determined that with respect to those rules, a more extensive investigation and consideration was warranted.

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 amendment 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 (again, if any) 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. The goal of the Committee was not to vote definitively on whether to propose an amendment to any of those rules, but, rather, to determine whether to proceed further with the rules as part of a possible package of amendments. Thus, a "no" vote from the Committee would mean that no action would be taken to propose an amendment. A "yes" vote would mean only that the Committee was interested in further inquiry into a possible amendment and would either tentatively approve or consider possible language for an amendment at a later date.

1. Rule 106

The Reporter's memorandum on Rule 106, the rule of completeness, indicated that courts and commentators are in dispute over two important questions about the scope of the rule. One question is whether the rule operates as an independent rule of admissibility—admitting completing evidence even if it would otherwise be excluded as hearsay or under some other rule of exclusion. This is called a "trumping" function. The other major question is whether the rule should permit completing evidence of oral statements and actions as well as the written statements currently covered by the rule. The Reporter prepared model drafts that would cover these points. At its Fall 2002 meeting, the Committee considered this memorandum and noted that while the courts appeared to be in dispute over the existence of a trumping function, this dispute does not seem to make a real difference

in the cases. The Committee also unanimously rejected the suggestion that Rule 106 should be amended to cover oral statements, on the ground that such a change could lead to disruption and uncertainty at trial. The change could lead to attempts of an opponent to disrupt the proponent's order of proof by contending that the proponent's witness testified to a misleading portion of an oral statement; disputes will often arise about what the oral statement actually was. There often will have to be a sidebar hearing to determine who said what.

In light of the discussion at the Fall 2002 meeting, the Reporter prepared a memorandum on Rule 106 that analyzed whether the apparent split in authority over the trumping function had actually led to a difference in the cases or resulted in a problem in practice. The Reporter concluded that few if any of the cases would be affected by the addition or rejection of a trumping function in Rule 106. The cases rejecting a trumping function would come out the same because the proffered evidence would still have been excluded under the circumstances, most commonly because the proffered statements were not needed to correct any misimpression. And the cases adopting a trumping function could all have been decided on other grounds, most commonly because the proponent "opened the door" to completing evidence, or because the "fairness" language of Rule 106 mandated the result.

After discussion, the Committee determined that the costs of amending Rule 106 to include a trumping function were far outweighed by the risks that a change in language would be misinterpreted, and concluded that any problems under the current rule were being well-handled by the courts.

A motion was made to terminate consideration of any amendment to Rule 106. That motion was approved unanimously.

2. 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 might be appropriate 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 civil rights 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.

After the Fall 2002 meeting, the Committee received a request from a member of the public to propose an amendment to Rule 404(a)(1) "to explicitly authorize admission of character evidence to prove a trait of character when it is essential to a claim or defense." The Reporter prepared a memorandum on this proposal and the Committee considered the proposal in detail. Committee members concluded that such an amendment was unnecessary and was likely to do more harm than good. The amendment was considered unnecessary because the Rule as it exists does not prohibit the admission of character evidence when offered to prove an element of a claim or defense. Rather, Rule 404(a) prohibits character evidence only when offered for a specific purpose: to prove "action in conformity" with the character trait. If the character evidence is offered to prove an element of a claim or defense, i.e., where character is "in issue", the evidence by definition is not being offered to prove conduct. All federal courts have recognized this point and have uniformly admitted character evidence when character is "in issue." Moreover, the amendment may do more harm than good–it may create a negative inference that the law is to change, when in fact the amendment would make no change in the law. Finally, Committee members noted that there are difficulties in determining when character is "in issue", e.g., in defamation cases, entrapment cases, self-defense cases, and any attempt to describe when character is "in issue" and when it is not might be fraught with peril.

Several of the Judges at the meeting argued that an amendment was unnecessary because neither litigants or judges are confused or are having problems with the current law. They noted that it was only common sense that if a character trait had to be proven in a case because the substantive law so demanded it, then one mode of obvious and admissible proof would be character evidence.

A suggestion was made that the distinction between character "in issue" and character evidence offered to prove conduct might be made in a Committee Note should the Committee decide to proceed with an amendment to Rule 404(a)(1) that would prohibit the use of character evidence to prove conduct in civil cases. The response from most Committee members was that such an addition was not necessary because the rule is on the one hand self-evident (character evidence is obviously admissible when the substantive law demands proof of character) and on the other hand the question of when a trait of character is "in issue" is a subtle one that may be difficult to describe.

A motion was made to reject the proposed amendment that would specify that character evidence is admissible when offered to prove an element of a claim or defense. That motion was approved unanimously.

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, i.e., the amendment that would prohibit the use of character evidence to prove conduct in civil cases. No Committee member expressed any concerns about that proposal. The Committee resolved to consider the proposed amendment as part of a possible package of amendments at the Spring 2004 Committee meeting.

3. 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, relying on a policy argument that the interest in admitting relevant evidence in a criminal case outweighs the interest in encouraging settlement. Other courts hold that compromise evidence is excluded in subsequent criminal litigation when offered as an admission of guilt, noting that there is nothing in the language of Rule 408 that would permit the use of evidence of civil compromise to prove criminal liability.

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 the only use for impeachment specified in the Rule is impeachment for bias, and noting further 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 tentatively agreed to consider (as part of a possible package of amendments) an amendment that would limit the impeachment exception to use for bias, and that would exclude compromise evidence even if offered by the party who made an offer of

settlement. As to the use of compromise evidence in criminal cases, the Justice Department representative noted at that time that the Department had not yet come to a conclusion on whether, as a matter of policy, such evidence should be admissible in criminal cases. For the Spring 2003 meeting, the Reporter prepared two models, one that would admit compromise evidence in criminal cases and one that would exclude it, with both models containing an impeachment exception limited to bias and a preclusion of compromise evidence even where offered by the party who made the settlement offer.

The models prepared by the Reporter attempted to restructure the existing Rule. 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. Since 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.

The models prepared by the Reporter restructured the Rule by providing that settlement offers and acceptances and statements offered in compromise are inadmissible unless permitted by a specific exception in a new subdivision (b) of the Rule. Thus, the models deleted the reference to the validity or amount of the claim. It was these models that were reviewed by the Committee at its Spring 2003 meeting.

On the question of admissibility of compromise evidence in criminal cases, the Department of Justice representative stated that the Department had concluded that compromise evidence should be admissible in a subsequent criminal case. The Department noted that it is often the case that through settlement of civil proceedings, a defendant is put on notice of the wrongfulness of his conduct. The Department's major concern was that if Rule 408 were amended to exclude evidence of a civil compromise in a subsequent criminal case, the government would lose evidence that would be critical to prove that the defendant knew that his conduct was illegal or wrongful.

Most Committee members stated in response that policy arguments weigh strongly in favor of excluding evidence of a civil compromise in a later criminal case. If such evidence is admissible in a criminal case, it significantly diminishes the incentive to settle civil litigation. Moreover,

excluding compromise evidence in criminal cases would not result in the loss of evidence in such cases—without a rule protecting compromise evidence, there is likely to be no settlement that could ever be admitted in a criminal case. In other words, the only evidence "lost" is that generated by the rule protecting compromise evidence.

One Committee member expressed concern over the Reporter's restructuring of the Rule. The deletion of the language explicating the impermissible purpose for compromise evidence–when offered to prove the validity or amount of the claim–might create unintended consequences. For example, in insurance litigation, a claim against the insurer for bad faith is often premised on unreasonable statements and offers in settlement negotiations. Under the current Rule, this evidence is admissible against the insurer because it is not offered to prove the validity or amount of the claim against the insurer. Under the restructured rule, this evidence would be excluded unless a specific exception were added covering claims against insurers for bad faith. Similarly, some fraud claims are premised on fraudulent statements made in settlement negotiations. Under the current rule, these statements are admissible because they are not offered to prove the validity or amount of the underlying claim. Under the restructured rule, this evidence would be excluded unless a specific exception were provided.

Committee members and the Reporter considered this comment on the attempted restructuring to be well-taken. The Committee resolved that the "validity or amount" language of the current Rule would have to be retained. The alternative would be to think up every situation in which compromise evidence ought to be admissible and then include each situation as a specific exception. But this solution is perilous as it is all too likely that some important exception will be missed. Accordingly, the Committee resolved to return to the original structure of the Rule, with any proposed amendment working within that structure to provide for an impeachment exception limited to bias and to provide that compromise evidence is excluded when offered to prove the validity or amount of a claim even if it is offered by the party who made the settlement offer.

Committee members noted that there was another virtue in retaining the language specifying validity or amount of the claim as the only impermissible purpose for compromise evidence. Retaining this language will solve the DOJ concern about the use of compromise evidence in criminal cases to prove notice. If the evidence of a civil compromise is offered to prove notice, then it is not offered to prove the validity or amount of a claim. See, e.g., *United States v. Austin*, 54 F.3d 394 (7th Cir. 1995) (no error to admit evidence of the defendant's settlement with the FTC, because it was offered to prove that the defendant was on notice that subsequent similar conduct was wrongful). Thus, the question of whether Rule 408 should apply in criminal cases is properly limited to cases where the government is using the evidence not to prove notice but rather to prove that the defendant had admitted guilt.

The Committee asked the DOJ representative if the Department might wish to reconsider its position on the use of compromise evidence in subsequent criminal litigation if the original structure of Rule 408 is retained. In other words, if notice cases fall out of the equation, does the balance of interests, in the Department's view, justify exclusion or admission of civil compromise evidence as

proof of defendant's guilt? The DOJ representative promised to bring the reformulated question back to the Department for further discussion.

The Committee resolved to give further consideration to an amendment to Rule 408 at the next meeting. The Committee asked the Reporter to consider two further questions in working on a new model for a proposed amendment: 1) Are there problems in the courts in determining when a matter is "in dispute" so as to trigger the protections of Rule 408? 2) What is the meaning of the sentence providing that the Rule does not require exclusion of evidence "otherwise discoverable" merely because it is presented in the course of compromise negotiations? Is there any way to sharpen that language to make it more understandable?

4. Rule 410

In the course of investigating a possible amendment to Rule 408 at its Fall 2002 meeting, the Committee reviewed the case law holding that Rule 408 protects against admission of statements made by the government during plea negotiations in a *criminal* case. Rule 410 applies to plea negotiations, but it does not by its terms protect statements and offers made by the government: It provides that statements and offers in plea negotiations are not admissible "against the defendant." The inapplicability of Rule 410 to government statements and offers in plea negotiations has led some courts to hold that such evidence is excluded under Rule 408. The Committee noted, however, that Rule 408, by its terms, does not apply to negotiations in criminal cases—Rule 408 refers to efforts to compromise a "claim," as distinct from criminal charges.

As a policy matter, the Committee determined at its Fall 2002 meeting that government statements and offers in plea negotiations should be excluded from a criminal trial, in the same way that a defendant's statements are excluded. A mutual rule of exclusion would encourage a free flow of discussion that is necessary to efficient guilty plea negotiations; there is no good reason to protect only the statements of a defendant in a guilty plea negotiation. 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, which, by its terms, covers statements and offers of compromise 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.

The Committee directed the Reporter to prepare a draft of an amendment to Rule 410 that would exclude statements and offers made by the government during guilty plea negotiations. That draft was reviewed and considered at the Spring 2003 meeting.

While the Committee adhered unanimously to the position that statements made by prosecutors in guilty plea negotiations should be protected, some concerns were expressed about the

consequences of an amendment to Rule 410. 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.

The Committee also considered two other possible problems with Rule 410 that might be clarified if an amendment were to be proposed on other grounds. Those questions are: 1) whether the Rule's protection should cover guilty pleas that are either rejected by the court or vacated on review–currently the Rule specifically covers only guilty pleas that are "withdrawn"; 2) whether the Rule should specify that its protections are inapplicable if the defendant breaches the plea agreement.

As to the applicability of the Rule to rejected and vacated pleas, the Committee was generally agreed that the question has not arisen often enough in the courts to justify an amendment on its own. However, if the Rule is to be amended on other grounds, the Committee agreed that it would be useful to clarify that the protections of the Rule are applicable to rejected and vacated pleas as well as to withdrawn pleas. 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.

As to treatment of pleas that have been breached, the Committee was in general agreement that any attempt to clarify the Rule would be likely to cause more problems than it solved. For one thing, it would be difficult to write a rule that would determine with any clarity whether an agreement was breached or not. Should the exception be limited to material breaches, for example? What kind of breach would be "material" ? Committee members resolved that the question of admissibility of plea negotiations after an asserted breach could be handled by agreement between the parties and by a reviewing court.

The Committee also considered a recent Second Circuit case holding that the protections of Rule 410 do not apply to statements made in plea negotiations with a foreign government. The Committee considered whether an amendment to Rule 410 to protect prosecution statements might also usefully include language providing that negotiations with foreign prosecutors are (or are not) protected. The Committee resolved that the question of the extraterritorial effect of Rule 410 had not been vetted sufficiently in the courts to justify an amendment at this point.

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 to the use of statements made in plea negotiations 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, to prevent speculation that any amendment was rejecting Supreme Court precedent on the subject.

The Committee resolved to give further consideration to an amendment to Rule 410 that would protect statements by the prosecutor during guilty plea negotiations. The Reporter was directed to prepare a revised draft of a model amendment to Rule 410 that would protect prosecution statements when offered against the government by the defendant who was the other party in the negotiations. The revised model would also specify that the protections of the Rule would apply to rejected and vacated pleas. Finally, as a stylistic matter, the final paragraph of the existing Rule should be restylized so that it does not begin with "However".

5. Rule 606(b)

Evidence Rule 606(b) generally excludes juror affidavits or testimony concerning jury deliberations. The policies behind the Rule are to protect the privacy of jury deliberations and to preserve the finality of jury verdicts. The stated exceptions to the Rule are where the juror statements are offered "on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." The rule is silent on whether juror statements are admissible to prove that the verdict reported by the jury was different from that actually agreed upon by the jurors. Courts have generally allowed juror statements to prove errors in the reporting of the verdict, but there is dispute among the courts as to the scope of this court-created exception to the Rule.

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 reported and the verdict intended by the jurors. The Reporter's memorandum addressed two problems under the current Rule: 1. All courts have found an exception to the Rule, allowing juror testimony on clerical errors in the reporting of the verdict, even though there is no language permitting such an exception in the text of the Rule; and 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.

The Committee discussed whether Rule 606(b) should be amended to account for errors in the reporting of the verdict, and if so, what the breadth of the exception should be. The Committee was unanimous in its belief that an amendment to Rule 606(b) is warranted. Not only would an amendment rectify a divergence between the text of the Rule and the case law (thus eliminating a trap for the unwary and the unpredictability that results from such divergence), but it would also eliminate a circuit split on an important question of Evidence law.

The Committee was also unanimous in its belief that if an amendment to Rule 606(b) is to be proposed, it 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 was thought to 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 tentatively decided to place a narrow amendment to Rule 606(b) on its list of a possible package of amendments that could be proposed in 2004. The Committee tentatively approved language providing that a juror may testify about whether "the verdict reported is the verdict that was decided upon by the jury." This language, and the advisability of an amendment to Rule 606(b), will be reconsidered by the Committee at its Spring 2004 meeting.

5. Rule 803(6)

At the Committee's request, Professor Broun, the consultant to the Committee, prepared a memorandum on whether Evidence Rule 803(6) should be amended to add a "business duty" requirement to the Rule. The "business duty" requirement addresses a problem that arises when information recorded in a business record comes from outside the recording entity. If the person reporting from outside the entity has no "business duty" to report the information reliably, then there is a concern that the business record will be a reliable recording of unreliable information.

Professor Broun's report noted that Rule 803(6) does not explicitly contain a "business duty" requirement in the text of the Rule. The federal courts that have considered the question, however, have found a business duty requirement inherent in the Rule. That requirement can be satisfied when the reporting party has a business duty, or where the statement from the reporting party is independently admissible under a hearsay exception, thus satisfying the requirements of Rule 805, covering multiple levels of hearsay. Professor Broun also noted that some courts have relaxed the business duty requirement when the underlying data has been verified. Some other courts have abrogated the requirement where there are other adequate guarantees of trustworthiness. Professor Broun concluded that although there are some differences in the federal courts in dealing with the issue, for the most part a consistent pattern has emerged. Ordinarily, there will be a required business

duty to report, but that duty may be supplanted by a clear motive to verify or other circumstances that bring the communication within the policy behind the business records exception.

After discussion, the Committee resolved unanimously to terminate consideration of any amendment to Rule 803(6). Committee members agreed with Professor Broun that the courts have approached the question of "business duty" in a flexible and reasonable manner. The Committee found it advisable to give this common law development an opportunity to continue without amendment of the rule.

A motion was made and seconded to terminate consideration of any amendment to Rule 803(6). That motion was approved by unanimous vote.

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. The Committee determined that the survey will be structured as follows:

1. An introduction setting forth the purpose and plan of the project.

2. The project would be divided into sections, one for each privilege as well as a general section for a discussion of principles such as choice of law and invocation and waiver of a privilege.

3. 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 rule would include alternative clauses or provisions.

4. 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 ex-

planation 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.

5. 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 Spring 2003 meeting, Professor Broun presented, for the Committee's information, a draft of the first two sections of the survey on the psychotherapist-patient privilege. It was agreed that Professor Broun would finish the third section of the survey on that privilege and move on to the attorney-client privilege. Judge Shadur asked for clarification on whether the survey, when completed, would be published as the work of the Committee as a whole. Committee members agreed that as with the previous reports outside the rulemaking process, the survey would not be considered Committee work product, but rather would be attributed to Professor Broun and the Reporter, working under the auspices of the Committee.

Other Business

1. "De Bene Esse" Depositions

Judge Levi, Chair of the Civil Rules Committee, asked the Evidence Rules Committee to consider the consequences of a proposal to amend the Civil Rules to permit more general use of "de bene esse" depositions, i.e., depositions prepared as a substitute for trial testimony. "De bene esse" depositions are distinguished as a practical matter from discovery depositions because they are taken for the express purpose of substituting for trial testimony. Currently, however, there is nothing in the Civil Rules or in the Evidence Rules that distinguishes between discovery and "de bene esse" depositions. The question for the Evidence Rules Committee was whether a rule supporting more general use of a "de bene esse" deposition would conflict with the Federal Rules of Evidence.

The Reporter's memorandum to the Committee indicated that a rule permitting use of "de bene esse" depositions would create a conflict with the hearsay rule. The current exception that might apply–the Rule 804(b)(1) exception for prior testimony–is premised on the unavailability of the declarant, and with respect to "de bene esse" depositions, the deponent is often not unavailable for trial in the sense required by the Evidence Rules. The Reporter noted, however, that there was some ambiguity about the proposed rule change, in that it could be read as permitting use of "de bene esse" depositions only after stipulation among the parties. If the "de bene esse" deposition was given only after stipulation as to its admissibility, there would be no conflict with the Evidence Rules.

Committee members agreed that a rule permitting broad use of "de bene esse" depositions–at

least in the absence of a stipulation–would create a conflict with the hearsay rule and also a possible conflict with the general preference for live testimony and the trial court's discretion under Evidence Rule 611(a) to control the mode and presentation of testimony. Committee members further expressed disapproval of the proposal on the merits. In their view, a rules-based distinction between discovery depositions and "de bene esse" depositions was unjustified. One problem would arise if a discovery deposition were taken and then the deponent becomes unavailable for trial under the terms of Evidence Rule 804(a). When the proponent moves to admit the deposition at trial, the opponent would have an argument that the proponent gave no "de bene esse" notice at the time the deposition was taken. This would change the existing law that discovery depositions are admissible when they comply with the terms of a hearsay exception. Committee members strongly expressed the opinion that no distinction should be made in the rules between discovery and "de bene esse" depositions.

Finally, Committee members discussed a related problem concerning the relationship between the Civil Rules and the Evidence Rules. Civil Rule 32 contains what amounts to a freestanding exception to the hearsay rule for depositions. There has always been an uneasy relationship between depositions admitted under Civil Rule 32 and depositions admitted under Evidence Rule 804(b)(1). The unavailability requirement applicable to depositions admitted under Rule 804(b)(1) is different from, and generally more stringent than, the requirements under Civil Rule 32. The most obvious difference is that to be unavailable on grounds of absence under Rule 804, the deponent must be beyond the subpoena power. In contrast, under Rule 32, the deponent need only be more than 100 miles from the place of trial. Committee members found no compelling reason for an exception that is so similar to Rule 804(b)(1) and yet based on subtly different admissibility requirements. Moreover, the placement of such an exception in a completely separate set of rules can only be deemed a source of confusion and a trap for the unwary

The Committee resolved unanimously to report the following conclusions to the Civil Rules Committee: 1) Adoption of a rule permitting broad use of "de bene esse" depositions would create a conflict with the Evidence Rules, unless the rule were premised on stipulation; 2) On the merits, the Evidence Rules Committee is opposed to any attempt to distinguish "de bene esse" depositions from discovery depositions: and 3) The Evidence Rules Committee would be happy to work with the Civil Rules Committee in addressing the problem created by the existence of a freestanding hearsay exception in Civil Rule 32.

2. Proposal on Preserving Exhibits

The Administrative Office referred to the Evidence Rules Committee a proposal from Judge Roll for a rule that would require district courts to preserve trial exhibits pending appeal. The Reporter prepared a memorandum on the subject, concluding that a rule governing preservation of exhibits during appeal was (assuming it was necessary) better placed in local rules or in the Appellate Rules rather than in the Evidence Rules. The Committee agreed with the Reporter's conclusion, and was informed by John Rabiej that the proposal was being taken up by the Appellate Rules Committee. The Reporter noted that the Appellate Rules Committee should be advised that any rule concerning preservation of exhibits should be limited to documentary exhibits only. District courts should not be expected to preserve physical evidence or dangerous substances pending appeal. The Reporter noted that many local rules distinguish between documentary exhibits and physical evidence, providing for court retention for the former pending appeal, but not for the latter.

3. Pending Legislation

The Reporter apprised the Committee of two bills pending in Congress that would have an impact on the Federal Rules of Evidence. One bill would enact a parent-child privilege as a new Rule 502 of the Federal Rules of Evidence. The other bill would make changes to Federal Rule 414 and 415, by providing for more liberal rules of admissibility in cases involving child molestation.

Neither of these bills is in danger of imminent enactment. The Committee determined that it would be prepared to provide comment on these bills if and when necessary. Committee members noted that the Committee was already on record as opposing any amendment that would add only a single codified privilege to the Federal Rules of Evidence, as this would result in a patchwork approach to the privileges.

4. Tribute to Judge Shadur

On behalf of the Committee, the Chair expressed profound gratitude to Judge Shadur for his stellar service as a member and subsequently Chair of the Evidence Rules Committee. Judge Shadur was a moving force behind the important amendments to Evidence Rules 701, 702 and 702 that were enacted in 2000. His boundless intellect and dedication were critical to the work of the Committee. Judge Smith presented Judge Shadur with a certificate signed by the Chief Justice acknowledging Judge Shadur's service on the Evidence Rules Committee. Judge Shadur expressed his thanks and noted that service on the Committee was a valuable experience for trial judges, giving them a unique opportunity to consider in depth the meaning and application of the Evidence Rules.

Next Meeting

The next meeting of the Committee is tentatively scheduled for November 13, 2003, at a place to be determined.

The meeting was adjourned at 3:00 p.m., April 25.

Respectfully submitted,

Daniel J. Capra
Reed Professor of Law
Reporter