Advisory Committee on Evidence Rules

Minutes of the Meeting of April 29th and 30th, 2004

Washington, D.C.

The Advisory Committee on the Federal Rules of Evidence (the "Committee") met on April 29th and 30th 2004 in Marina Del Rey, California.

The following members of the Committee were present:

Hon. Jerry E. Smith, Chair
Hon. Robert L. Hinkel
Hon. Jeffrey L. Amestoy
Thomas W. Hillier, Esq.
David S. Maring, Esq.
Patricia Refo, Esq.
John S. Davis, Esq., Department of Justice

Also present were:

Hon. David F. Levi, Chair of the Standing Committee on Rules of Practice and Procedure
Hon. Thomas W. Thrash, Jr., Liaison from the Standing Committee on Rules of Practice and Procedure
Hon. Christopher M. Klein, Liaison from the Bankruptcy Rules Committee
Hon. Paul Kelly, Liaison from the Civil Rules Committee
Robert Fiske, Esq., Liaison from the Criminal Rules Committee
Hon. C. Arlen Beam, Chair of the Drafting Committee for the Uniform Rules of Evidence
Professor Leo Whinery, Reporter to the Drafting Committee for the Uniform Rules of Evidence
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
Adam J. Szubin, Department of Justice

Opening Business

Judge Smith extended a welcome to those who were attending an Evidence Rules Committee meeting for the first time: John Davis, the new Justice Department representative, Judge Kelly, who was substituting for Judge Kyle as Liaison from the Civil Rules Committee, and Robert Fiske, who was substituting for Judge Trager as Liaison from the Criminal Rules Committee. Judge Smith asked for approval of the draft minutes of the Fall 2003 Committee meeting. The minutes were approved unanimously. Judge Smith then gave a short report on the June 2003 Standing Committee meeting, noting that the Evidence Rules Committee had no action items for the agenda at that meeting.

On behalf of the Committee, Judge Smith expressed thanks and gratitude to Chief Justice Amestoy and to David Maring, whose terms on the Committee will expire before the next meeting.

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

At its April 2001 meeting, the Committee directed the Reporter to review scholarship, case law, 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 rules, so that the Committee could take an in-depth look at whether those rules require amendment.

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

1. Rule 404(a)

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

The Committee once again discussed the merits of the proposed amendment at the Spring 2004 meeting. A liaison suggested that character evidence could be important to a civil defendant charged with serious misconduct; but Committee members responded that the costs of allowing character evidence outweighed the benefits in civil cases. Specifically, the use of character evidence could result in a trial based on personality rather than the facts.

The Committee considered how the proposed amendment would affect habeas cases. Because habeas cases are civil cases, the amendment would prohibit the circumstantial use of character evidence by a habeas petitioner. Members pointed out that this is already the case under the current majority rule—the majority of courts currently prohibit the circumstantial use of character evidence in all civil cases. Moreover, the Evidence Rules do not break out habeas cases for special evidentiary treatment, and it would be anomalous to do so in this one Rule. The Committee resolved to undertake a long-term project that would assess the use of the Evidence Rules in habeas cases.

A Committee member suggested that the proposed Committee Note be revised slightly to clarify that the ban on circumstantial use of character evidence will apply to all civil cases, even where the defendant's conduct is closely related to criminal charges. The Committee agreed that such a clarification would be useful.

A motion was made and seconded to approve the proposed amendment to Evidence Rule 404(a), together with the Committee Note, and to recommend to the Standing Committee that the proposal be released for public comment. The motion was approved by a unanimous vote.

The proposed amendment to Rule 404 provides as follows:

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

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

> (1) Character of accused.— ~~Evidence~~ In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;
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> (2) Character of alleged victim.— ~~Evidence~~ In a criminal case, and subject to the limitations of Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;
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> * * *

The Committee Note to the proposed amendment to Rule 404(a) provides as follows:

Committee Note

The Rule has been amended to clarify that in a civil case evidence of a person's character is never admissible to prove that the person acted in conformity with the character trait. The amendment resolves the dispute in the case law over whether the exceptions in subdivisions (a)(1) and (2) permit the circumstantial use of character evidence in civil cases. *Compare Carson v. Polley*, 689 F.2d 562, 576 (5th Cir. 1982) ("when a central issue in a

case is close to one of a criminal nature, the exceptions to the Rule 404(a) ban on character evidence may be invoked"), *with SEC v. Towers Financial Corp.*, 966 F.Supp. 203 (S.D.N.Y. 1997) (relying on the terms "accused" and "prosecution" in Rule 404(a) to conclude that the exceptions in subdivisions (a)(1) and (2) are inapplicable in civil cases). The amendment is consistent with the original intent of the Rule, which was to prohibit the circumstantial use of character evidence in civil cases, even where closely related to criminal charges. *See Ginter v. Northwestern Mut. Life Ins. Co.*, 576 F.Supp. 627, 629-30 (D. Ky.1984) ("It seems beyond peradventure of doubt that the drafters of F.R.Evi. 404(a) explicitly intended that all character evidence, except where 'character is at issue' was to be excluded" in civil cases).

The circumstantial use of character evidence is generally discouraged because it carries serious risks of prejudice, confusion and delay. *See Michelson v. United States*, 335 U.S. 469, 476 (1948) ("The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."). In criminal cases, the so-called "mercy rule" permits a criminal defendant to introduce evidence of pertinent character traits of the defendant and the victim. But that is because the accused, whose liberty is at stake, may need "a counterweight against the strong investigative and prosecutorial resources of the government." C. Mueller & L. Kirkpatrick, *Evidence: Practice Under the Rules*, pp. 264-5 (2d ed. 1999). See also Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U.Pa.L.Rev. 845, 855 (1982) (the rule prohibiting circumstantial use of character evidence "was relaxed to allow the criminal defendant with so much at stake and so little available in the way of conventional proof to have special dispensation to tell the factfinder just what sort of person he really is"). Those concerns do not apply to parties in civil cases.

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

2. Rule 408

The Reporter's memorandum on Rule 408, prepared for the Fall 2002 meeting, noted that

the courts have been long-divided on three important questions concerning the scope of the Rule:

1) Some courts hold that evidence of compromise is admissible against the settling party in subsequent criminal litigation while others hold that compromise evidence is excluded in subsequent criminal litigation when offered as an admission of guilt.

2) Some courts hold that statements in compromise can be admitted to impeach by way of contradiction or prior inconsistent statement. Other courts disagree, noting that if statements in compromise could be admitted for contradiction or prior inconsistent statement, this would chill settlement negotiations, in violation of the policy behind the Rule.

3) Some courts hold that offers in compromise can be admitted in favor of the party who made the offer; these courts reason that the policy of the rule, to encourage settlements, is not at stake where the party who makes the statement or offer is the one who wants to admit it at trial. Other courts hold that settlement statements and offers are never admissible to prove the validity or the amount of the claim, regardless of who offers the evidence. These courts reason that the text of the Rule does not provide an exception based on identity of the proffering party, and that admitting compromise evidence would raise the risk that lawyers would have to testify about the settlement negotiations, thus risking disqualification.

At the Fall 2002 meeting, the Committee agreed to present, as part of its package, an amendment that would 1) limit the impeachment exception to use for bias, and 2) exclude compromise evidence even if offered by the party who made an offer of settlement. The remaining issue–whether compromise evidence should be admissible in criminal cases–was the subject of extensive discussion at the 2003 meetings and again at the Spring 2004 meeting. At all of these meetings, the Justice Department representative expressed concern that some statements made in civil compromise (e.g., to tax investigators) could be critical evidence needed in a criminal case to prove that the defendant had committed fraud. If Rule 408 were amended to exclude such statements in criminal cases, then this probative and important evidence would be lost to the government. The DOJ representative recognized the concern that the use of civil compromise evidence in criminal cases would deter civil settlements. But he contended that the Civil Division of the DOJ had not noted any deterrent to civil compromise from such a rule in the circuits holding that civil compromise evidence is indeed admissible in criminal cases.

Discussion of the Rule at the 2003 meetings indicated Committee dissatisfaction with Rule 408 as originally structured. As it stands, Rule 408 is structured in four sentences. The first sentence states that an offer or acceptance in compromise "is not admissible to prove liability for or invalidity of the claim or its amount." The second sentence provides the same preclusion for statements made in compromise negotiations–an awkward construction because a separate sentence is used to apply the same rule of exclusion applied in the first sentence. The third sentence says that the rule "does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations." The rationale of this sentence, added by Congress, is to prevent parties from immunizing pre-existing documents from discovery simply by bringing them to the negotiating table. The addition of this sentence at this point in the Rule, however, creates a

structural problem because the fourth sentence of the rule contains a list of permissible purposes for compromise evidence, including proof of bias. As such, the third sentence provides a kind of break in the flow of the Rule. Moreover, the fourth sentence is arguably unnecessary, because none of the permissible purposes involves using compromise evidence to prove the validity or amount of the claim. Under the Rule, the only impermissible purpose for compromise evidence is when it is offered to prove the validity or amount of a claim.

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

In the discussion of a restructured Rule 408, the Committee considered whether to retain the language of the existing Rule that evidence "otherwise discoverable" is not excluded merely because it was presented in the course of compromise negotiations. After extensive debate, the Committee agreed with courts, commentators, and rules drafters in several states, and concluded that the "otherwise discoverable" sentence is superfluous. It was added to the Rule to emphasize that pre-existing records were not immunized simply because they were presented to the adversary in the course of compromise negotiations. But such a pretextual use of compromise negotiations has never been permitted by the courts. The Committee therefore agreed, to drop the "otherwise discoverable" sentence from the text of the revised Rule 408, with an explanation for such a change to be placed in the Committee Note. The Committee also considered whether it was necessary to improve the language that triggers the protection of the amendment: the Rule applies to compromise negotiations as to a "matter which was in dispute." The Reporter prepared a description of the cases and commentary on this question and the Committee determined that it would not be appropriate to change this language, as the courts were not in conflict as to its application.

This left the question of the admissibility of compromise evidence in criminal cases. At the Spring 2004 meeting the DOJ representative reiterated the Department's position that Rule 408 should be completely inapplicable in criminal cases. But other Committee members argued for a distinction between statements made in settlement negotiations and the offer or acceptance of the settlement itself. It was noted — from the personal experience of several lawyers — that a defendant may decide to settle a civil case even though it strenuously denies wrongdoing. These Committee members argued that in such cases the settlement should not be admissible in criminal cases because the settlement is more a recognition of reality than an admission of criminality. Moreover, if the settlement itself could be admitted as evidence of guilt, defendants may choose not to settle, and this could delay needed compensation to those allegedly injured by the defendant's activities.

Committee members noted that the DOJ's concerns about admissibility of compromise evidence were almost if not completely limited to statements of fault made in compromise negotiations; such direct statements of criminality are obviously relevant to subsequent criminal liability, but the same does not apply to the settlement agreement itself. These Committee members

recognized that even if Rule 408 were inapplicable to settlements, a particular settlement might nonetheless be excluded in a criminal case under Rule 403. But these members concluded that any protection under Rule 403 was too unpredictable for civil defendants to rely upon.

In light of the discussion, the Reporter revised the working draft, which had provided that Rule 408 was completely inapplicable in criminal cases. The new draft distinguished between offers and acceptances of settlement (inadmissible in criminal cases) and statements made in settlement negotiations (admissible in subsequent criminal litigation, subject of course to Rule 403). The DOJ representative opposed this draft, although he recognized that most of the Department's concerns went to the admissibility of statements rather than offers and acceptances. The Department representative contended that courts would have difficulty distinguishing between statements made in negotiation and the ultimate offer or acceptance. In many cases, the statement alleged to be admissible might be intertwined with the offer or acceptance. Thus, the Department representative contended that the proposed amendment would give rise to litigation as to its meaning. In contrast, the public defender on the Committee opposed the draft because it did not go far enough. He favored an amendment that would bar all civil compromise evidence from subsequent criminal litigation. He argued that civil defendants are often poorly represented, and as such they may unwittingly provide evidence of their guilt in the course of civil compromise negotiations. In his view, the proposed amendment would be a trap for the unwary insofar as it allowed statements made in compromise negotiations to be admissible in subsequent criminal cases.

Committee members also discussed some questions about the scope of the Rule. One question was whether the Rule would prevent proof of compromise evidence in a criminal case where the allegation is that the compromise itself was an act of extortion or other illegality. The Reporter responded that the current Rule would not exclude that evidence; courts have held that Rule 408 does not bar proof of wrongdoing in the settlement process because the compromise evidence is not offered to prove the invalidity of the underlying claim, but is rather offered as proof of a criminal act.

Committee members noted that many of the hard questions of Rule 408's applicability involved whether compromise evidence is offered for a purpose other than to prove the validity or amount of the civil claim. If compromise evidence can be offered in criminal cases to prove that the compromise itself was illegal, or to prove that the defendant by settling was made aware of the wrongfulness of his conduct, on the ground that the purpose for this kind of evidence was to prove something other than the validity or amount of the underlying claim, then much of the Department's concerns over Rule 408 protection would be answered. Committee members noted that it would be problematic to change the language in the text of the Rule concerning the "validity", "invalidity", or "amount" of the claim, as this language has been subject to extensive case law and it is by no means certain that an amendment would provide language that was any more clear than the current text. The Committee therefore directed the Reporter to add a paragraph to the Committee Note to clarify that there was no intent to change the existing law on whether compromise evidence is offered for a purpose other than to prove the validity, invalidity, or amount of the claim.

A motion was made and seconded to approve the proposed amendment to Evidence Rule 408, together with the Committee Note, and to recommend to the Standing Committee that the proposal be released for public comment. The motion was approved by a 5-2 vote.

The proposed amendment to Rule 408 provides as follows:

Rule 408. Compromise and Offers to Compromise

(a) General rule. -- ~~Evidence of~~ The following is not admissible on behalf of any party, when offered as evidence of liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:

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

(2) in a civil case, conduct or statements made in compromise negotiations ~~is likewise not admissible~~ regarding the claim.

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

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

Committee Note

Rule 408 has been amended to settle some questions in the courts about the scope of the Rule, and to make it easier to read. First, the amendment clarifies that Rule 408 does not protect against the use of statements and conduct during civil settlement negotiations when offered in a criminal case. *See, e.g.*, *United States v. Prewitt*, 34 F.3d 436, 439 (7th Cir. 1994) (statements made in civil settlement negotiations are not barred in subsequent criminal prosecutions, given the "public interest in the prosecution of crime"). Statements made in civil compromise negotiations may be excluded in criminal cases where the circumstances so warrant under Rule 403. But there is no absolute exclusion imposed by Rule 408.

The amendment distinguishes statements and conduct in compromise negotiations (such as a direct admission of fault) from an offer or acceptance of a compromise of a civil claim. An offer or acceptance of a compromise of a civil claim is excluded under the Rule if offered against a criminal defendant as an admission of fault. In that case, the predicate

for the evidence would be that the defendant, by compromising, has admitted the validity and amount of the civil claim, and that this admission has sufficient probative value to be considered as proof of guilt. But unlike a direct statement of fault, an offer or acceptance of a compromise is not very probative of the defendant's guilt. Moreover, admitting such an offer or acceptance could deter defendants from settling a civil claim, for fear of evidentiary use in a subsequent criminal action. *See, e.g.*, Fishman, *Jones on Evidence, Civil and Criminal*, § 22:16 at 199, n.83 (7th ed. 2000) ("A target of a potential criminal investigation may be unwilling to settle civil claims against him if by doing so he increases the risk of prosecution and conviction.").

The amendment retains the language of the original rule that bars compromise evidence only when offered as evidence of the "validity", "invalidity", or "amount" of the disputed claim. The intent is to retain the extensive case law finding Rule 408 inapplicable when compromise evidence is offered for a purpose other than to prove the validity, invalidity, or amount of a disputed claim. *See, e.g., Athey v. Farmers Ins. Exchange,* 234 F.3d 357 (8th Cir. 2000) (evidence of settlement offer by insurer was properly admitted to prove insurer's bad faith); *Coakley & Williams v. Structural Concrete Equip.*, 973 F.2d 349 (4th Cir. 1992) (evidence of settlement is not precluded by Rule 408 where offered to prove a party's intent with respect to the scope of a release); *Cates v. Morgan Portable Bldg. Corp.*, 708 F.2d 683 (7th Cir. 1985) (Rule 408 does not bar evidence of a settlement when offered to prove a breach of the settlement agreement, as the purpose of the evidence is to prove the fact of settlement as opposed to the validity or amount of the underlying claim); *Uforma/Shelby Bus. Forms, Inc. v. NLRB*, 111 F.3d 1284 (6th Cir. 1997) (threats made in settlement negotiations were admissible; Rule 408 is inapplicable when the claim is based upon a wrong that is committed during the course of settlement negotiations). Nor does the amendment affect the case law providing that Rule 408 is inapplicable when evidence of the compromise is offered to prove notice. *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); *Spell v. McDaniel,* 824 F.2d 1380 (4th Cir. 1987) (in a civil rights action alleging that an officer used excessive force, a prior settlement by the City of another brutality claim was properly admitted to prove that the City was on notice of aggressive behavior by police officers).

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

would undermine the policy of encouraging uninhibited settlement negotiations).

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

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

3. Rule 410

At the Spring 2004 meeting the Committee continued its review of a possible amendment to Rule 410 that would protect statements and offers made by prosecuting attorneys**,** to the same extent as the Rule currently protects statements and offers made by defendants and their counsel. The policy behind such an amendment would be to encourage a free flow of discussion during guilty plea negotiations.

A draft proposal was prepared by the Reporter for the April 2003 meeting that added "against the government" to the opening sentence of the Rule, at the same place in which the Rule provides that offers and statements in plea negotiations are not admissible "against the defendant." At that meeting the Committee determined that this would not be a satisfactory drafting solution. If the Rule were amended only to provide that offers and statements in guilty plea negotiations were not

admissible "against the government," this might provide too broad an exclusion. It would exclude, for example, statements made *by the defendant* during plea negotiations that could be offered "against the government," for example, to prove that the defendant had made a prior consistent statement, or to prove that the defendant believed in his own innocence, or was not trying to obstruct an investigation. Thus, the Committee resolved that any change to Rule 410 should specify that the government's protection would be limited to statements and offers *made by prosecutors* during guilty plea negotiations.

At its Fall 2003 meeting the Committee considered a draft of an amendment to Rule 410 that would protect statements and offers made by prosecutors during guilty plea negotiations. Committee members discussed whether the government should be protected from statements and offers made by the prosecutor in plea negotiations even where the evidence is offered by a different defendant. All Committee members, including the DOJ representative, recognized that a defendant should be able to inquire into a deal struck or to be struck with a former codefendant who is a cooperating witness at the time of the trial–and such inquiry may be pertinent to the bias or prejudice of the cooperating witness even if a deal has not been formally reached or even offered. The working draft of the amendment was revised to provide that statements and offers of prosecutors would not be barred if offered to show the bias or prejudice of a government witness.

At the Spring 2004 meeting, a number of questions and concerns were raised about the merits of the draft amendment to Rule 410. The most important objection was that the amendment did not appear necessary, because no reported case has ever held that a statement or offer made by a prosecutor in a plea negotiation can be admitted against the government as an admission of the weakness of the government's case. Indeed, every reported case has held such evidence inadmissible when offered as a government-admission. It is true that some courts have used questionable authority to reach this result; for example, some courts have held that statements and offers made by prosecutors in guilty plea negotiations are excluded under Rule 408, even though that Rule applies only to statements and offers made to compromise a civil claim. Yet notwithstanding the questionable reasoning, the fact remains that there is no reported case that has failed to protect against admission of prosecution statements and offers in guilty plea negotiations. Accordingly, there is no conflict among the courts that would be rectified by an amendment; and a conflict in the courts has always been considered by the Committee to be a highly desirable justification for an amendment to the Evidence Rules.

Committee members also observed that the draft amendment could lead to some problematic results. For example, what if a defendant contended that he was a victim of prosecutorial misconduct or selective prosecution, and the prosecutor's statements during a plea negotiation provided relevant evidence of bad intent? Under the draft amendment, this important evidence would be excluded. And yet to provide an exception for such circumstances might result in an exception that would swallow the protective rule. That is, there would be a danger of the exception's applying whenever the defendant made a contention of "misconduct" on the part of the government.

Another problem case is where the defendant wants to testify that he rejected a guilty plea because he is innocent. This testimony would appear to be excluded by the proposed amendment

because it would constitute evidence of the government's offer. It could be argued that the relevant evidence would be the defendant's rejection of the offer and not the offer itself, but that would seem to be an insubstantial distinction.

Given the problems involved in applying a rule that explicitly protects prosecution statements and offers, and the fact that the courts are reaching fair and uniform results under the current rules, including Rule 403, members of the Committee questioned whether the benefits of an amendment to Rule 410 would outweigh the costs. The Committee ultimately concluded that Rule 410 was not "broken," and therefore that the costs of a "fix" are not justified.

A motion was made and seconded to defer any proposed amendment to Rule 410. This motion was passed by a unanimous vote.

4. Rule 606(b)

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

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

After extensive discussion at previous meetings, the Committee tentatively determined that an amendment to Rule 606(b) is warranted to rectify the long-standing conflict in the courts, and

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

At the Fall 2003 meeting, some Committee members suggested that the scope of the exception to Rule 60(b) should be comparable to the exception permitting a judge to correct a clerical mistake in a judgment under Civil Rule 60(a). But at the Spring 2004 meeting a member pointed out that the exceptions are not analogous. If the jury misunderstands the law and returns a verdict, it cannot be corrected as a clerical mistake. But if the clerk misunderstands the verdict and enters it incorrectly, that error could be corrected as a clerical mistake. In light of this comment, the Committee decided to refrain from including any reference to Civil Rule 60(a) in the Committee Note to the proposed amendment to Evidence Rule 606(b).

The Committee once again discussed whether the exception for juror proof should be made broader to permit correction of verdicts if the intent of the jury was clearly different from that indicated in the verdict reported. But Committee members noted that anything broader than an exception for "clerical mistake" would lead to a slippery slope, allowing evidence of jury deliberations whenever there is arguably a flaw in the decisionmaking process.

Finally, Committee members noted that it would be useful to emphasize that Rule 606(b) does not bar the court from polling the jury and from taking steps to remedy any error that seems obvious when the jury is polled. A paragraph to that effect was added to the proposed Committee Note.

A motion was made and seconded to approve the proposed amendment to Evidence Rule 606(b), together with the Committee Note, and to recommend to the Standing Committee that the proposal be released for public comment. The motion was approved by a 6-1 vote.

The proposed amendment to Rule 606(b) provides as follows:

Rule 606. Competency of Juror as Witness

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

(b) *Inquiry into validity of verdict or indictment.* — Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any

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

The Committee Note to the proposed amendment to Rule 606(b) provides as follows:

Committee Note

Rule 606(b) has been amended to provide that juror testimony may be used to prove that the verdict reported was the result of a clerical mistake. The amendment responds to a divergence between the text of the Rule and the case law that has established an exception for proof of clerical errors. *See, e.g., Plummer v. Springfield Term. Ry.*, 5 F.3d 1, 3 (1st Cir. 1993) ("A number of circuits hold, and we agree, that juror testimony regarding an alleged clerical error, such as announcing a verdict different than that agreed upon, does not challenge the validity of the verdict or the deliberation of mental processes, and therefore is not subject to Rule 606(b)."); *Teevee Toons, Inc., v. MP3.Com, Inc.*, 148 F.Supp.2d 276, 278 (S.D.N.Y. 2001) (noting that Rule 606(b) has been silent regarding inquiries designed to confirm the accuracy of a verdict).

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

and application of those instructions to the facts of the case"). Thus, the "clerical mistake" exception to the Rule is limited to cases such as "where the jury foreperson wrote down, in response to an interrogatory, a number different from that agreed upon by the jury, or mistakenly stated that the defendant was 'guilty' when the jury had actually agreed that the defendant was not guilty." *Id.*

It should be noted that the possibility of clerical error will be reduced substantially by polling the jury. Rule 606(b) does not, of course, prevent this precaution. *See* 8 C. Wigmore, *Evidence,* § 2350 at 691 (McNaughten ed. 1961) (noting that the reasons for the rule barring juror testimony, "namely, the dangers of uncertainty and of tampering with the jurors to procure testimony, disappear in large part if such investigation as may be desired is *made by the judge* and takes place *before the jurors' discharge* and separation") (emphasis in original). Errors that come to light after polling the jury "may be corrected on the spot, or the jury may be sent out to continue deliberations, or, if necessary, a new trial may be ordered." C. Mueller & L. Kirkpatrick, *Evidence Under the Rules* at 671 (2d ed. 1999) (citing *Sincox v. United States,* 571 F.2d 876, 878-79 (5th Cir. 1978)).

5. Rule 609

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

At its Fall 2003 meeting the Committee tentatively agreed that Rule 609(a)(2) should be amended to resolve the dispute in the courts over how to determine whether a conviction involves dishonesty or false statement. The Committee determined that an amendment would resolve an

important issue on which the circuits are clearly divided. The Committee was at that time unanimously in favor of an "elements" definition of crimes involving dishonesty or false statement. Committee members noted that requiring the judge to look behind the conviction to the underlying facts could (and often does) impose a burden on trial judges. Moreover, the inquiry is indefinite because it is often impossible to determine, solely from a guilty verdict, what facts of dishonesty or false statement the jury might have found. Most importantly, whatever additional probative value there might be in a crime committed deceitfully, it is lost on the jury assessing the witness's credibility when the elements of the crime do not in fact require proof of dishonesty or false statement. This is because when the conviction is introduced to impeach the witness, the jury is told only about the general nature of the conviction, not about its underlying facts.

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

At the Spring 2004 meeting the Committee revisited the draft of an amendment to Rule 609(a)(2), under which a court would determine whether a conviction involved dishonesty or false statement solely by looking at the elements of the crime. The Department of Justice opposed this draft. The DOJ representative recognized that the change was litigant-neutral in that it would protect both prosecution and defense witnesses. Indeed the representative observed that Rule 609(a)(2) is invoked more frequently against the prosecution than it is against the defense. The DOJ representative also emphasized that the Department was not in favor of an open-ended rule that would require the court to divine from the record whether the witness committed some deceitful act in the course of a crime. But the Department was concerned that certain crimes that should be included as *crimina falsi* would not fit under a strict "elements" test. The prime example is obstruction of justice. It may be plain from the charging instrument that the witness committed obstruction by falsifying documents, and it may be evident from the circumstances that this fact was determined beyond a reasonable doubt. And yet deceit is not an absolutely necessary element of the crime of obstruction of justice; that crime could be committed by threatening a witness, for example.

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

The Department also noted that an "elements" test would be dependent on the vagaries of charging and pleading. For example, if a person lies on a government form as part of a plan to obstruct justice, this misconduct could be charged under any number of offenses; some would have an element of false statement, some would not. The Department representative argued that it made no sense for the same conduct to receive different treatment under Rule 609(a)(2) depending solely on how that conduct is charged.

Committee members considered and discussed in detail the Department's objection to an amendment that would provide an "elements" test for determining which convictions fall under Rule 609(a)(2). Initially the Committee voted, over the Department representative's dissent, to adhere to the elements test. Committee members were concerned that anything other than an elements test would return to the poor state of affairs that currently exists in most courts, i.e., an indefinite and time-consuming "min-trial" to determine whether the witness committed some deceitful fact some time in the course of a crime. After extensive discussion, however, the Committee as a whole determined that there was no real conflict within the Committee about the goals of an amendment. Those goals are: 1) to resolve a long-standing dispute among the circuits over the proper methodology for determining when a crime is automatically admitted under Rule 609(a)(2); 2) to avoid a mini-trial into the facts supporting a conviction; and 3) to limit Rule 609(a)(2) to those crimes that are especially probative of the witness's character for untruthfulness.

The Committee resolved to allow the Reporter and the Department of Justice representatives to work on compromise language that would accomplish the goals on which everyone agreed. This work was done overnight and submitted for the Committee's review on the second day of the meeting. The compromise would permit automatic impeachment when an element of the crime required proof of deceit; but it would go somewhat further and permit automatic impeachment if an underlying act of deceit could be "readily determined" from such information as the charging instrument. Some Committee members expressed concern that the language might be too vague and might permit the mini-trial that the Committee sought to avoid. But other members pointed out that the burden is on the proffering party to show the underlying facts that readily indicate deceit, and that the term "readily available" provides the court with authority to terminate an inquiry it finds too indefinite or burdensome. Committee members also noted that the new draft deletes the indefinite term that identified the crime as one that "involved" dishonesty or false statement. Under the new draft, the crime actually must be a crime of dishonesty or false statement; it cannot be admitted under Rule 609(a)(2) merely because there was some act of deceit in committing the crime.

Committee members eventually agreed that the new draft captured the goals of the Committee in proposing an amendment to Rule 609(a)(2): it would rectify a conflict, prevent a mini-trial, and permit automatic admissibility for only those crimes that are especially probative of the witness's character for untruthfulness.

A motion was made and seconded to approve the proposed amendment to Evidence Rule 609(a)(2), together with the Committee Note, and to recommend to the Standing Committee that the proposal be released for public comment. The motion was approved by a unanimous vote.

The proposed amendment to Rule 609(a)(2) provides as follows:

Rule 609. Impeachment by Evidence of Conviction of Crime

(a) General rule.—For the purpose of attacking the ~~credibility~~ character for truthfulness of a witness,

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

(2) evidence that any witness has been convicted of a crime that readily can be determined to have been a crime of dishonesty or false statement shall be admitted ~~if it involved dishonesty or false statement~~, regardless of the punishment.

* * *

The Committee Note to the Proposed Amendment to Rule 609(a)(2) provides as follows:

Committee Note

The amendment provides that Rule 609(a)(2) mandates the admission of evidence of a conviction only when the criminal act was itself an act of dishonesty or false statement. Evidence of all other crimes is inadmissible under this subsection, irrespective of whether the witness exhibited dishonesty or made a false statement in the process of their commission. Thus, evidence that a witness committed a violent crime, such as murder, is not admissible under Rule 609(a)(2), even if the witness acted deceitfully in the course of committing the crime.

This amendment is meant to give effect to the legislative intent to limit the convictions that are automatically admissible under subsection (a)(2). The Conference Committee provided that by "dishonesty and false statement" it meant "crimes such as perjury, subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the [witness's] propensity to testify truthfully." Historically, offenses classified as *crimina falsi* have included only those crimes in which the ultimate criminal act was itself an act

of deceit. *See* Green, *Deceit and the Classification of Crimes: Federal Rule of Evidence 609(a)(2) and the Origins of* Crimen Falsi, 90 J. Crim. L. & Criminology 1087 (2000).

Evidence of crimes in the nature of *crimina falsi* must be admitted under Rule 609(a)(2), regardless of how such crimes are specifically charged. For example, evidence that a witness was convicted of making a false claim to a federal agent is admissible under this subsection regardless of whether the crime was charged under a section that expressly references deceit (e.g., 18 U.S.C. § 1001, Material Misrepresentation to the Federal Government) or a section that does not (e.g., 18 U.S.C. § 1503, Obstruction of Justice).

The amendment also requires that the proponent have ready proof of the nature of the conviction. Ordinarily, the elements of the crime will indicate whether it is one of dishonesty or false statement. Where the deceitful nature of the crime is not apparent from the statute and the face of the judgment – as, for example, where the conviction simply records a finding of guilt for a statutory offense that does not reference deceit expressly – a proponent may offer information such as an indictment, a statement of admitted facts, or jury instructions to show that the witness was necessarily convicted of a crime of dishonesty or false statement. *Cf. Taylor v. United States*, 495 U.S. 575, 602 (1990) (providing that a trial court may look to a charging instrument or jury instructions to ascertain the nature of a prior offense where the statute is insufficiently clear on its face). But the amendment does not contemplate a "mini-trial" in which the court plumbs the record of the previous proceeding to determine whether the crime was in the nature of *crimen falsi.*

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

6. Rule 706

Judge Gettleman has requested that the Committee consider an amendment to Rule 706 that

would make stylistic changes and that also would dispense with the requirement of an order to show cause before an expert is appointed. Commentators have raised other problems in the administration of the Rule. At the Fall 2003 meeting, the Committee directed the Reporter to prepare a memorandum on Rule 706, so that the Committee could determine whether an amendment to the Rule should be included as part of the package to be sent to the Standing Committee.

The Committee reviewed and discussed the Reporter's memorandum on Rule 706. The Committee observed that Rule 706 does not address some important issues concerning the appointment of expert witnesses. Among the open issues are: standards for appointment, method for selection, ex parte contacts, jury instructions, and allocation of the expert witness's fee. The Committee ultimately concluded, however, that an amendment to Rule 706 was not necessary at this time. There is very little case law on Rule 706, and the case law that exists does not indicate that there is a conflict in interpreting the Rule. The courts do not appear to be having problems in resolving the questions left open by the existing Rule. Finally, while Judge Gettleman's stylistic suggestions would provide an improvement, the Committee concluded that this improvement was not enough to justify the costs of an amendment to the Evidence Rules.

A motion was made and seconded to take no further action on an amendment to Rule 706. That motion was approved by a unanimous vote.

7. Rule 803(3)

At its Fall 2003 meeting the Evidence Rules Committee directed the Reporter to prepare a report on Rule 803(3)—the hearsay exception for a declarant's statement of his or her state of mind—so that the Committee could determine the necessity of an amendment to that Rule. The possible need for amendment of Rule 803(3) arises from a dispute in the courts about whether the hearsay exception covers statements of a declarant's state of mind when offered to prove the conduct of another person.

The Reporter's memorandum noted that the Supreme Court's decision in *Crawford v. Washington*, handed down after the Fall 2003 meeting, rendered any amendment to a hearsay exception inappropriate at this time. The Court in *Crawford* radically revised its Confrontation Clause jurisprudence. This has a direct bearing on the scope of Rule 803(3), because the use of the state of mind exception to prove the conduct of a non-declarant occurs almost exclusively in criminal cases, where the statement is offered to prove the conduct of the accused. This means that any amendment of Rule 803(3) that would apply to criminal cases is almost surely premature and unwise so shortly after *Crawford*.

The Committee agreed unanimously with the Reporter's conclusion. The Court in *Crawford* left open a number of questions about the relationship between hearsay exceptions and the Confrontation Clause. It held that the admission of "testimonial" hearsay violates the Confrontation Clause even if the hearsay is reliable — but it did not provide a definition of the term "testimonial."

It intimated that if hearsay is not "testimonial" it might escape constitutional regulation entirely; but it did not so hold. Consequently, the full import of *Crawford* and of the constitutionality of the Federal Rules hearsay exceptions must await development by the courts, probably over a number of years. Under these circumstances, the Committee believes that it would be inappropriate to propose any amendment to a hearsay exception that would have a substantial effect in criminal cases.

The Committee directed the Reporter to keep it apprised of the case law as it develops after *Crawford.*

8. Rule 803(8)

At its Fall 2003 meeting the Evidence Rules Committee directed the Reporter to prepare a report on Rule 803(8)—the hearsay exception for public reports—so that the Committee could determine the necessity of an amendment to that Rule. The possible need for amendment of Rule 803(8) arises from several anomalies in the Rule as well as a dispute in the courts about the scope of the Rule. The Reporter's memorandum noted (as with Rule 803(3)) that any amendment to a hearsay exception is probably premature in light of the Supreme Court's recent decision in *Crawford v. Washington*. The problems that the courts have had with the public records exception arise almost exclusively when a public record is offered against a criminal defendant. This is the very situation addressed by the Court in *Crawford*. The Committee resolved unanimously to defer consideration of any amendment to Rule 803(8).

9. Rule 804(b)(3)

In 2003 the Evidence Rules Committee proposed an amendment to Evidence Rule 804(b)(3). The amendment provided that statements against penal interest offered by the prosecution in criminal cases would not be admissible unless the government could show that the statements carried "particularized guarantees of trustworthiness." The intent of the amendment was to assure that statements offered by the prosecution under Rule 804(b)(3) would comply with constitutional safeguards imposed by the Confrontation Clause. The amendment was approved by the Judicial Conference and referred to the Supreme Court.

The amendment to Rule 804(b)(3) essentially codified the Supreme Court's Confrontation Clause jurisprudence, which required a showing of "particularized guarantees of trustworthiness" for hearsay admitted under an exception that was not "firmly rooted." But while the amendment was pending in the Supreme Court, that Court granted certiorari and decided *Crawford v. Washington*. *Crawford* essentially rejected the Supreme Court's prior jurisprudence, which had held that the Confrontation Clause demands that hearsay offered against an accused must be reliable. The *Crawford* Court replaced the reliability-based standard with a test dependent on whether the proffered hearsay is "testimonial."

Shortly after the Supreme Court decided *Crawford*, it considered the proposed amendment to Rule 804(b)(3). The Court decided to send the amendment back to the Standing Committee for reconsideration in light of *Crawford.* This action was not surprising, because the very reason for the amendment was to bring the Rule into line with the Confrontation Clause. Now that the governing standards for the Confrontation Clause have been changed, the proposed amendment did not meet its intended goal. It embraced constitutional standards that are no longer applicable.

For reasons discussed earlier in the meeting in the discussion of other hearsay exceptions, the Committee determined that it was prudent to hold off on any consideration of an amendment to a hearsay exception until the courts are given some time to figure out the meaning and all the implications of *Crawford.* Any attempt to bring Rule 804(b)(3) into line with *Crawford* standards at this point would be unwise given the fact that those standards have not yet been clarified.

PROJECT ON PRIVILEGES

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

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

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

on the privilege, but not every article.

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

The materials on the psychotherapist-patient privilege were presented at the Fall 2003 meeting and were tentatively approved by the Committee.

At the Spring 2004 meeting Professor Broun presented, for the Committee's information and review, a draft of the survey rule and commentary on the attorney-client privilege. Committee members commended Professor Broun on his excellent work, and provided some comments and suggestions. Professor Broun noted that he would continue his work on the "future developments" section for the attorney-client privilege, and this work would be completed for the next meeting. The Reporter noted that he would work on the materials on waiver and would provide some work product on that rule for the Committee to review at the next meeting.

New Business

1. Civil Rules Restyling

The Evidence Rules Committee considered whether it should provide any suggestions to the Civil Rules Committee concerning the restylization of two Civil Rules that have a bearing on the admissibility of evidence. Those rules are Rules 32 and 44. The Reporter provided the Committee with a memorandum on the subject.

One possible suggestion is to provide a uniform reference to the Federal Rules of Evidence whenever the Civil Rules refer to rules of admissibility. As it is currently restyled, Rule 32 refers both to the "rules of evidence" and to the "Federal Rules of Evidence." The Reporter noted that he had already provided a memorandum at the request of the Civil Rules Committee, suggesting that the references be made uniformly to the "Federal Rules of Evidence." The Civil Rules Committee is concerned, however, that the reference to "the rules of evidence" might intentionally be broader than the Federal Rules. It might encompass state rules, common law rules, and statutory rules of evidence. But the Reporter noted that the Federal Rules themselves incorporate these extrinsic rules of evidence. See, e.g., Rules 302, 402, 501, 801, and 1101. On the other hand, the Civil Rules Committee understandably wishes to be certain that a uniform reference will not create a change in any result. The Committee asked Professor Broun to research the matter to determine whether a uniform reference to the Federal Rules of Evidence could lead to a change of result in any case.

In all other respects, the Committee concluded that the restylized Rules 32 and 44 are excellent and would make those rules much easier to understand and more user-friendly.

The Reporter's memorandum on Rules 32 and 44 also noted that the Civil Rules Committee might be interested in a broader project that would better integrate the Civil Rules and the Evidence Rules. The Evidence Rules Committee has consistently concluded that rules of admissibility should be placed in the Evidence Rules. The Evidence Rules are where courts and litigators will look for the applicable rules of evidence. Yet there are a few Civil Rules (most importantly Rules 32 and 44) that specifically govern the admissibility of evidence at trial.

One possibility to be explored is whether these Civil Rules can be amended to provide that admissibility of deposition testimony (Rule 32) and public records (Rule 44) is governed by the Federal Rules of Evidence. This was the solution adopted by the Criminal Rules Committee when it amended Criminal Rule 11, which overlapped the provisions of Evidence Rule 410. Any similar change to the Civil Rules has been determined to be beyond the scope of the style project. The Evidence Rules Committee expressed its interest in a joint project with the Civil Rules Committee to provide a better integration between the Civil and Evidence Rules. But it was also noted that such a project would have an effect on the Bankruptcy Rules and the Criminal Rules as well. So while the project would be a useful one, it might be better placed under the auspices of the Standing Committee.

2. Civil Rules Inadvertent Waiver Proposal

The liaison from the Civil Rules Committee reported that his Committee was proposing a rule concerning waiver of privilege by disclosure during the course of discovery. The proposed rule would govern the procedure for making a claim that disclosure was inadvertent. The rule does not purport to set forth substantive standards for when a waiver should or must be found. The Civil Rules Committee justifiably was concerned that a rule setting forth legal standards for determining waiver would be a rule of privilege requiring direct enactment by Congress. Such a rule would also, of course, be a rule of evidence, and would therefore be of interest to the Evidence Rules Committee.

The Civil Rules Committee has indicated its interest in working with the Evidence Rules Committee on a rule concerning inadvertent disclosure of privileged material. The Evidence Rules Committee unanimously agreed that a joint project on this important subject is in order. It was noted that the goal of the project might be a suggestion to Congress rather than a proposed rule through the rulemaking process.

The meeting was adjourned Friday, April 30th.

Respectfully submitted,

Daniel J. Capra
Reporter