TO: **Honorable David F. Levi, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **Honorable Jerry E. Smith, Chair**
Advisory Committee on Evidence Rules

DATE: **December 1, 2003**

RE: **Report of the Advisory Committee on Evidence Rules**

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on November 13, 2003 in Washington, D.C. At this meeting, the Committee continued with its long-term project of reviewing the Evidence Rules to determine whether amendments must be proposed to rectify conflicts in courts about the meaning or application of an Evidence Rule. The goal of the project is to prepare a package of amendments, if necessary, and present that package to the Standing Committee in June, 2004 to seek authorization for release for public comment.

Part III of this Report provides a summary of the Committee's long-term projects. A complete discussion of these matters can be found in the draft minutes of the November 2003 meeting, attached to this Report.

II. Action Items

No action items

III. Information Items

A. Long-Term Project on Possible Changes to Evidence Rules

Two years ago the Evidence Rules Committee, as part of its long-range planning, directed its Reporter to review scholarship, caselaw, and other sources of evidence law to determine whether there are any evidence rules that might be in need of amendment. At its 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 the Committee could take an in-depth look at whether those rules require amendment. At its 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 proposed 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.

The Committee continued its consideration of reports on a number of possibly problematic Evidence Rules at its Fall 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 any particular rule as part of a possible package of amendments.

The Committee voted to reject the following proposals:

1. *Rule 607:* The Committee found it unnecessary to codify the lower court case law that prohibits a party from calling a witness solely to impeach that witness with evidence that is otherwise inadmissible. Courts have handled this abusive practice under the existing Rule, and there is no dispute in the courts as to the impermissibility of this practice.

2. *Rule 613(b):* Rule 613(b) provides that a prior inconsistent statement can be admitted without giving the witness an opportunity to examine it in advance of admission. The witness, however, must be given an opportunity at some point in the trial to explain or deny the statement. The Rule thus rejects the common-law procedure under which the proponent was required to lay a foundation for the prior inconsistent statement at the time the witness testified. The Committee considered whether the Rule should be amended to return to the common-law foundation requirement. After reviewing case law, the Committee voted unanimously not to propose an amendment to the Rule. The Committee concluded that the Rule does not appear to create problems for courts or litigants. Courts use their discretion to control the order of proof to prohibit the admission of a witness's inconsistent statement *before* the witness testifies. And prudent counsel are unlikely to wait to introduce the statement *after* the witness leaves the stand, because counsel would thereby assume the risk that the witness might not be available to explain or deny the statement. After discussion, Committee members agreed that any conceptual problems in the Rule largely have been solved by the proper use of judicial discretion and by prudent practice of counsel.

3. *704(b):* The Committee considered whether Rule 704(b) should be amended to limit its coverage to the expert testimony of mental health professionals. The Committee found no need for an amendment of this Rule, as it has been applied consistently and without significant problems.

4. *Rule 801(d)(1)(B):* The Committee considered a proposal to amend Rule 801(d)(1)(B) to expand the hearsay exception for prior consistent statements to cover every statement that would be admissible to rehabilitate the credibility of the declarant-witness. Following its presumption against amending the Evidence Rules, the Committee found no problem in the application of Rule 801(d)(1)(B) that was substantial enough to justify the significant costs of an amendment.

5. *Rule 803(18):* The Committee investigated whether the learned treatise exception to the hearsay rule should be amended to cover authoritative publications in electronic form (e.g., video). The Committee saw the virtue of accommodating technological advances in the presentation of evidence. The Committee chose, however, not to proceed with an amendment to Rule 803(18) at this time. Only one federal court has considered whether a learned treatise may be admitted in electronic form. That court had no trouble admitting an authoritative videotape under the learned treatise exception. The Committee decided that it would not be prudent to propose an amendment when only one court has weighed in on the question.

6. *Rule 806:* Rule 806 provides generally that the credibility of a hearsay declarant may be impeached to the same extent as if the declarant were testifying at trial. The Committee reviewed a suggestion made in academic commentary to amend the Rule to permit extrinsic evidence of a hearsay declarant's bad acts when they are pertinent to the declarant's character for untruthfulness. The Committee rejected this proposal on the ground that extrinsic evidence carries a risk of confusion and can be very time-consuming. This is why such evidence is not admissible to impeach a witness's character for truthfulness at trial, under the terms of Rule 608(b). The Committee saw no reason to make an exception to the well-reasoned extrinsic evidence ban for impeachment of a hearsay declarant.

The Committee voted to give tentative approval to the following proposals:

1. *Rule 404(a)*: The Committee has agreed on tentative language for a possible amendment to Rule 404(a)(1) to clarify that character evidence is never admissible to prove conduct in a civil case. The text of Rule 404(a) seems to prohibit the circumstantial use of character evidence in a civil case, and yet two circuits have held that such evidence is admissible when a defendant is charged by the plaintiff with what amounts to criminal activity. The Committee will revisit this proposal at its meeting in Spring 2004.

2. *Rule 408:* The Committee is continuing to work on a possible amendment to Rule 408, the Rule that limits the admissibility of evidence of settlement and compromise. Currently there is substantial dispute in the courts over three important questions: a) whether evidence of a civil compromise is admissible in subsequent criminal litigation; b) whether statements made during

settlement negotiations can be admitted to impeach a party for prior inconsistent statement or contradiction; and c) whether an offer to settle can be admitted in favor of the party who made the offer. The Committee has tentatively agreed on an amendment that would limit the protection of Rule 408 to civil cases; prohibit the use of compromise evidence when offered to impeach by way of prior inconsistent statement or contradiction; and prohibit the admission of compromise evidence no matter which party offers it. The Committee has also tentatively agreed to restructure the Rule to make it easier to read and apply.

3. *Rule 410:* The Committee has agreed that Evidence Rule 410SSthe Rule that excludes most statements and offers made during guilty plea negotiationsSSshould be amended to protect the statements and offers of prosecutors as well as defendants and defense counsel. Currently the Rule does not protect statements and offers of prosecutors from admissibility at trial. The Committee has determined that the policy of encouraging plea bargaining would be furthered by providing protection for the statements of all of the parties to a plea negotiation. The Committee will give further consideration to the language for a proposed amendment at its Spring 2004 meeting.

4. *Rule 606(b):* Evidence Rule 606(b) generally excludes juror affidavits or testimony concerning jury deliberations. The rule is silent, however, 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. The Committee has tentatively agreed to propose an amendment to Rule 606(b) that would codify a narrow exception, permitting proof from jurors on whether there was a clerical mistake in the reporting of the verdict. A broader 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. In contrast, an exception permitting proof only on questions of clerical error preserves the privacy of jury deliberations, as the inquiry concerns only what the jury decided, not why it decided as it did. The Committee will revisit the proposed amendment to Rule 606(b) at its Spring 2004 meeting.

5. *Rule 609(a):* Rule 609(a)(2) provides that convictions for crimes involving dishonesty or false statement (rendered within a certain time period) are automatically admissible to impeach a witness's character for truthfulness. The admissibility of convictions for crimes not involving dishonesty or false statement is subject to a balancing test under Rule 609(a)(1). Rule 609(a)(2) does not define which crimes involve dishonesty or false statement. Courts have taken different and conflicting approaches to defining the crimes that fall within Rule 609(a)(2). Many courts look to the manner in which the crime was committed – the underlying facts. If the crime was committed in a deceitful manner, then the crime is found "automatically" admissible under Rule 609(a)(2). Other courts look only to the statutory elements of the crime for which the witness was convicted. Under this view, the conviction is admissible under Rule 609(a)(2) only if its statutory elements necessarily require the commission of an act of false statement or deceit.

The Evidence Rules Committee has tentatively agreed to propose an amendment to resolve the conflict in the courts over the definition of crimes involving dishonesty or false statement. It has also tentatively resolved that if the Rule is to be amended, it should adopt an "elements" definition of crimes involving dishonesty or false statement. Under the proposed amendment, a crime involves dishonesty or false statement within the meaning of Rule 609(a)(2) only if its statutory elements necessarily involve the commission of an act of dishonesty or false statement. The Committee believes an "elements" approach promotes efficiency and more uniform results. In contrast a rule requiring the court to look behind the conviction, to the manner in which it was committed, will often result in an indeterminate inquiry and an unjustified expenditure of the court's time. The Committee will revisit the proposed amendment to Rule 609 at its Spring 2004 meeting.

In addition, and as set forth in the Report to the Standing Committee in June 2002, the Committee has directed the Reporter to prepare memoranda on the following rules, to determine whether any changes to these rules are necessary:

1. Rule 706 (to consider certain stylistic suggestions and to determine whether to incorporate civil trial practice standards developed by the ABA).

2. Rule 803(3) (to consider whether the Rule should be amended to cover statements of the declarant's state of mind where offered to prove the conduct of someone other than the declarant).

3. Rule 803(8) (to consider whether the language excluding law enforcement reports in criminal cases should be replaced by general language requiring that public reports are to be excluded if they are untrustworthy under the circumstances).

I wish to emphasize that in regard to any rules or other items as to which the Committee has indicated possible interest, the Committee continues to be wary of recommending changes that are not considered absolutely necessary to the proper administration of justice.

B. Privileges

The Committee's Subcommittee on Privileges has been working on a long-term project to prepare a "survey" of the existing federal common law of privileges. The end-product is intended to be a descriptive, non-evaluative presentation of the existing federal law, and not a proposal for any amendment to the Evidence Rules. The survey is intended to help courts and lawyers in working through the existing federal common law of privileges, and if completed it will be published as a work of the Consultant to the Committee, Professor Ken Broun, and the Reporter. At this stage, the survey of the psychotherapist-patient privilege has been substantially completed, and Professor Broun is beginning work on the attorney-client privilege.

IV. Minutes of the November 2003 Meeting

The Reporter's draft of the minutes of the Committee's November 2003 meeting is attached to this report. These minutes have not yet been approved by the Committee.