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OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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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: **May 16, 2005**

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

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on April 28, 2005, in Phoenix, Arizona. At the meeting the Committee approved proposed amendments to Evidence Rules 404(a), 606(b) and 609; subsequently the Committee conducted an electronic vote and approved an amendment to Evidence Rule 408. The Evidence Rules Committee recommends that the Standing Committee approve each of the proposed amendments and forward them to the Judicial Conference. Part II of this Report summarizes the Committee's approval of the four proposed amendments. An attachment to this Report includes the text, Committee Note, statement of changes made after public comment, and summary of public comment for each of the proposed amendments to the Evidence Rules.

Part III of this Report provides a summary of the Committee's long-term project on the privileges. A complete discussion of all current Committee matters can be found in the draft minutes of the April 2005 meeting, attached to this Report.

II. Action Items

1. Recommendation To Forward the Proposed Amendment to Evidence Rule 404(a) to the Judicial Conference

The Evidence Rules Committee has voted unanimously to propose an amendment to Rule Rule 404(a). This amendment is made necessary because of a long-standing conflict in the circuits over whether character evidence can be offered to prove conduct in civil cases. This circuit split has caused disruption and disuniform results in the federal courts. The question of the admissibility of character evidence to prove conduct arises frequently in cases brought under 42 U.S.C § 1983, so an amendment to the Rule will have a helpful impact on a fairly large number of cases.

After careful consideration over a number of years, the Evidence Rules Committee has concluded that 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. Moreover, an amendment prohibiting the circumstantial use of character evidence in civil cases is in accord with the original intent of Rule 404, which was to permit character evidence circumstantially only when offered in the first instance by the "accused." The reference is clearly to a criminal defendant, indicating an original intent to prohibit the circumstantial use of character evidence in civil cases.

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

Recommendation — The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 404(a) be approved and forwarded to the Judicial Conference.

2. Recommendation To Forward the Proposed Amendment to Evidence Rule 408 to the Judicial Conference

Federal courts have long been divided on three important questions concerning the scope of Rule 408, the rule prohibiting admissibility of statements and offers during compromise negotiations when offered to prove the validity or amount of the claim:

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.

Over a number of meetings, the Committee unanimously agreed that Rule 408 should be amended to 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 reason for the former amendment is that a broader impeachment exception is likely to chill settlement negotiations, as the parties may fear that anything they say could somehow be found inconsistent with a later statement at trial. The reason for the latter amendment is that a rule permitting a party to admit its own statements and offers in compromise could result in the strategic manufacturing of evidence, and also could lead to attorneys having to testify about just what statements and offers were made in alleged compromise.

The remaining issue–whether compromise evidence should be admissible in criminal cases–has been the subject of extensive discussion at Evidence Rules Committee meetings over a number of years. At all of these meetings, the Justice Department representative expressed concern that some statements made in civil compromise (e.g., to tax investigators) could be critical evidence

needed in a criminal case to prove that the defendant had committed a crime. But other Committee members argued that any rule permitting compromise evidence to be admitted in a criminal case would deter the settlement of civil cases.

Eventually a compromise was reached that distinguished between statements made in settlement negotiations (admissible in a subsequent criminal case) and the offer or acceptance of the settlement itself (inadmissible in a subsequent criminal case if offered to prove the validity or amount of the claim). 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. In such cases the settlement itself 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. At the April 2004 meeting, a majority of the Committee voted to release a proposed amendment to Rule 408 that would exclude offers and acceptances of settlement in criminal cases, but that would admit in such cases conduct and statements made in the course of settlement negotiations. The Standing Committee approved the proposal for release for public comment.

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

At the April 2005 meeting, most of the Evidence Rules Committee members expressed significant concern over and sympathy with the negative public comment. But the DOJ representative argued at length that the comment was misguided. He made the following points: 1) the comment overstates the protection of the existing rule, which prohibits compromise evidence in criminal cases only when it is offered to prove the validity or amount of the claim; 2) the comment fails to note that several circuits already employ a rule that admits compromise evidence in criminal cases even when offered as an admission of guilt; 3) the comment fails to take account of the fact that many statements made to government enforcement officials in an arguable effort to settle a civil regulatory matter are essential for proving the defendant's guilt in a subsequent criminal case—the primary example being a statement to a revenue agent that is later critical evidence against the defendant in a criminal tax prosecution; 4) the rule preferred by the public comment would allow a defendant to make a statement in compromise and later testify in a criminal case inconsistently

with that statement, free from impeachment.

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

Committee members recognized that the proposed compromise would require some work on the language of the proposal, as well as work on the Committee Note. The Committee therefore resolved to allow the Reporter to prepare language that would permit statements of compromise to be admitted in criminal cases only when made in an action brought by a government regulatory agency. That language would be reviewed by the Chair and if the Chair approved, the proposal could be sent out for an electronic vote by the Committee members. On May 9, 2005 a proposed amendment to Rule 408 was sent electronically to all Committee members. That proposal would permit statements of compromise to be admitted in criminal cases only if made in cases brought by a government regulatory agency. An e-mail vote was taken and the proposed amendment was approved by a 5-2 vote.

Recommendation — The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 408, as modified after public comment, be approved and forwarded to the Judicial Conference.

3. Recommendation To Forward the Proposed Amendment to Evidence Rule 606(b) to the Judicial Conference

Evidence Rule 606(b) generally prohibits parties from introducing testimony or affidavits from jurors in an attempt to impeach the jury verdict. Federal courts have established an exception to the rule that permits juror proof on certain errors in rendering the verdict, even though there is no language permitting such an exception in the text of the Rule. But the circuits have long been in dispute about the breadth of that exception. Some courts allow juror proof whenever the verdict has an effect that is different from the result that the jury intended to reach, while other courts follow a narrower exception permitting juror proof only where the verdict reported is different from that which the jury actually reached because of some clerical error. The former exception is broader because it would permit juror proof whenever the jury misunderstood (or ignored) the court's instructions. For example, if the judge told the jury to report a damage award without reducing it by the plaintiff's proportion of fault, and the jury disregarded that instruction, the verdict reported

would be a result different from what the jury actually intended, thus fitting the broader exception. But it would not be different from the verdict actually reached, and so juror proof would not be permitted under the narrow exception for clerical errors.

The Evidence Rules Committee has determined that an amendment to Rule 606(b) is necessary in order to bring the case law on the rule into conformance with the text of the Rule, and, more importantly, to clarify the breadth of the exception for mistakes in entering the verdict.

The proposed amendment to Rule 606(b) that was released for public comment in 2004 added an exception permitting juror testimony or affidavit when offered to prove that "the verdict reported is the result of a clerical mistake." The Committee determined that a broader exception permitting proof of juror statements whenever the jury misunderstood or ignored the court's instruction would have the potential of intruding into juror deliberations and upsetting the finality of verdicts in a large and undefined number of cases. The broader 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.

Only a few public comments were received on the proposed amendment to Rule 606(b). The comments were largely positive; but one comment contended that the term "clerical mistake" was vague and could be interpreted to provide an exception for juror proof that was broader than that intended by the Committee, as the Committee intended to provide an exception only in those limited cases in which the jury's decision was inaccurately entered onto the verdict form.

For the April 2005 meeting, the Committee considered language for the amendment to Rule 606(b) that was drafted by the Reporter in response to the public comment. This language was intended to sharpen and narrow the "clerical mistake" exception that was released for public comment. The language permitted juror proof to determine "whether there was a mistake in entering the verdict onto the verdict form." Committee members unanimously agreed that this language was an improvement on the language of the amendment that was released for public comment. The Committee approved the amendment to Rule 606(b), as modified, with one member dissenting.

The Committee Note to the proposed amendment emphasizes 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.

Recommendation — The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 606(b), as modified after public comment, be approved and forwarded to the Judicial Conference.

4. Recommendation To Forward the Proposed Amendment to Evidence Rule 609 to the Judicial Conference

Evidence 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 balancing test for impeaching witnesses whose felony convictions do not fall within the definition of Rule 609(a)(2). At its Spring 2004 meeting the Evidence Rules Committee approved an amendment to Evidence Rule 609(a)(2) for release for public comment. The amendment was intended to resolve the long-standing conflict in the courts over how to determine whether a conviction involves dishonesty or false statement within the meaning of that Rule. The basic conflict is that some courts determine "dishonesty or false statement" solely by looking at the elements of the conviction for which the witness was found guilty. If none of the elements requires proof of falsity or deceit beyond a reasonable doubt, then the conviction must be admitted under Rule 609(a)(1) or not at all. Most courts, however, look behind the conviction to determine whether the witness committed an act of dishonesty or false statement before or after committing the crime. Under this view, for example, a witness convicted of murder would have committed a crime involving dishonesty or false statement if he lied about the crime, either before or after committing it.

One possible way to amend the rule is to provide a definition of crimes involving dishonesty or false statement by looking only to the elements of the conviction. This is the rule favored by most commentators—and initially by most members of the Evidence Rules Committee—on the ground that requiring the judge to look behind the conviction to the underlying facts could (and often does) impose a burden on trial judges. Moreover, it is often impossible to determine, solely from a guilty verdict, what facts of dishonesty or false statement the jury might have found. Most importantly, whatever additional probative value there might be in a crime committed deceitfully, it is lost on the jury assessing the witness's credibility when the elements of the crime do not in fact require proof of dishonesty or false statement. This is because when the conviction is introduced to impeach the witness, the jury is told only about the general nature of the conviction, not about its underlying facts. Finally, if a crime not involving false statement as an element (e.g., murder or drug dealing) is found inadmissible under Rule 609(a)(2), it is still likely to be admitted under the balancing test of Rule 609(a)(1). Thus, the costs of an "elements" approach would appear to be low–all that is lost is automatic admissibility.

The Department of Justice, while agreeing that Rule 609 should be amended, has opposed a strict "elements" test. The Department has emphasized that it is 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.

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

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

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

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

Recommendation — The Evidence Rules Committee unanimously recommends that the proposed amendment to Evidence Rule 609, as modified after public comment, be approved and forwarded to the Judicial Conference.

III. Information Item

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 and the Reporter.

The Committee is also considering whether to propose a statute to cover the problem of unintentional waiver of privileged information. In complex litigation the lawyers spend significant amounts of time and effort to preserve the privilege, even when many of the documents are of no concern to the producing party. The reason is that if a privileged document is produced, there is a risk that a court will find a subject matter waiver that will apply not only to the instant case but to other cases as well. An enormous amount of expense is put into document production in order to protect waiver. Moreover, the fear of waiver leads to extravagant claims of privilege. The Committee is considering whether a proposed statute can be drafted to permit parties under certain circumstances to produce documents in discovery without risking subject matter waiver.

IV. Minutes of the April 2005 Meeting

The Reporter's draft of the minutes of the Committee's April 2005 meeting is attached to this report. These minutes have not yet been approved by the Committee.

Attachments:

Proposed amendments to Evidence Rules 404(a), 408, 606(b) and 609.
Draft minutes of April 2005 Evidence Rules Committee meeting

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE*

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;

(2) Character of alleged victim.— ~~Evidence~~ In a criminal case, and subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the alleged

*New matter is underlined and matter to be omitted is lined through.

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;

(3) Character of witness.—Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

* * * * *

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.

Nothing in the amendment is intended to affect the scope of Rule 404(b). While Rule 404(b) refers to the "accused", the "prosecution" and a "criminal case", it does so only in the context of a notice requirement. The admissibility standards of Rule 404(b) remain fully applicable to both civil and criminal cases.

CHANGES MADE AFTER PUBLICATION AND COMMENTS

No changes were made to the text of the proposed amendment as released for public comment. A paragraph was added to the Committee Note to state that the amendment does not affect the use of Rule 404(b) in civil cases.

SUMMARY OF PUBLIC COMMENTS

Jack E. Horsley, Esq., (04-EV-001) states that the "thrust" of the proposed amendment is "well supported." He questions, however, whether the rule should be "enlarged" by stating that "an exception exists if the case involves the element of the person's character."

Professor Thomas J. Reed (04-EV-003) declares that the proposed change to Rule 404(a) would "do more harm than good" and if picked up by the states could result in the unintentional creation of a "rule that bars character evidence in civil actions where character evidence is routinely admitted, e.g., child custody cases."

The Federal Magistrate Judges Association (04-EV-007) supports the proposed amendment to Rule 404(a), noting that it "reinforces the original intent of the Rule to prohibit the circumstantial use of character evidence in civil cases" and "clarifies that Fed.R.Evid. 404(a)(2) is subject to the more stringent limitations of Fed.R.Evid. 412 regarding the use of character evidence of a victim."

Professor Peter Nicolas, (04-EV-010) contends that the amendment "might result in some confusion" as it might be construed to mean that Rule 404(b) applies only in criminal cases.

The State Bar of California's Committee on Federal Courts (04-EV-012) supports the proposed amendment to Rule 404(a), observing that "the use of character evidence carries serious risks of prejudice, confusion and delay" and therefore that "the exceptions applicable to the use of character evidence in criminal cases should not be extended to civil cases."

The Committee on the Federal Rules of Evidence of the American College of Trial Lawyers (04-EV-017) is in favor of the proposed amendment.

Rule 408. Compromise and Offers to Compromise

(a) Prohibited uses.—Evidence of the following is not admissible on behalf of any party, when offered to prove 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) conduct or statements made in compromise negotiations ~~is likewise not admissible~~ regarding the claim, except when made in compromise of a claim by a government regulatory agency and offered in a subsequent criminal case.

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

(b) Permitted uses.— 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 and apply. First, the amendment provides that Rule 408 does not prohibit the government from introducing statements or conduct of an accused made during compromise negotiations of a prior civil dispute between the accused and a government regulatory agency. *See, e.g.*, *United States v. Prewitt*, 34 F.3d 436, 439 (7th Cir. 1994) (admissions of fault made in compromise of a civil securities enforcement action were admissible against the accused in a subsequent criminal action for mail fraud). When an individual makes a statement in the presence of government agents, its subsequent admission in a criminal case should not be unexpected. The individual can seek to

protect against subsequent disclosure through negotiation and agreement with the civil regulator, or even in certain circumstances with an attorney for the government under Rule 410.

Statements made in compromise negotiations of a government enforcement action may be excluded in criminal cases where the circumstances so warrant under Rule 403. For example, if an individual was unrepresented at the time the statement was made in a civil enforcement proceeding, its probative value in a subsequent criminal case may be minimal. But there is no absolute exclusion imposed by Rule 408.

In contrast, statements made during compromise negotiations of other disputed claims are not admissible in subsequent criminal litigation, when offered as an admission of the validity or amount of that claim. Where private parties enter into compromise negotiations they cannot protect against the subsequent use of statements in criminal cases by way of private ordering. The inability to guarantee protection against subsequent use could lead to parties refusing to admit fault, even if by doing so they could favorably settle the private matter. Such a chill on settlement negotiations would be contrary to the policy of Rule 408.

The amendment distinguishes statements and conduct (such as a direct admission of fault) made in compromise negotiations of a claim by a government agency from an offer or acceptance of a compromise of such a claim. An offer or acceptance of a compromise of any 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 with the government regulator, 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 regulatory action, 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). So for example, Rule 408 is inapplicable if offered to show that a party made fraudulent statements in order to settle a litigation.

The amendment does not 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.

CHANGES MADE AFTER PUBLICATION AND COMMENTS

In response to public comment, the proposed amendment was changed to provide that statements and conduct during settlement negotiations are to be admissible in subsequent criminal litigation only when made during settlement discussions of a claim brought by a government regulatory agency. Stylistic changes were made in accordance with suggestions from the Style Subcommittee of the Standing Committee. The Committee Note was altered to accord with the change in the text, and also to clarify that fraudulent statements made during settlement negotiations are not protected by the Rule.

SUMMARY OF PUBLIC COMMENTS

Hon. Jack B. Weinstein (04-EV-002) is "dubious about allowing any conduct or statement made in compromise negotiations to be used in criminal cases." Judge Weinstein notes that a party will often be unsupervised by counsel "and may make statements for a variety of reasons that throw doubt on reliability."

Frank W. Dunham, Jr., Esq., (04-EV-004), a Federal Public Defender, states that it should be made clear within the Rule "that statements made by a representative or agent of a party in an attempt to settle a claim are never admissible against the party in any context, civil or criminal."

Professor Lynn McClain (04-EV-006) is opposed to the "compromise" taken in the proposed amendment as it was released for public comment, that would have prohibited settlements from admissibility in criminal cases, but would have permitted statements made during the settlement to be admissible in such cases. He states that "the compromise in the proposed Rule, by having a foot in each court, achieves neither full encouragement of settlement nor full-out prosecutions."

The Federal Magistrate Judges Association (04-EV-007) "does not support the proposed amendment which would bar for use *only in civil cases* the conduct or statements of a party made in compromise negotiations." The Association states that "there is nothing in the materials provided that demonstrates" that exclusion of settlement statements from a criminal trial "is a serious problem in connection with the Justice Department's efforts to ferret out crime." The Association also notes that the amendment as it was released for public comment would have hampered "the efforts of civil litigants' legal counsel and those serving as mediators to successfully resolve civil disputes during the course of settlement negotiations."

The Law Firm of Cunningham, Bounds, Yance, Crowder and Brown, L.L.C., (04-EV-008) opposed the proposed amendment to Rule 408 as it was released for public comment, insofar as it would have permitted statements made in settlement negotiations to be admitted in subsequent criminal cases. The Firm noted that it is "hard to draw a line" between offers of compromise, which would not be admissible in criminal cases, and statements made during settlement negotiations, which would have been admissible under the proposed amendment as released for public comment. The Firm also noted that "[i]f a plaintiff or a defendant might be subject to criminal prosecution for anything he or she says or does during settlement negotiations, this new rule would have a tendency both to prevent such negotiations from taking place at all and to minimize their usefulness if they do occur."

Daniel E. Monnat, Esq., (04-EV-009) applauds the "wise decision" to limit the exception for impeachment evidence and to provide that compromises or offers to compromise are not admissible in criminal cases. But Mr. Monnat was opposed to the provision in the amendment as released for public comment that would have allowed all statements made in compromise negotiations to be admissible in a subsequent criminal case. Mr. Monnat argued that "[t]he same reasons that weigh in favor of this prohibition in civil cases weigh equally if not more strongly in favor of extending the prohibition to criminal cases." Mr. Monnat contended that statements admitting criminal conduct, made during civil settlement negotiations, are questionable as evidence because "they may be made merely to encourage settlement, or may be demanded as a condition of settlement." He also was concerned that a "civil lawyer may not fully understand the criminal consequences of statements made during settlement negotiations" and that the proposed amendment as released for public comment placed "an additional burden on civil lawyers to anticipate and understand how their representation in a civil matter might leave their clients vulnerable to

future criminal prosecution."

Professor David Leonard and 25 Signatory Law Professors (04-EV-011) opposed the amendment to Rule 408 as released for public comment, but only insofar as it would have permitted all statements made in settlement negotiations to be admitted in subsequent criminal cases. They noted that in this respect the proposed amendment would have had "a substantial chilling effect in certain types of disputes that often lead to criminal prosecution." The professors stated that under the amendment as released for public comment, even the statements of an attorney made during a settlement negotiation would have been admissible, as agency-admissions against the client in a subsequent criminal case. "The possibility that lawyer statements may be admissible against clients in subsequent criminal cases may chill lawyers in their civil representation, make civil case lawyers witnesses against their clients in criminal proceedings, and result in their inability to continue to represent their clients in any proceedings."

On other aspects of the proposed amendment, the professors state that "the Advisory Committee has made an appropriate choice in proposing to exclude compromise evidence when offered to impeach by contradiction or by prior inconsistent statement" and that "the Advisory Committee has most likely reached the most appropriate conclusion in proposing to make clear that Rule 408 bars a party from offering evidence of its own settlement activity as well as that of its adversary." Finally, the professors support the deletion of the sentence referring to discoverable material, as that sentence is "unnecessary," and also support the other proposed stylistic changes to the Rule.

The Committee on Federal Courts of the State Bar of California (04-EV-012) supports the proposed amendment to Rule 408 as it was released for public comment. The Committee states that

the amendment "would resolve a number of long-standing disputes concerning the scope of Rule 408 by eliminating a number of exceptions to the Rule that some courts have recognized." The Committee believes that "the elimination of such exceptions furthers the purpose of the Rule by promoting and facilitating settlements."

Professor Jeffrey S. Parker (04-EV-014) opposed the amendment to Rule 408 insofar as it would have permitted all statements made in settlement negotiations to be used in subsequent criminal cases. He stated that "[a]ttaching potential criminal liability to unguarded statements in settlement discussions discourages settlement even more than attaching civil liability, given the harshness of the criminal sanction." He also contended that "[t]he opportunities for ripping even hypothetical statements out of context, and then arguing inferences in the highly charged atmosphere of a criminal trial, are legion, and they will lead to abuses." Professor Parker argued that the amendment as released for public comment would have provided a trap for the unwary, as "unsophisticated parties will be entrapped by a staged atmosphere of amicability and conciliation."

Phil R. Richards, Esq., (04-EV-015) was "very concerned" with the proposed amendment to Rule 408 as it was released for public comment, because that amendment would have authorized "the use of statements of fault made during settlement negotiations as evidence in a subsequent criminal case." He stated that "[d]uring settlement conferences and mediations, the candor of the parties is routinely encouraged through assurances that anything they say cannot be used outside of the settlement proceeding for any purpose. To then use statements made under such circumstances to establish the guilt of the party in a criminal proceeding is fundamentally unfair, and deprives them of the protections that are built in to the criminal justice system to insure that such admissions are not unwittingly made."

The Committee on the Federal Rules of Evidence of the American College of Trial Lawyers ((04-EV-017) opposed the amendment to Rule 408 as released for public comment, insofar as it would have permitted all statements made in settlement negotiations to be admitted in subsequent criminal cases. The Committee contended that such an amendment would "reduce, not encourage compromise." The Committee questioned "whether conduct or a statement during settlement negotiations is any more reliable or probative of a criminal defendant's guilt than evidence of an offer or acceptance of settlement." It predicted that the result of such an amendment would be "a reversion to the earlier practice of using hypothetical statements to avoid a factual admission, a practice the Rule was intended to avoid." The Committee also opined that the proposed amendment would have been inconsistent with other federal law that favors confidentiality of communications during settlement negotiations, such as the Alternative Dispute Resolution Act of 1998, and local rules governing court-sponsored mediation. The Committee is in favor of the other amendments to Rule 408, as they "further the larger purpose of the Rule which is to encourage compromise."

Professor James Duane (04-EV-018) was opposed to the proposed amendment to Rule 408 as it was released for public comment, as it would have permitted all statements made in settlement negotiations to be admitted in subsequent criminal cases. He argued that "the proposed amendment would pose a powerfully chilling effect on the willingness of civil parties and their lawyers to engage in the robust and uninhibited give-and-take that is common in settlement negotiations." He also contended that the amendment would have created problems in determining whether a party even made a certain statement during a settlement negotiation. Therefore, "cautious lawyers representing the defendant in any civil case — even in state court — will completely refrain from participating in any sort of oral settlement talks if there is any possibility that federal

criminal charges may arise out of the same matter, for there will be no other way to avoid the terrible risk of saying something perfectly innocent that might be misunderstood or incorrectly recollected by the other participant, who sometimes might not even be a lawyer." Professor Duane argued that statements made in settlement negotiations are not critical evidence of guilt, because if they are declared admissible in criminal cases, they will never be made, except by those without experienced counsel.

Rule 606. Competency of Juror as Witness

* * * * *

(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 there was a mistake in entering the verdict onto the verdict form. ~~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~~.

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 mistake in entering the verdict on the verdict form. 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 mistakes in entering the verdict on the verdict form, 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 exception established by the amendment 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 errors in the verdict form 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)).

CHANGES MADE AFTER PUBLICATION AND COMMENTS

Based on public comment, the exception established in the amendment was changed from one permitting proof of a "clerical mistake" to one permitting proof that the verdict resulted from a mistake in entering the verdict onto the verdict form. The Committee Note was modified to accord with the change in the text.

SUMMARY OF PUBLIC COMMENTS

The Federal Magistrate Judges Association (04-EV-007) supports the proposed amendment. It notes that the amendment "addresses the incongruity between the Rule and case law" and that by limiting the exception to clerical error, it "preserves the sanctity of jury deliberations and the finality of jury verdicts." The Association notes that the proposed amendment does not prevent the court "from polling the jury and taking steps to remedy any obvious errors evidence from that poll."

The Committee on the Federal Rules of Evidence of the American College of Trial Lawyers (04-EV-017) opposes the amendment to Rule 606(b) as it was released for public comment. The College agrees that the Rule should be amended to resolve a conflict in the case law over the scope of an exception for mistaken jury verdicts. But it argues that "the new rule's exception for 'clerical mistakes' is unclear, and even if that term's meaning can be divined by reference to the case law cited by the Advisory Committee, that meaning is not adequately clarified or justified." The College suggests that the term "inadvertence, oversight or mistake" should be substituted for "clerical mistake" in the proposed amendment as it was issued for public comment.

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 shall be admitted, regardless of the punishment , if it readily can be determined that the elements of the crime, as proved or admitted, required an act of dishonesty or false statement by the witness.

(b) Time limit.—Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon, annulment, or certificate of rehabilitation.—Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other

equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime ~~which~~ that was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications.—Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal.—The pendency of an appeal therefrom does not render evidence of a conviction

inadmissible. Evidence of the pendency of an appeal is admissible.

Committee Note

The amendment provides that Rule 609(a)(2) mandates the admission of evidence of a conviction only when the conviction required the proof of (or in the case of a guilty plea, the admission of) an act of dishonesty or false statement. Evidence of all other convictions is inadmissible under this subsection, irrespective of whether the witness exhibited dishonesty or made a false statement in the process of the commission of the crime of conviction. Thus, evidence that a witness was convicted for a crime of violence, such as murder, is not admissible under Rule 609(a)(2), even if the witness acted deceitfully in the course of committing the crime.

The amendment is meant to give effect to the legislative intent to limit the convictions that are to be automatically admitted 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 requires that the proponent have ready proof that the conviction required the factfinder to find, or the defendant to admit, an act of dishonesty or false statement. Ordinarily, the statutory 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 factfinder had to find, or the defendant had to admit, an act of dishonesty or false statement in order for the witness to have been convicted. *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); *Shepard v. United States*, 125. S.Ct. 1254 (2005) (the inquiry to determine whether a guilty plea to a crime defined by a nongeneric statute necessarily admitted elements of the generic offense was limited to the charging document's terms, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or a comparable judicial record). 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.

CHANGES MADE AFTER PUBLICATION AND COMMENTS

The language of the proposed amendment was changed to provide that convictions are automatically admitted only if it readily can be determined that the elements of the crime, as proved or admitted, required an act of dishonesty or false statement by the witness.

SUMMARY OF PUBLIC COMMENTS

Hon. Jack B. Weinstein (04-EV-002) opposes the amendment to Rule 609(a) as it was released for public comment. Judge Weinstein questions the fairness of expanding a conviction "beyond its operative elements." He contends that the amendment as originally proposed would "seriously disadvantage defendants in some cases."

The Federal Magistrate Judges Association (04-EV-007) supports the proposed amendment to Rule 609(a). It notes that the intent of the amendment "is to clearly limit the Rule to the admission of convictions that only involve an act of dishonesty or false statement."

Professor Peter Nicolas (04-EV-010) contends that "notwithstanding the concerns expressed by the Justice Department," the Committee's "initial impulse — to draft an amendment that

focused on the elements of the conviction — was a sounder approach than that followed in the proposed amendment" as it was issued for public comment. Professor Nicholas contends that "courts will no doubt differ on the meaning of the phrase 'readily can be determined,' leading to inconsistent application of the rule." He also argues that even under the stricter "elements" test, the cost is ordinarily not exclusion, "but merely the benefit of automatic admissibility." He concludes that if a crime somehow involved an act of dishonesty or false statement (but not an element), it is very likely to be admissible under the balancing test of Rule 609(a)(1).

Professor Jeffrey Parker (04-EV-014) states that the proposed amendment to Rule 609(a) as released for public comment was "unwise and unjustified" and "is likely to create satellite disputes over the reliability of the *crimen falsi* classification."

Professor Myrna Raeder and Twenty Signatory Law Professors (04-EV-016) oppose the amendment to Rule 609(a) as it was released for public comment, noting that "[w]hile the Committee Notes indicate that a mini-trial is not contemplated" to determine whether the crime is one of dishonesty or false statement, "any procedure that is not limited to statutory elements is likely to result in wide variation among trial courts." Professor Raeder argues that "issues of fairness and ease of administration" justify the need to "confine proof of 609(a)(2) crimes to statutory elements." Finally, as to "the Justice Department's concern that some obstructions of justice may involve deceit, in a specific case this argument would likely be successful when made to the judge under 609(a)(1) test balancing whether the conviction's probative value outweighs its prejudicial effect to the accused. What 609(a)(2) provides is an automatic admit, which should be reserved for convictions where the statutory elements provide the necessary proof."

The Committee on the Federal Rules of Evidence of the American College of Trial Lawyers (04-EV-017) opposes the proposed amendment to Rule 609(a)(2) as it was released for public comment. The Committee argues that the automatic admissibility mandated by Rule 609(a)(2) "should be interpreted narrowly and viewed with caution." It notes that the choice "is not between categorically admitted prior convictions under (a)(2) and excluding them entirely" because the court "retains broad discretion under Rule 609(a)(1) to admit virtually all prior felony convictions that are less than ten years old." The Committee "objects only to enlarging the cases in which the trial judge has no choice but to admit" a conviction. The Committee also expresses concern about the difficulty of learning the facts of the prior conviction and the "efficient use of judicial time." It notes that an "advantage of relying only on statutory criteria is that they can be quickly, easily, and objectively determined simply by referring to widely available reference sources."