

**EXCERPT FROM THE
REPORT OF THE JUDICIAL CONFERENCE**

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

**TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES:**

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FEDERAL RULES OF EVIDENCE

Rules Recommended for Approval and Transmission

The Advisory Committee on Evidence Rules proposed amendments to Rules 404, 408, 606, and 609 with a recommendation that they be approved and transmitted to the Judicial Conference. Each addresses a longstanding conflict among the courts of appeals. The proposed amendments were published for comment in August 2004. The scheduled public hearing was canceled because no request to testify was submitted. The Committee vote was unanimous to approve each of the four amendments.

The proposed amendment to Rule 404(a) resolves the conflict in the courts about the admissibility of character evidence offered as circumstantial proof of conduct in a civil case. The original purpose of the rule was to bar the admission of character evidence when offered to prove a person's conduct, because the evidence might lead to a trial of personality and cause a jury to decide the case on improper grounds. A limited exception was recognized in criminal cases in deference to the possibility that character evidence might be the defendant's sole defense and as a counterweight to the resources of the government. Over time, some courts began extending this limited exception and permitted the use of character evidence in civil cases. Under the amendment, evidence of a person's character is never admissible in a civil case to prove that the person acted in conformity with the character trait. The advisory committee concluded that a clear rule is necessary to avoid the serious risks of prejudice, confusion, and

delay that may arise when character evidence is used to prove that a person acted in conformity with the character trait.

The proposed amendment to Rule 408 resolves three longstanding conflicts in the courts about the admissibility of statements and offers made in settlement negotiations when offered to prove the validity or amount of the claim. The amendment does not alter the current rule that such information can be used for other purposes.

Resolving the first conflict, the proposed amendment provides that a statement or conduct regarding a claim made in the course of settlement negotiations in a civil dispute is barred in a subsequent criminal case, unless the statement was made in an action brought by a government regulatory, investigative, or enforcement agency. When an individual makes a statement in the presence of government agents, its subsequent admission in a criminal case should not be unexpected. The proposed amendment published for comment contained a broader exception, which would have permitted a statement or conduct regarding a claim made during settlement negotiations to be admitted in any subsequent criminal case. The proposal was revised to except such a statement or conduct only when made in a civil dispute initiated by a government agency.

The proposed amendment distinguishes statements and conduct in settlement negotiations (such as a direct admission of fault) from an offer or acceptance of a compromise settlement of a civil claim. An offer or acceptance of a compromise of a civil claim is excluded from all criminal cases if offered against the defendant as an admission of fault because a defendant may offer or agree to settle a litigation for reasons other than a recognition of fault.

Resolving the second conflict, the proposed amendment to Rule 408 also prohibits the use of statements made in settlement negotiations when offered to impeach a witness through a prior inconsistent statement or through contradiction. The advisory committee concluded that broad impeachment would impair the public policy of promoting settlements by chilling

settlement negotiations as the parties may fear that anything they say could somehow be found inconsistent with a later statement at trial.

Resolving the third conflict, the proposed amendment to Rule 408 bars a party from introducing its own statements and offers made during settlement negotiations when offered to prove the validity, invalidity, or amount of the claim. Waiving the protection unilaterally would implicitly disclose the adversary's involvement in the compromise negotiations and might also require testimony from the participating attorneys about what statements and offers were made in the alleged compromise, leading to disqualifications.

The proposed amendment to Rule 606(b) clarifies whether statements from jurors can be admitted to prove disparity between the verdict rendered and the verdict intended by the jurors. All courts have permitted jury testimony to prove certain errors in the verdict, even though the text of the rule is silent on the issue. But there is a longstanding conflict among the courts about the breadth of that exception, with some courts finding an exception whenever the verdict has an effect that is different from the result that the jury intended to reach.

The proposed amendment generally prohibits parties from introducing testimony or affidavits from jurors in an attempt to impeach the jury verdict. It admits proof of juror statements, but only to show “whether there was a mistake in entering the verdict onto the verdict form.”

The advisory committee concluded that adopting a broad exception permitting proof of juror statements whenever the jury misunderstood or ignored the court's instruction would unduly interfere with juror deliberations and undermine the finality of jury verdicts. In addition, a broad exception was rejected because an inquiry into whether the jury misunderstood or misapplied an instruction improperly would intrude into the jurors' mental processes underlying the verdict, rather than the verdict's accuracy in capturing what the jurors had agreed upon. The

proposed amendment does not prevent the court from polling the jurors before the jury is discharged and taking steps to remedy any error that seems obvious when the jury is polled.

The proposed amendment to Rule 609 resolves the conflict among the courts about whether a prior conviction involves dishonesty or false statement, which can automatically be used to impeach the witness. The proposed amendment permits automatic impeachment only “if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.”

Under the amendment, the crime must be a crime of dishonesty or false statement. Evidence of all other crimes is inadmissible under the rule, irrespective of whether the witness exhibited dishonesty or made a false statement in the process of their commission. The proposed 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. If the deceitful nature of the crime is not apparent from the statute and the face of the judgment — as, for example, when a state court 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. But the proposed 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 Committee concurred with the advisory committee’s recommendations.

Recommendation: That the Judicial Conference approve the proposed amendments to Evidence Rules 404, 408, 606, and 609 and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

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