ADVISORY COMMITTEE
ON
EVIDENCE RULES

Washington, D.C.
November 13, 2003

ADVISORY COMMITTEE ON EVIDENCE RULES

AGENDA FOR COMMITTEE MEETING
Washington, D.C.
November 13, 2003

I. Opening Remarks of the Chair

Including approval of the minutes of the Spring 2003 meeting, and a report on the June 2003 meeting of the Standing Committee. The Draft minutes of the Spring 2003 meeting and the minutes of the Standing Committee are included in the agenda book.

II. Consideration of Evidence Rules

A. Rule 404(a)

The Reporter's memorandum, concerning the possible amendment that would prohibit the circumstantial use of character evidence in a civil case, is included in the agenda book.

B. Rule 408

The Reporter's memorandum concerning Rule 408, in response to the resolution of the Committee on a possible amendment at the last meeting, is included in the agenda book.

C. Rule 410

The Reporter's memorandum on Rule 410, concerning the possibility of amending the Rule to protect statements and offers by the prosecution, is included in the agenda book.

D. Rule 606(b)

The Reporter's memorandum, concerning the possibility of amending Rule 606(b) to provide an exception for correcting errors in the rendering of the verdict, is included in the agenda book.

E. Rule 607

The Reporter's memorandum addresses the possibility of amending Rule 607 to codify the case law that prohibits a party from calling a witness in bad faith solely to impeach that witness with otherwise inadmissible evidence. The memorandum is included in the agenda book.

F. Rule 609(a)

The Reporter's memorandum, concerning the possibility of amendment Rule 609(a) to rectify some conflicts in the courts and to make a certain technical change, is included in the agenda book.

G. Rule 801(d)(1)(B)

The Reporter's memorandum addresses the possibility of amending Rule 801(d)(1)(B) to provide that a consistent statement is exempt from the hearsay rule whenever it is admissible to rehabilitate the witness. The memorandum is included in the agenda book, together with an article by Judge Bullock on the subject.

H. Rule 806

The Reporter's memorandum addresses the possibility of amending Rule 806 to provide that bad acts of a hearsay declarant can be proved by extrinsic evidence if they could be the subject of inquiry were the declarant to testify. It also addresses other anomalies in the language and application of Rule 806. The memorandum is included in the agenda book, together with an article by Professor Cordray on the subject.

III. Privileges

The agenda book includes Ken Broun's draft of the "survey rule" on the psychotherapist-patient privilege, as well as the commentary on the survey rule and a discussion of possible future development with respect to that privilege. This work is intended as a model of the "Survey of Privileges" project for the Committee to consider.

IV. Next Meeting

ADVISORY COMMITTEE ON EVIDENCE RULES

October 2003

Chair:

Honorable Jerry E. Smith
United States Circuit Judge
United States Court of Appeals
12621 Bob Casey United States Courthouse
515 Rusk Avenue
Houston, TX 77002-2698

Members:

Honorable Ronald L. Buckwalter
United States District Judge
United States District Court
14614 James A. Byrne
United States Courthouse
601 Market Street
Philadelphia, PA 19106-1714

Honorable Robert L. Hinkle
United States District Judge
United States District Court
United States Courthouse
111 North Adams Street
Tallahassee, FL 32301-7717

Honorable Jeffrey L. Amestoy
Chief Justice, Vermont Supreme Court
109 State Street
Montpelier, VT 05609-0801

David S. Maring, Esquire
Maring Williams Law Office P.C.
400 E. Broadway, Suite 307
Bismarck, ND 58501

Patricia Lee Refo, Esquire
Snell & Wilmer L.L.P.
One Arizona Center
Phoenix, AZ 85004-2202

Thomas W. Hillier II
Federal Public Defender
Suite 1100
1111 Third Avenue
Seattle, WA 98101-3203

Deputy Attorney General
(ex officio)
Stuart A. Levey
Principal Associate Deputy Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W., Room 4208
Washington, DC 20530

ADVISORY COMMITTEE ON EVIDENCE RULES (CONTD.)

Liaison Members:

Honorable Thomas W. Thrash, Jr.
United States District Judge
United States District Court
2188 Richard B. Russell Federal Building
and United States Courthouse
75 Spring Street, S.W.
Atlanta, GA 30303-3361

Honorable Christopher M. Klein
United States Bankruptcy Judge
United States Bankruptcy Court
3-200 United States Courthouse
501 I Street
Sacramento, CA 95814-2322

Honorable Richard H. Kyle
United States District Judge
United States District Court
764 Warren E. Burger Federal Building
316 North Robert Street
St. Paul, MN 55101

Honorable David G. Trager
United States District Judge
United States District Court
225 Cadman Plaza, East
Room 224
Brooklyn, NY 11201

Reporter:

Professor Daniel J. Capra
Fordham University School of Law
140 West 62nd Street
New York, NY 10023

Advisors and Consultants:

Honorable C. Arlen Beam
United States Court of Appeals
435 Robert V. Denney United States Courthouse
100 Centennial Mall North
Lincoln, NE 68508

Professor Leo H. Whinery
University of Oklahoma
College of Law
300 Timberdell Road
Norman, OK 73019

Professor Kenneth S. Broun
University of North Carolina
School of Law
CB #3380, Van Hecke-Wettach Hall
Chapel Hill, NC 27599

Secretary:

Peter G. McCabe
Secretary, Committee on Rules of
Practice and Procedure
Washington, DC 20544

ADVISORY COMMITTEE ON EVIDENCE RULES

SUBCOMMITTEES

Subcommittee on Privileges
Professor Daniel J. Capra
Judge Jerry E. Smith, *ex officio*
Judge Ronald L. Buckwalter
David S. Maring, Esquire
Professor Kenneth S. Broun, Consultant

October 27, 2003
Projects

JUDICIAL CONFERENCE RULES COMMITTEES

Chairs

Honorable David F. Levi
Chief Judge, United States District Court
United States Courthouse
501 I Street, 14th Floor
Sacramento, CA 95814

Honorable Samuel A. Alito, Jr.
United States Circuit Judge
357 United States Post Office
and Courthouse
50 Walnut Street
Newark, NJ 07101

Honorable A. Thomas Small
United States Bankruptcy Judge
United States Bankruptcy Court
Post Office Drawer 2747
Raleigh, NC 27602

Honorable Lee H. Rosenthal
United States District Judge
United States District Court
11535 Bob Casey U.S. Courthouse
515 Rusk Avenue
Houston, TX 77002-2698

Honorable Edward E. Carnes
United States Circuit Judge
United States Court of Appeals
United States Courthouse, Suite 500D
One Church Street
Montgomery, AL 36104

Honorable Jerry E. Smith
United States Circuit Judge
United States Court of Appeals
12621 Bob Casey U.S. Courthouse
515 Rusk Avenue
Houston, TX 77002-2698

Reporters

Prof. Daniel R. Coquillette
Boston College Law School
885 Centre Street
Newton Centre, MA 02159

Prof. Patrick J. Schiltz
University of St. Thomas
School of Law
1000 La Salle Avenue, MSL 400
Minneapolis, MN 55403-2015

Prof. Jeffrey W. Morris
University of Dayton
School of Law
300 College Park
Dayton, OH 45469-2772

Prof. Edward H. Cooper
University of Michigan
Law School
312 Hutchins Hall
Ann Arbor, MI 48109-1215

Prof. David A. Schlueter
St. Mary's University
School of Law
One Camino Santa Maria
San Antonio, TX 78228-8602

Prof. Daniel J. Capra
Fordham University
School of Law
140 West 62nd Street
New York, NY 10023

October 27, 2003
Projects

Advisory Committee on Evidence Rules

Minutes of the Meeting of April 25th, 2003

Washington, D.C.

The Advisory Committee on the Federal Rules of Evidence (the "Committee") met on April 25th, 2003 at the Thurgood Marshall Federal Judiciary Building in Washington, D.C..

The following members of the Committee were present:

Hon. Jerry E. Smith, Chair
Hon. Ronald L. Buckwalter
Hon. Robert L. Hinkle
David S. Maring, Esq.
Patricia Lee Refo, Esq.
Thomas W. Hillier, Esq.
Christopher A. Wray, Esq.

Also present were:

Hon. Milton I. Shadur, former Chair of the Evidence Rules Committee
Hon. Thomas W. Thrash, Jr., Liaison from the Standing Committee on Rules of Practice and Procedure
Hon. Christopher M. Klein, Liaison from the Bankruptcy Rules Committee
Hon. Lee H. Rosenthal, representing the Civil Rules Committee
Hon. David G. Trager, Liaison from the Criminal Rules Committee
Professor Daniel R. Coquillette, Reporter to the Standing Committee on Rules of Practice and Procedure
Peter G. McCabe, Esq., Secretary, Standing Committee on Rules of Practice and Procedure
John K. Rabiej, Esq., Chief, Rules Committee Support Office
James Ishida, Esq., Rules Committee Support Office
Jennifer Marsh, Esq., Federal Judicial Center
Professor Daniel J. Capra, Reporter to the Evidence Rules Committee
Professor Kenneth S. Broun, Consultant to the Evidence Rules Committee
Roger Pauley, Esq., former member of the Evidence Rules Committee

Witnesses at the public hearing were:

Professor Richard Friedman
David Romine, Esq.

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

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

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

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

Opening Business of the Committee Meeting

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

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

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

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

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

circumstances, the costs of an amendment (in upsetting settled precedent and in making it more difficult to bring some civil cases) outweighed whatever benefits the amendment would provide.

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

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

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

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

The liaison from Criminal Rules suggested that as a trial judge, he would prefer having more explication in the Rule. The distinction between "corroborating circumstances" and "particularized guarantees" is that the former standard permits (and in some courts requires) a showing of independent corroborating evidence indicating that the hearsay statement is true, while the latter standard *prohibits* any reference to corroborating evidence. This distinction is not evident in the

nature of the terms used, and so it could be helpful to provide such a distinction in the text. Other Committee members noted, however, the peril of adding such language to the Rule, including the danger of freezing common law development, and the danger of misdescription and over- and under-inclusiveness. They noted that any distinction between the two standards could be clarified in the Committee Note. The Reporter offered to write a paragraph to add to the Committee Note clarifying the distinction between the two standards, and that the Committee could review this language later in the meeting.

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

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

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

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

The following is the text of the proposed amendment and Committee Note that will be referred to the Standing Committee with the recommendation that it be approved and forwarded to the Judicial Conference:

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

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

* * *

COMMITTEE NOTE

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

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

that is not "firmly rooted" must "possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial." *Idaho v. Wright,* 497 U.S. 805, 822 (1990). In contrast, "corroborating circumstances" can be found, at least in part, by a reference to independent corroborating evidence that indicates the statement is true.

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

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

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

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

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

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

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

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

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

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

At its April 2001 meeting, the Committee directed the Reporter to review scholarship, caselaw, and other bodies of evidence law to determine whether there are any evidence rules that might be in need of amendment as part of the Committee's long-range planning. At the April 2002 meeting, the Committee reviewed a number of potential changes and directed the Reporter to prepare a report on a number of different rules, so that the Committee could take an in-depth look at whether those rules require amendment. The Committee's decision to investigate those rules further was not intended to indicate that the Committee had actually agreed to propose any amendments. Rather, the Committee determined that with respect to those rules, a more extensive investigation and consideration was warranted.

At the October 2002 meeting, the Committee began to consider the Reporter's memoranda on some of the rules that have been found worthy of in-depth consideration. The Committee agreed that the problematic rules should be considered over the course of four Committee meetings, and that if any rules are found in need of amendment, the amendment proposals would be delayed in order to package them as a single set of amendments to the Evidence Rules. This would mean that the package of amendments, if any, would go to the Standing Committee at its June 2004 meeting, with a recommendation that the proposals (again, if any) be released for public comment.

With that timeline in mind, the Committee considered reports on several possibly problematic Evidence Rules at its April 2003 meeting. The goal of the Committee was not to vote definitively on whether to propose an amendment to any of those rules, but, rather, to determine whether to proceed further with the rules as part of a possible package of amendments. Thus, a "no" vote from the Committee would mean that no action would be taken to propose an amendment. A "yes" vote would mean only that the Committee was interested in further inquiry into a possible amendment and would either tentatively approve or consider possible language for an amendment at a later date.

1. Rule 106

The Reporter's memorandum on Rule 106, the rule of completeness, indicated that courts and commentators are in dispute over two important questions about the scope of the rule. One question is whether the rule operates as an independent rule of admissibility—admitting completing evidence even if it would otherwise be excluded as hearsay or under some other rule of exclusion. This is called a "trumping" function. The other major question is whether the rule should permit completing evidence of oral statements and actions as well as the written statements currently covered by the rule. The Reporter prepared model drafts that would cover these points. At its Fall 2002 meeting, the Committee considered this memorandum and noted that while the courts appeared

to be in dispute over the existence of a trumping function, this dispute does not seem to make a real difference in the cases. The Committee also unanimously rejected the suggestion that Rule 106 should be amended to cover oral statements, on the ground that such a change could lead to disruption and uncertainty at trial. The change could lead to attempts of an opponent to disrupt the proponent's order of proof by contending that the proponent's witness testified to a misleading portion of an oral statement; disputes will often arise about what the oral statement actually was. There often will have to be a sidebar hearing to determine who said what.

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

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

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

2. Rule 404(a)

At its Fall 2002 meeting, the Committee tentatively agreed on language that would amend Evidence Rule 404(a) to prohibit the circumstantial use of character evidence in civil cases. The Committee determined that an amendment might be appropriate because the circuits are split over whether character evidence can be offered to prove conduct in a civil case. Such a circuit split can cause disruption and disuniform results in the federal courts. Moreover, the question of the admissibility of character evidence to prove conduct arises frequently in civil rights cases, so an amendment to the Rule would have a helpful impact on a fairly large number of cases. The Committee also concluded that as a policy matter, character evidence should not be admitted to prove conduct in a civil case. The circumstantial use of character evidence is fraught with peril in

any case, because it could lead to a trial of personality and could cause the jury to decide the case on improper grounds. But the risks of character evidence historically have been considered worth the costs where a criminal defendant seeks to show his good character or the pertinent bad character of the victim. This so-called "rule of mercy" is thought necessary to provide a counterweight to the resources of the government, and is a recognition of the possibility that the accused, whose liberty is at stake, may have little to defend with other than his good name. None of these considerations is operative in civil litigation. In civil cases, the substantial problems raised by character evidence were considered by the Committee to outweigh the dubious benefit that character evidence might provide.

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

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

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

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

Judge Smith then asked whether any member of the Committee wanted to revisit or to question the amendment to Rule 404(a) that was tentatively approved at the Fall 2002 meeting, i.e., the amendment that would prohibit the use of character evidence to prove conduct in civil cases. No Committee member expressed any concerns about that proposal. The Committee resolved to consider the proposed amendment as part of a possible package of amendments at the Spring 2004 Committee meeting.

3. Rule 408

The Reporter's memorandum on Rule 408, prepared for the Fall 2002 meeting, noted that the courts are divided on three important questions concerning the scope of the Rule:

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

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

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

At the Fall 2002 meeting, the Committee tentatively agreed to consider (as part of a possible package of amendments) an amendment that would limit the impeachment exception to use for bias, and that would exclude compromise evidence even if offered by the party who made an offer of settlement. As to the use of compromise evidence in criminal cases, the Justice Department representative noted at that time that the Department had not yet come to a conclusion on whether, as a matter of policy, such evidence should be admissible in criminal cases. For the Spring 2003 meeting, the Reporter prepared two models, one that would admit compromise evidence in criminal cases and one that would exclude it, with both models containing an impeachment exception limited to bias and a preclusion of compromise evidence even where offered by the party who made the settlement offer.

The models prepared by the Reporter attempted to restructure the existing Rule. As it stands, Rule 408 is structured in four sentences. The first sentence states that an offer or acceptance in compromise "is not admissible to prove liability for or invalidity of the claim or its amount." The second sentence provides the same preclusion for statements made in compromise negotiations–an awkward construction because a separate sentence is used to apply the same rule of exclusion applied in the first sentence. The third sentence says that the rule "does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations." The rationale of this sentence, added by Congress, is to prevent parties from immunizing pre-existing documents from discovery simply by bringing them to the negotiating table. The addition of this sentence at this point in the Rule, however, creates a structural problem because the fourth sentence of the rule contains a list of permissible purposes for compromise evidence, including proof of bias. As such, the third sentence provides a kind of break in the flow of the Rule. Moreover, the fourth sentence is arguably completely unnecessary, because none of the permissible purposes involves using compromise evidence to prove the validity or amount of the claim. Since the only impermissible purpose for this evidence is when it is offered to prove the validity or amount of a claim, it is unnecessary to add a sentence specifying certain (though apparently not all) permissible purposes for the evidence.

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

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

Most Committee members stated in response that policy arguments weigh strongly in favor of excluding evidence of a civil compromise in a later criminal case. If such evidence is admissible in a criminal case, it significantly diminishes the incentive to settle civil litigation. Moreover, excluding compromise evidence in criminal cases would not result in the loss of evidence in such cases—without a rule protecting compromise evidence, there is likely to be no settlement that could ever be admitted in a criminal case. In other words, the only evidence "lost" is that generated by the rule protecting compromise evidence.

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

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

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

The Committee asked the DOJ representative if the Department might wish to reconsider its

position on the use of compromise evidence in subsequent criminal litigation if the original structure of Rule 408 is retained. In other words, if notice cases fall out of the equation, does the balance of interests, in the Department's view, justify exclusion or admission of civil compromise evidence as proof of defendant's guilt? The DOJ representative promised to bring the reformulated question back to the Department for further discussion.

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

4. Rule 410

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

As a policy matter, the Committee determined at its Fall 2002 meeting that government statements and offers in plea negotiations should be excluded from a criminal trial, in the same way that a defendant's statements are excluded. A mutual rule of exclusion would encourage a free flow of discussion that is necessary to efficient guilty plea negotiations; there is no good reason to protect only the statements of a defendant in a guilty plea negotiation. The Committee also determined, however, that if an amendment is required to protect government statements and offers in guilty plea negotiations, that amendment should be placed in Rule 410, not Rule 408, which, by its terms, covers statements and offers of compromise made in the course of attempting to settle a *civil* claim. Rule 410, which governs efforts to settle criminal charges, is the appropriate place for any amendment that would exclude statements and offers in guilty plea negotiations.

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

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

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

As to the applicability of the Rule to rejected and vacated pleas, the Committee was generally agreed that the question has not arisen often enough in the courts to justify an amendment on its own. However, if the Rule is to be amended on other grounds, the Committee agreed that it would be useful to clarify that the protections of the Rule are applicable to rejected and vacated pleas as well as to withdrawn pleas. Committee members noted that as a policy matter, there was no basis for distinguishing a withdrawn plea from a plea that is rejected or vacated. In any of these cases, the policy of protecting plea negotiations warrants protection from these subsequent unforeseen developments–otherwise negotiations are likely to be chilled by uncertainty.

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

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

Finally, the Committee agreed that the question of whether the protections of Rule 410 can be waived should be addressed in the Committee Note and not in the Rule. The Supreme Court has

decided that the defendant can agree to the use of statements made in plea negotiations to impeach him should he testify at trial, but courts are still working out whether the power to waive the protections of Rule 410 extends to other situations. Thus, it would be counterproductive to codify a waiver rule in the text. But it would be important to acknowledge the waiver rule in the Committee Note, to prevent speculation that any amendment was rejecting Supreme Court precedent on the subject.

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

5. Rule 606(b)

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

At its April 2002 meeting, the Committee directed the Reporter to prepare a report on a possible amendment to Rule 606(b) that would clarify whether and to what extent juror testimony can be admitted to prove some disparity between the verdict reported and the verdict intended by the jurors. The Reporter's memorandum addressed two problems under the current Rule: 1. All courts have found an exception to the Rule, allowing juror testimony on clerical errors in the reporting of the verdict, even though there is no language permitting such an exception in the text of the Rule; and 2. The courts are in dispute about the breadth of that exception–some courts allow juror proof whenever the verdict has an effect that is different from the result that the jury intended to reach, while other courts follow a narrower exception permitting juror proof only where the verdict reported is different from that which the jury actually reached because of some clerical error. The former exception is broader because it would permit juror proof whenever the jury misunderstood (or ignored) the court's instructions. For example, if the judge told the jury to report a damage award without reducing it by the plaintiff's proportion of fault, and the jury disregarded that instruction, the verdict reported would be a result different from what the jury actually intended, thus fitting the broader exception. But it would not be different from the verdict actually reached, and so juror proof

would not be permitted under the narrow exception for clerical errors.

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

The Committee was also unanimous in its belief that if an amendment to Rule 606(b) is to be proposed, it should codify the narrower exception of clerical error. An exception that would permit proof of juror statements whenever the jury misunderstood or ignored the court's instruction was thought to have the potential of intruding into juror deliberations, and upsetting the finality of verdicts, in a large and undefined number of cases. As such, the broad exception is in tension with the policies of the Rule. In contrast, an exception permitting proof only if the verdict reported is different from that actually reached by the jury does not intrude on the privacy of jury deliberations, as the inquiry only concerns what the jury decided, not why it decided as it did.

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

5. Rule 803(6)

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

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

Broun concluded that although there are some differences in the federal courts in dealing with the issue, for the most part a consistent pattern has emerged. Ordinarily, there will be a required business duty to report, but that duty may be supplanted by a clear motive to verify or other circumstances that bring the communication within the policy behind the business records exception.

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

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

Privileges

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

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

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

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

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

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

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

Other Business

1. "De Bene Esse" Depositions

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

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

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

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

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

2. Proposal on Preserving Exhibits

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

evidence, providing for court retention for the former pending appeal, but not for the latter.

3. Pending Legislation

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

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

4. Tribute to Judge Shadur

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

Next Meeting

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

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

Respectfully submitted,

Daniel J. Capra
Reed Professor of Law
Reporter

THE DRAFT MINUTES FOR THE JUNE 2003

STANDING COMMITTEE MEETING

WILL BE SENT TO YOU IN A SUBSEQUENT MAILING

FORDHAM
University School of Law

Lincoln Center, 140 West 62nd Street, New York, NY 10023-7485

Daniel J. Capra
Philip Reed Professor of Law

Phone: 212-636-6855
e-mail:dcapra@law.fordham.edu
Fax: 212-636-6899

Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Proposal to amend Rule 404(a)
Date: November 1, 2003

At its October 2002 meeting the Evidence Rules Committee tentatively approved for further consideration, as part of its long-range project, an amendment to Rule 404(a) that explicitly would prohibit the circumstantial use of character evidence in civil cases. This memorandum summarizes the work of the Committee on the proposed amendment to this point.

I. The Committee's Tentative Approval for Further Consideration

The Committee's rationale for continuing with an amendment to Rule 404(a) was twofold:

1) An amendment is appropriate because the circuits are split over whether character evidence can be offered to prove conduct in a civil case. The question arises frequently in civil rights cases, so an amendment to the rule would have a helpful impact on a fairly large number of cases.

2) This split is best resolved by a rule prohibiting, rather than permitting, the circumstantial use of character evidence in civil cases. A rule of prohibition is consistent with the existing language of the rule, the original Advisory Committee Note, and the majority of the cases. It is also the better rule as a matter of policy. 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 only 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. It is a recognition of the possibility that the accused, whose liberty is at stake, may have little to defend with other than his good name. None of these considerations is operative in civil litigation. In civil cases, the substantial problems raised by character

evidence were considered by the Committee to outweigh the dubious benefit that character evidence might provide.

3) The Committee also agreed that if Rule 404(a) is to be amended, the amendment should include a reference in the text that evidence of a victim's character, otherwise admissible under the Rule, nonetheless could be excluded under Rule 412 in cases involving sexual assault. Although the need for such clarification might not justify an amendment on its own, the Committee determined that clarifying language would be useful as part of a larger amendment.

4) The Committee rejected a suggestion from the public that Rule 404(a) be amended to specify that the limitations on character evidence do not apply when character is "in issue." Rule 404(a) by its terms applies only when character evidence is offered circumstantially, and therefore it does not apply when a party's character is an element of the case. Nor have the courts had any problem in holding that Rule 404(a) is inapplicable when character is "in issue."

What follows is a working draft of a proposed amendment to Rule 404(a). This amendment could be taken up again as part of a possible package of future amendments at the Spring 2004 meeting. An alternative is that the Committee might recommend it to the Standing Committee at its January meeting, for publication in August together with any other amendments that might be proposed. This may (or may not) be advantageous, as historically the January meeting of the Standing Committee has a lighter agenda than the June meeting.

Working Draft of Proposed Amendment to Rule 404(a)

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 except as provided in Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

* * *

Model Committee Note

The Rule has been amended to clarify that in a civil case character evidence is never admissible to prove conduct in conformity therewith. 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. *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 and 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.

FORDHAM
University School of Law

Lincoln Center, 140 West 62nd Street, New York, NY 10023-7485

Daniel J. Capra
Philip Reed Professor of Law

Phone: 212-636-6855
e-mail:dcapra@law.fordham.edu
Fax: 212-636-6899

Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Possible Amendment to Rule 408
Date: November 1, 2003

At its April 2002 meeting the Evidence Rules Committee directed the Reporter to prepare a report on Rule 408–the Rule prohibiting admission of settlements and statements made in settlement when offered to prove the validity or amount of a claim–so that the Committee could determine whether it is necessary to propose an amendment to that Rule. At its Fall 2002 meeting the Committee reviewed the Rule and agreed to continue its consideration of a possible amendment. Committee consideration continued at the Spring 2003 meeting and suggestions were made for improvement and for further research into other questions involving the Rule.

The possible need for amendment of Rule 408 arises from at least three problems that have been raised in the application of the Rule. Those problems are: 1) whether compromise evidence is admissible in a subsequent criminal case; 2) whether statements made in settlement negotiations are admissible to impeach a party by way of contradiction or prior inconsistent statement; 3) whether Rule 408 prohibits settlement offers when it is the party who made the offer that wants the evidence admitted. Each of these questions has been the subject of conflicting interpretations among the courts.

This report is divided into four parts. Part One describes the Committee's consideration of a possible amendment up to this point. Part Two discusses the results of research on two aspects of the Rule that were raised at the last meeting. Part Three sets forth some models for an amendment within the current structure of the Rule. If the Committee decides that one of the models is acceptable, then this model can be kept for consideration as part of a possible package of amendments at the Spring 2004 meeting.

Part Four presents a "restyled" amendment for the Committee's consideration. The restylization retains the "validity or amount" language of the existing rule, but restructures the rule in an attempt to make it read a bit better. If the Committee decides that this restructure is useful, then any substantive changes agreed upon by the Committee can be incorporated for consideration

as a possible package of amendments at the Spring 2004 meeting.

The report also includes, as an attachment, a recent case from the Tenth Circuit holding that Rule 408 protects against the use of civil compromise evidence in subsequent criminal cases. The case provides a good discussion of the case law on the subject.

I. Rule 408 and the Committee's Determinations Up To This Point

The Rule

Rule 408 currently provides as follows:

Rule 408. Compromise and Offers to Compromise

Evidence of (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 claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

The Advisory Committee Note to Rule 408 is as follows:

Advisory Committee's Note

As a matter of general agreement, evidence of an offer to compromise a claim is not receivable in evidence as an admission of, as the case may be, the validity or invalidity of the claim. As with evidence of subsequent remedial measures, dealt with in Rule 407, exclusion may be based on two grounds. (1) The evidence is irrelevant, since the offer may be motivated by a desire for peace rather than from any concession of weakness of position. The validity of this position will vary as the amount of the offer varies in relation to the size of the claim and may also be influenced by other circumstances. (2) A more consistently impressive ground is promotion of the public policy favoring the compromise and settlement of disputes. McCormick §§ 76, 251. While the rule is ordinarily phrased in terms of offers of compromise, it is apparent that a similar attitude must be taken with respect to completed compromises when offered against a party thereto. This latter situation will not, of course, ordinarily occur except when a party to the present litigation has compromised with a third person.

The same policy underlies the provision of Rule 68 of the Federal Rules of Civil Procedure that evidence of an unaccepted offer of judgment is not admissible except in a

proceeding to determine costs.

The practical value of the common law rule has been greatly diminished by its inapplicability to admissions of fact, even though made in the course of compromise negotiations, unless hypothetical, stated to be "without prejudice," or so connected with the offer as to be inseparable from it. McCormick § 251, pp. 540-41. An inevitable effect is to inhibit freedom of communication with respect to compromise, even among lawyers. Another effect is the generation of controversy over whether a given statement falls within or without the protected area. These considerations account for the expansion of the rule herewith to include evidence of conduct or statements made in compromise negotiations, as well as the offer or completed compromise itself. For similar provisions see California Evidence Code §§ 1152, 1154.

The policy considerations which underlie the rule do not come into play when the effort is to induce a creditor to settle an admittedly due amount for a lesser sum. McCormick § 251, p. 540. Hence the rule requires that the claim be disputed as to either validity or amount.

The final sentence of the rule serves to point out some limitations upon its applicability. Since the rule excludes only when the purpose is proving the validity or invalidity of the claim or its amount, an offer for another purpose is not within the rule. The illustrative situations mentioned in the rule are supported by the authorities. As to proving bias or prejudice of a witness, see Annot., 161 A.L.R. 395, contra, Fenberg v. Rosenthal, 348 Ill. App. 510, 109 N.E.2d 402 (1952), and negativing a contention of lack of due diligence in presenting a claim, 4 Wigmore § 1061. An effort to "buy off" the prosecution or a prosecuting witness in a criminal case is not within the policy of the rule of exclusion. McCormick § 251, p. 542.

For other rules of similar import, see Uniform Rules 52 and 53; California Evidence Code §§ 1152, 1154; Kansas Code of Civil Procedure §§ 60-452, 60-453; New Jersey Evidence Rules 52 and 53.

Committee Consideration and Resolution at the Fall 2002 Meeting

The Reporter's memorandum prepared for the Fall 2002 meeting noted that the courts are divided on three important questions concerning the scope of the rule:

1) Some courts hold that evidence of compromise is admissible against the settling party in subsequent criminal litigation, relying on a policy argument that the interest in admitting relevant evidence in a criminal case outweighs the interest in encouraging

settlement. Other courts hold that compromise evidence is excluded in subsequent criminal litigation, noting that there is nothing in the language of Rule 408 that would permit the use of evidence of civil compromise to prove criminal liability, and that to admit such evidence in a criminal case would discourage a party from settling a parallel civil case.

2) Some courts hold that statements made in settlement negotiations can be admitted to impeach by way of contradiction or prior inconsistent statement. Other courts disagree, noting that the only use for impeachment specified in the Rule is impeachment for bias, and noting further that if statements in compromise could be admitted for contradiction or prior inconsistent statement, this would chill settlement negotiations, contrary to 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 proffers 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.

Fall 2002 Meeting

At its Fall 2002 meeting, the Committee began its discussion on whether Rule 408 should be amended to specify that compromise evidence is either admissible or inadmissible in criminal cases. Most Committee members stated that policy arguments weigh strongly in favor of excluding evidence of a civil compromise in a later criminal case. If such evidence is admissible in a criminal case, it will significantly diminish the incentive to settle civil litigation. Moreover, excluding compromise evidence in criminal cases would not result in the loss of evidence in those cases—without a rule protecting compromise evidence, there is likely to be no settlement that could ever be admitted in a criminal case. In other words, the only evidence "lost" is that generated by the rule protecting compromise evidence.

Committee members argued that it is necessary to amend Rule 408 to provide specifically that evidence of a civil compromise is inadmissible in subsequent criminal litigation. Under the case law interpreting the current Rule, such evidence is admissible in some circuits and not in others. This is a poor state of affairs, because there may be no way, at the time of a civil settlement, to predict where a criminal litigation might be brought. Moreover it is unfair to have such powerful evidence admissible against some defendants and not others. Finally, the possibility that a civil settlement will be admissible in a criminal case somewhere presents a trap for the unwary. Rule

408, by its terms, does not specify that civil settlements are admissible in criminal litigation, so a lawyer and client may enter into civil settlement negotiations under the mistaken impression that such negotiations and settlement never could be used against the client in a criminal case. The member from the Department of Justice emphasized, however, that while the DOJ was in favor of an amendment to Rule 408 to resolve the split in the circuits, it had not at that time come to a conclusion as to whether civil settlements should be admissible or inadmissible in subsequent criminal litigation.

The Committee then discussed whether the rule should permit impeachment by way of prior inconsistent statement and contradiction. Committee members agreed that the Rule should not permit such broad impeachment, because to do so would unduly inhibit settlement. Parties justifiably would be concerned that something said in settlement negotiations later could be found inconsistent with some statement or position taken at trial; it is virtually impossible to be absolutely consistent throughout the settlement process and trial. The Committee resolved that if Rule 408 is to be amended, it should include a provision specifically stating that compromise evidence cannot be offered to impeach by way of prior inconsistent statement or contradiction. The Reporter noted that such a provision exists in several states.

The Committee then turned to whether compromise evidence should be admissible in favor of the party who made the statement or offer of settlement. The Committee determined that such evidence should not be admissible. If a party were to reveal its own statement or offer, this would itself reveal the fact that the adversary entered into settlement negotiations; such evidence is entitled to protection on its own. Thus, it would not be fair to hold that the protections of Rule 408 can be waived unilaterally, because the Rule, by definition, protects both parties from having the fact of negotiation disclosed to the jury. Moreover, a party that admits its own offer or statement in compromise would open the door to evidence of counter-offers, responses to offers and counter-offers, and the like—all with the possibility that lawyers will have to be disqualified because of the need to testify about the tenor and import of the settlement negotiations. There is also a possibility that a party might give "window-dressing" offers in an attempt to generate evidence for use at trial. The Committee concluded that allowing a party to admit its own settlement statements and offers would open up a "can of worms" and could not be justified by any corresponding benefit. The Committee resolved that any amendment to Rule 408 should include a provision stating that compromise evidence is excluded even if proffered by the party that made the statement or offer in compromise. Such a provision is necessary, because the circuits are divided on the point, and differing results on the question are not justifiable.

At the end of its discussion, the Committee directed the Reporter to prepare the following for the Committee's consideration at the next meeting:

1) a draft of an amendment to Rule 408 that would provide that compromise evidence is inadmissible in a criminal case;

2) a draft of an amendment that would provide, in contrast, that such evidence is admissible in a criminal case;

3) provisions in both model drafts of Rule 408 that would provide that compromise evidence may not be used for impeachment by prior inconsistent statement or contradiction; and

4) provisions in both model drafts that would provide that compromise evidence is not admissible even if proffered by the party who made the statement or offer in compromise.

Spring 2003 Meeting

The models prepared by the Reporter for the Spring 2003 meeting attempted to restructure the existing Rule. As it stands, Rule 408 is structured in four sentences. The first sentence states that an offer or acceptance in compromise "is not admissible to prove liability for or invalidity of the claim or its amount." The second sentence provides the same preclusion for statements made in compromise negotiations–an awkward construction because a separate sentence is used to apply the same rule of exclusion applied in the first sentence–one sentence for the offer and the other one for statements. The third sentence says that the rule "does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations." The apparent rationale of this sentence, added by Congress, is to prevent parties from immunizing pre-existing documents from discovery simply by bringing them to the negotiating table. The addition of this sentence at this point in the Rule, however, creates a structural problem because the fourth sentence of the rule contains a list of permissible purposes for compromise evidence, including proof of bias. As such, the third sentence provides a kind of break in the flow of the Rule. Moreover, the fourth sentence is arguably completely unnecessary, because none of the expressed "exceptions" involves using compromise evidence to prove the validity or amount of the claim. The only impermissible purpose for this evidence is when it is offered to prove the validity or amount of a claim. So it is unnecessary to add a sentence specifying certain (though apparently not all) permissible purposes for the evidence.

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

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

Most Committee members disagreed with the DOJ opposition and continued to believe that policy arguments weigh strongly in favor of excluding evidence of a civil compromise in a subsequent criminal case. Exclusion was considered necessary to encourage settlement of civil cases, especially because parallel civil and criminal investigations are becoming more frequent.

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

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

Committee members noted that there was another virtue in retaining the language specifying validity or amount of the claim as the only impermissible purpose for compromise evidence. Retaining this language will solve the DOJ concern about the use of compromise evidence in criminal cases to prove notice. If the evidence of a civil compromise is offered to prove notice, then it is not offered to prove the validity or amount of the civil claim. See, e.g., *United States v. Austin,* 54 F.3d 394 (7th Cir. 1995) (no error to admit evidence of the defendant's settlement with the FTC,

because it was offered to prove that the defendant was on notice that subsequent similar conduct was wrongful). Thus, the question of whether Rule 408 should apply in criminal cases is properly limited to cases where the government is using the evidence not to prove notice but rather to prove that the defendant had admitted guilt when settling the civil case. On this limited question, there is much to be said for a rule allowing a defendant to settle a civil case without the fear that it will later be used as an admission of guilt in a criminal prosecution.

The Committee asked the DOJ representative if the Department might wish to reconsider its position on the use of compromise evidence in subsequent criminal litigation, so long as the original structure of Rule 408 is retained. In other words, if notice cases fall out of the equation, does the balance of interests, in the Department's view, justify exclusion or admission of civil compromise evidence as proof of the defendant's guilt? The DOJ representative promised to bring the reformulated question back to the Department for further discussion.

The Committee resolved to give further consideration to an amendment to Rule 408 at the Fall 2003 meeting. In further discussion, the Committee asked the Reporter to consider two additional questions in working on a new model for a proposed amendment:

1) Are courts having problems in determining when a matter is "in dispute" so as to trigger the protections of Rule 408?

2) What is the meaning of the sentence providing that the Rule does not require exclusion of evidence "otherwise discoverable" merely because it is presented in the course of compromise negotiations? Is there any way to sharpen that language to make it more understandable?

The next section of this memorandum deals with the two questions on which research was requested.

II. Possible Additional Problems With Rule 408

A. When Does a "Claim Which Was Disputed" Arise to Trigger the Protections of Rule 408?

Rule 408 protects offers and statements only when made "in compromising or attempting to compromise a claim which was disputed as to either validity or amount." Thus, if a statement or offer was made before a "claim " which is "disputed" arose, it is not protected by the Rule. There are a number of cases throughout the circuits that discuss the meaning of the term "claim which was disputed".

An amendment to the term "claim which was disputed" arguably might be justified if two conditions can be shown: 1) Courts are in dispute over the meaning of the term, leading to different results in different circuits; and 2) Language could be found that is sufficiently precise to solve the conflict and avoid any further uncertainty about when the Rule is triggered. Research indicates that neither of these preconditions are satisfied, and that therefore a change in the "claim which was disputed" language does not appear to be justified.

A superficial reading of the cases might lead one to think that there is indeed a conflict in the courts about the meaning of "claim which was disputed." A student note claims that "the circuit courts implement many 'tests' – some broad, some narrow – to determine if Rule 408 protects certain settlement communications made before litigation." Comment, *When Are Settlement Communications Protected as "Offers to Compromise" Under Rule 408?*, 40 Santa Clara L.Rev. 547 (2000). But upon close reading of the cases, it is apparent that any difference in language used to define a "test" is meaningless: all of the courts appear to apply the same test for when a disputed "claim" has arisen, and there appears to be no case in which a difference in phrasing the "test" has actually created a difference in result.

This is not to say that it is always easy to determine whether a disputed claim has arisen at the time of a communication or offer in settlement. As it is said in *Emerging Problems Under the Federal Rules of Evidence* at 69 (3rd ed. 2002):

> Problems in determining when a "claim" is "disputed" antedated promulgation of the Rule and are attributable not to the language of the Rule, but to the difficulties inherent in applying the underlying policy of encouraging settlements.

In other words, the question of whether a disputed claim has arisen will depend on the circumstances, and these circumstances cannot be controlled or affected by the language of a Rule.

The Courts appear to agree on the following propositions in construing the term "claim which was disputed" in Rule 408:

1. Communications and offers can be protected even though litigation has not yet been filed.

2. Business negotiations, occurring before any clear disagreement between the parties, are not protected.

3. Communications are protected if made after a clear difference of opinion has been expressed by both parties.

The case that best summarizes the case law is *Affiliated Manufacturers, Inc. v. Aluminum Co. of America,* 56 F.3d 521, 527 (3rd Cir. 1995). This was an action for payment of certain invoices. The plaintiff sought to exclude portions of correspondence, memoranda, and deposition testimony referring to compromises. The defendant argued that these were just business communications and cited some case law that appeared to take a strict approach to the term "claim which was disputed". The case cited for its allegedly strict view was *Big O Tire Dealers, Inc., v. Goodyear Tire and Rubber Co.,* 561 F.2d 1365 (10th Cir. 1977), in which the court declared that the discussions between the parties "had not crystallized to the point of threatened litigation." In the defendant's view, this case law required litigation to be imminent for the Rule to be triggered. But the *Affiliated* Court noted that Rule 408 requires only "an apparent difference of view between the parties concerning the validity or amount of a claim." It stated that the defendant had "oversimplified" the holding in *Big O* and noted that all courts have made clear that actual litigation is not required for the Rule to be triggered. The *Affiliated* Court concluded that "the Rule 408 exclusion applies where an actual dispute or a difference of opinion exists, rather than when discussions crystallize to the point of threatened litigation" and that the Rule is triggered when there is "a clear difference of opinion between the parties."

Thus, as stated above, any difference in the cases is dependent not on different tests but on the different circumstances arising in each case.. The opinion in *Johnson v. Land O'Lakes, Inc.,* 181 F.R.D. 388, 392 (N.D. Iowa 1998), is especially helpful as it reviews all the cases and finds that while there is a difference in language used by some courts, all can be reconciled by the following standard:

> Thus, the "trigger" for application of Rule 408, the existence of an actual dispute as to existing claims, appears to be whether the parties have rejected each other's claims for performance, or, to put it another way, whether the parties have reached a clear difference of opinion as to what performance is required. *When this point is reached depends upon the circumstances*, and thus a determination of whether Rule 408 bars admission of discussions cannot be made without hearing evidence as to the context of the challenged discussions.

(Emphasis added).

In sum, there seems little reason to amend the term "claim which was disputed." The only arguable possibility for a change would be to incorporate the "clear difference of opinion" language from the cases cited above. But it is not apparent that this is an improvement. The language is not measurably more precise than the current language in the Rule, and to make such an amendment would imply a need for change that does not appear to exist. Nevertheless, on the possibility that

the Committee believes that such a change of language is justified, a model amendment with this change is set forth in Part Three of this memorandum.

It could be argued that any uncertainties about the term "claim which was disputed" could be remedied by including a discussion of the point in a Committee Note to the Rule. That discussion might cite the cases discussed above and conclude by setting forth the "clear difference of opinion" standard that is found in the cases. It might point up that any apparent conflict in the cases is based not on any difference in the test applied, but rather in the different circumstances found in the cases. But there could be a problem with adding all of this analysis to the Committee Note. That Note discussion would not be tied to any change in the text of the Rule, and many members of the Standing Committee have taken the position that any exposition in the Committee Note should be limited to an explanation of and justification for the textual change in the Rule. Thus, any treatment of the "claim which was disputed" language solely in the Committee Note would raise concern from these Standing Committee members if the text of the Rule is not itself amended. However, if the Committee believes that an addition to the Committee Note is justified, language can be prepared to add to the proposed Note for the Spring 2004 meeting.

B. What is the Purpose of the "Otherwise Discoverable" Language in the Rule?

The third sentence of Rule 408 provides: "This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations." This language was added by Congress to deal with a specific perceived problem raised by the executive branch that will be discussed below. The sentence has not received much treatment in the cases, probably because it states a self-evident proposition and is basically superfluous.

Treatise Discussion

The best discussion of the meaning of the "otherwise discoverable" sentence is found in 23 Wright and Graham, *Federal Practice and Procedure* § 5310. The following description basically summarizes the analysis in that treatise. Material in quotation marks comes either from the treatise or the legislative history:

> "This curious provision is the result of obfuscation of the meaning of the rule by government agencies." The DOJ, the EEOC, and the Treasury Department all pushed for the addition of the third sentence of the Rule. The concern was that if "factual information" obtained during settlement were excluded, "it would severely affect the enforcement efforts

of agencies that investigate and attempt to settle alleged violations at the same time." The agencies argued that they frequently receive factual material ("documents, compilations, and the like") in the course of settlement discussions which is essential to the proof of a violation. The agencies further contended that without the "otherwise discoverable" sentence, agencies would be required "to initiate costly, duplicative and time consuming discovery proceedings to obtain information which it already has in its possession."

The agency's argument has two parts. First, there was a fear that statements made in settlement negotiations would be construed to protect against admission of any other evidence of the facts contained in such statements. That is, if a defendant said in a settlement negotiation, "we admit corporate misconduct", then the Rule would require exclusion of pre-existing documents that would provide evidence of that misconduct. Wright and Graham call this the "immunity argument." The second argument was that even if there were no immunity for such evidence, it would probably be cheaper to prove the facts by statements made in settlement negotiations than it would be to go out and get the other evidence through discovery. Wright and Graham refer to this as the "discovery costs argument."

Wright and Graham note that neither the commentators nor the state codifiers "have been much impressed with the immunity argument." (The third sentence of the Federal Rule is criticized in the Committee Notes of the state rules in Maine and Wyoming, among others). "All have found it quite simple to distinguish between the admissibility of statements made during compromise negotiations and the admissibility of other evidence offered to prove the facts that are the subject of these statements." The distinction is similar to that used in the attorney-client privilege, where the privilege protects the communication from the client to the attorney, but not the underlying fact communicated. In sum, the government's "immunity argument" is based on a concern that is not real in fact.

As to the discovery costs argument, Wright and Graham argue that it "seems irrelevant and overdrawn." If the fact communicated in settlement has already been produced in discovery, the costs of discovery have already been incurred and so the government's argument is "beside the point." On the other hand, if the fact has not already been discovered, the adversary is quite unlikely to refer to it in settlement negotiations, "lest he tip off his opponent as to the existence and importance of the fact." Thus, the discovery costs argument "only applies in cases where the opponent inadvertently reveals an undiscovered fact."

Despite the apparent lack of merit to the government's concerns, the House subcommittee was persuaded to add the "otherwise discoverable" sentence to the proposed Rule. The subcommittee explained that under the new sentence, "admissions of liability or opinions given during compromise negotiations continue inadmissible, but evidence of facts is admissible." The Senate Report explains the need for the sentence as follows:

> "This amendment adds a sentence to insure that evidence, such as documents, is not rendered inadmissible merely because it is presented in the course of compromise negotiations if the evidence is otherwise discoverable. A party would not be able to immunize from admissibility documents otherwise discoverable merely by offering them in a compromise negotiation."

Wright and Graham cite various sources to maintain that the "otherwise discoverable" sentence is "superfluous." For example, the drafters in Maine, rejecting the sentence, declared that it "seems to state what the law would be if it were omitted." The drafters in Wyoming called the sentence "superfluous." Mueller and Kirkpatrick refer to it as "redundant." And so forth.

Wright and Graham, in an exercise in fairness, try to make some sense of the provision by turning the language around, so that there might be an implication that information that is *not* discoverable is *not* admissible simply because it is disclosed in compromise negotiations. In other words, a sentence providing for inclusion of evidence may have meant, by negative inference, to exclude certain evidence. But after going through the various permutations on the word "discoverable"–does it mean discoverable under the Civil Rules?, discoverable independently by ordinary investigation?, etc., Wright and Graham conclude that the use of the word "discoverable" is simply an error. They conclude that given the indefiniteness of the term "otherwise discoverable", what Congress must have meant was "otherwise admissible." They note that in every explanation of the provision in the Congressional documents, "one can substitute the word 'admissible' for 'discoverable' without destroying the sense of what is said.."

Wright and Graham have this to say about construing the sentence as providing admissibility of "otherwise admissible" evidence disclosed in compromise negotiations:

> This eliminates most of the mischief that might be done by the third sentence without reducing it to a complete cipher. Under this interpretation, the third sentence becomes merely a gloss on the second sentence of the rule rather than an independent regulator of admissibility. It tells us that "conduct or statements" in the second sentence of the rule does not cover the substance of any evidence disclosed in compromise negotiations, though it may bar admission of the act of disclosure.

In other words, the sentence most plausibly means that Rule 408 protects communications during compromise negotiations, but it does not prevent proof of the underlying facts that are communicated–similar to the attorney-client privilege. This interpretation would mean that documents that pre-existed the compromise negotiation are not protected by the Rule, whereas communications about the existence of the documents or the facts contained in the them would be protected if the communications were made during compromise negotiations.

Case Law

There is very little case law on the "otherwise discoverable" provision of Rule 408, but what exists seems to follow the analysis set out in Wright and Miller above: that the third sentence of the Rule should be read to state the unremarkable position that evidence otherwise admissible is not excluded simply because it was presented in the course of compromise negotiations. This reading leads to four practical points found in the case law:

1) Pre-existing documents (i.e., documents prepared independently of compromise) are not protected simply because they are presented in compromise negotiations. See *Young v. McDowell Services, Inc.*, 1991 U.S.Dist.Lexis 21814 (N.D.Ga.) (form letter prepared independently of negotiations was admissible, despite the fact that it was later presented in compromise negotiations).

2) Underlying facts are not protected simply because they are disclosed in compromise negotiations–thus they can be proved through evidence other than the compromise communication itself. See *Liautaud v. Generationxcellent, Inc.*, 2002 U.S.Dist. Lexis 2404 (N.D.Ill.) (no protection of information that was proven independently of the compromise negotiations).

3) If a document *is* prepared for purposes of settlement, it is protected by the Rule. See *Ramada Development Co. v. Rauch,* 644 F.2d 1097 (5th Cir. 1981) (document prepared on behalf of both parties to assist them in settlement was protected by Rule 408; the third sentence of the Rule "was intended to prevent one from being able to immunize from admissibility documents otherwise discoverable merely by offering them in a compromise negotiation. Clearly such an exception does not cover the present case where the document, or statement, would not have existed but for the negotiations, hence the negotiations are not being used as a device to thwart discovery by making existing documents unreachable.").

4) A statement made in compromise remains protected even if it would have been possible to obtain the same or a similar statement in a deposition; while the Rule would not prevent such a deposition and admission of the deponent's statement, it does exclude the comparable statement made in a compromise negotiation. See *Kleen Laundry and Dry Cleaning Services, Inc., v. Total Waste Management Corp.*, 817 F.Supp. 225 (D.N.H. 1993) (the "otherwise discoverable" language of the Rule refers to pre-existing statements or statements made in depositions and the like; it does not allow admission of statements made in settlement negotiations simply because they could also have been obtained in a deposition).

Committee Options

It seems clear that courts and litigants could get along without the third sentence to Rule

408. Several states have rejected the sentence, e.g., Maine, Nevada, Wyoming. At best, the Rule serves only to emphasize the point of the second sentence–that only communications made for the purpose of compromise are protected by the Rule.

The third sentence is so likely to be superfluous, and so infrequently applied, that there is clearly no cause to delete or amend the sentence on its own account. The question is whether some change should be proposed as part of the larger amendment to the Rule that the Committee is currently considering.

In the context of a larger amendment, there are three possibilities with respect to the "otherwise discoverable" sentence of the Rule:

1. The sentence could be deleted.

2. The sentence could be amended to substitute "otherwise admissible" for "otherwise discoverable." (Note that Vermont changes "otherwise discoverable" to "otherwise obtainable from independent sources").

3. The sentence could be left unchanged.

These possibilities are now considered.

Deletion

Deletion of the sentence can be justified on the ground that the third sentence of the Rule does no good and could possibly be misconstrued, e.g., to hold that communications made in compromise are admissible if the same communications could be obtained in discovery. But the risk of misconstruction is not borne out in the handful of cases discussing the sentence. So the real question is whether it is necessary to delete the sentence because it is superfluous. This is a question for the Committee. The benefits of such a deletion are obvious–deletion of superfluous material makes the rule cleaner and easier to apply. But there are costs in deleting a superfluous provision that has not caused the courts any trouble. An amendment might create the impression that a real problem exists that is being remedied. That is, there might be a misconception that the deletion is substantive when in fact it is not.

One of the Models in Part III of this memorandum deletes the third sentence and sets forth some suggested language for the Committee Note that would emphasize that the change is not intended to be substantive.

Substituting "otherwise admissible" for "otherwise discoverable".

The courts have construed the third sentence to mean that evidence otherwise *admissible* is not excluded simply because it is presented in compromise negotiations. This construction makes sense for a number of reasons. First, because the term "discoverable" is indefinite–does it mean discoverable under the Rules, discoverable by independent efforts, or something else? (Note that the Vermont provision seeks to provide a mor precise definition by referring to information "otherwise obtainable from independent sources."). Second, the Rules of Evidence govern admissibility, not discoverability. Rule 408 is the only place in the entire Rules of Evidence in which a reference to discovery is made. (Of course some rules, such as 807, have notice provisions, but those are not discovery provisions in the classic sense.)

But while it makes sense to substitute "admissible" for "discoverable", the question is whether such a change is necessary given the fact that the courts have had no problem applying the rule as if the word "admissible" were already there. Moreover, even if such a change might be helpful in the sense of "codifying" the case law, the fact remains that the sentence, even as properly interpreted by the courts, is essentially superfluous–it emphasizes that the Rule does not protect information that was never protected by the Rule in the first place.

It is for the Committee to determine whether an amendment of the third sentence of the Rule is the best option. Language setting forth such an amendment, together with supporting language in the Committee Note, is included in one of the models in Part III.

Do Nothing

The costs and benefits of doing nothing to the third sentence are discussed above. On the one hand, the courts are not having problems with the third sentence, and it is invoked only infrequently. On the other hand, as part of a larger amendment, it might make sense either to delete the sentence as superfluous or to amend the sentence to bring it into accord with the case law that substitutes "admissible" for "discoverable." These questions are for the Committee.

III. Models For An Amendment To Rule 408

The models set forth below are all the same in three respects, as previously agreed upon by the Committee.

First, they each retain the "validity or amount" language, and the basic structure, from the existing Rule, thus rejecting the attempt that was made to restructure the Rule as one of presumptive exclusion with a list of exceptions.

Second, they each provide that the "impeachment" exception is limited to impeachment for bias; it does not permit the use of compromise statements to impeach by way of prior inconsistent statement or contradiction.

Third, they each provide that compromise evidence is inadmissible no matter who offers it. The party who makes an offer of settlement or statement of compromise is not permitted to offer that evidence in its favor.

The variations among the models are as follows:

1. *Admissible or not in a criminal case?* While most Committee members believe that Rule 408 should be amended to exclude evidence of a civil compromise in a subsequent criminal case, the Department of Justice was, at the last meeting, in favor of a contrary Rule. The Department's objection to the position of the majority of the Committee may be resolved by returning to the original structure of the Rule–that compromise evidence is only inadmissible if offered to prove the validity or amount of the claim. The Department's expressed concern was that if a civil compromise is not admissible in a subsequent criminal case, the criminal defendant could argue that he had no notice that his conduct was illegal, and therefore could not be found guilty of conduct occurring after the compromise. But under the current "validity or amount" structure, courts have had no problem finding that evidence of a civil compromise is admissible in a criminal case when offered to prove the defendant's awareness of illegality, as this is not proof of the validity or amount of the claim. See, e.g., *United States v. Hauert,* 40 F.3d 197 (7th Cir. 1994) (proper in a tax prosecution to admit settlement documents that the defendant signed with the IRS relating to earlier tax years, as this evidence showed the defendant's knowledge that his earnings were taxable, and was not offered to prove civil tax liability or the amount of such liability); *United States v. Austin,* 54 F.3d 394 (7th Cir. 1995) (settlement with the FTC was admitted to show that the defendant was on notice that his activity was illegal, and yet he continued to commit the same activity).

Whether the Justice Department is persuaded that its concerns are alleviated is a question that will be discussed at the Committee meeting. At this point, two different models are set forth on the question of admissibility in a subsequent criminal case: one providing for inadmissibility and the other for admissibility. The model providing for inadmissibility contains language in the Committee Note to emphasize that nothing in the amendment prevents the government from introducing compromise evidence in a subsequent criminal case when it is offered solely to prove

that the defendant was on notice that his conduct could be illegal.

2. "Clear Difference of Opinion": As discussed above, it is probably unnecessary and perhaps counterproductive to attempt to amend the "claim which was in dispute" language of the first sentence of the Rule. If that language is to be changed, however, the justification would be to codify the test used by the case law: that Rule 408 is triggered when there is a "clear difference of opinion" between the parties. Some of the models below contain such a change as part of a larger amendment.

3. "Otherwise Discoverable" Language: As discussed in Section Two, above, there are three options for the third sentence of the existing Rule: 1) delete it; 2) substitute "otherwise admissible" for "otherwise discoverable"; and 3) do nothing. The models set forth below work through each of these options.

Model One: Inadmissible in a Criminal Case; no change in "claim or dispute"; no change in third sentence.

Rule 408. Compromise and Offers to Compromise

Evidence of (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 claim ~~which~~ that was disputed as to either validity or amount, is not admissible on behalf of any party in a civil or criminal case to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness (but not including impeachment through contradiction or prior inconsistent statement) , negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Proposed Committee Note to Model One

Rule 408 has been amended to emphasize and effectuate the public policy of encouraging settlement of civil cases. Under the amendment, evidence of compromise of a civil claim is inadmissible to prove guilt in a subsequent criminal case, thus resolving a dispute among the circuits. *See, e.g., United States v. Bailey,* 327 F.3d 1311, 1104-6 (10th Cir. 2003) (discussing case law on both sides of the question, and concluding that "we agree with those courts which apply Rule 408 to bar settlement evidence in both criminal and civil proceedings"). If civil compromise evidence could be used in subsequent criminal litigation, defendants may be reluctant to settle civil claims and compensate victims, a result that is contrary to the policy of encouraging compromise that animates Rule 408. *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.").

While Rule 408 can be invoked in both civil and criminal cases, it does not exclude statements or offers made in an effort to settle *criminal* charges. Statements or offers to settle criminal cases, to be protected, must fall within the confines of Rule 410. The amendment therefore does not affect the result in cases such as *United States v. Graham,* 91 F.3d 213, 218-219 (D.C. Cir. 1996), where a criminal defendant invoked Rule 408 to exclude statements made to criminal investigators. Those statements were not protected

under Rule 410 because they were not made to an attorney for the prosecuting authority. The court held that Rule 408 "does not address the admissibility of evidence concerning negotiations to 'compromise' a criminal case" and that "the very existence" of Rule 410 and the corresponding Criminal Rule "strongly support the conclusion that Rule 408 applies only to civil matters."

Statements and offers by a prosecuting attorney during plea negotiations are likewise not protected under Rule 408. Some courts have held that the "principles" of Rule 408 justify protection of such statements and offers. *See United States v. Verdoorn*, 528 F.2d 103, 107 (8th Cir. 1976) (noting that offers by the prosecutor are not protected under Rule 410, but reasoning that the "principles" of Rule 408 warranted exclusion of the government's offers in a criminal case). After considering this case law, the Committee concluded that if any amendment is necessary to protect prosecution statements and offers in guilty plea negotiations, that amendment should be placed in Rule 410 and not Rule 408. Even without a change to Rule 408 or Rule 410, statements and offers by a prosecutor remain subject to exclusion under Rule 403. *See, e.g., United States v. Delgado*, 903 F.2d 1495 (11th Cir. 1990) (plea agreement and statements by the prosecutor cannot be offered as an admission by the government, because the deal may have been struck for reasons other than the government's belief in the innocence of the accused; relying upon Rule 403).

The amendment does not disturb the case law holding that a defendant's civil settlement can be admitted in a subsequent criminal case to prove that the defendant was notified through the settlement that his conduct was illegal. *See, e.g., United States v. Hauert,* 40 F.3d 197 (7th Cir. 1994) (proper in a tax prosecution to admit settlement documents that the defendant signed with the IRS relating to earlier tax years, as this evidence showed the defendant's knowledge that his earnings were taxable, and was not offered to prove civil tax liability or the amount of such liability); *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).

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*, 5th ed. 1999 at 186 ("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, 1545-6 (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 settlement).

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 would itself reveal the fact that the adversary entered into settlement negotiations. Thus, it would not be fair to hold that the protections of Rule 408 can 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").

Model Two: Admissible in Criminal Cases; no change to "claim which was in dispute"; no change to third sentence.

Rule 408. Compromise and Offers to Compromise

Evidence of (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 claim ~~which~~ that was disputed as to either validity or amount, is not admissible on behalf of any party in a civil case to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness (but not including impeachment through contradiction or prior inconsistent statement) , negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Proposed Committee Note to Model Two

Rule 408 has been amended to settle some questions in the courts about the scope of the Rule. First, the amendment clarifies that the exclusionary rule does not apply to compromise evidence when it is offered in a criminal case. *See, e.g.*, *United States v. Logan*, 250 F.3d 350, 367 (6th Cir. 2001) (while the inapplicability of Rule 408 to criminal cases "arguably may have a chilling effect on administrative or civil settlement negotiations in cases where parallel civil and criminal proceedings are possible, we find that this risk is heavily outweighed by the public interest in prosecuting criminal matters"); *Manko v United States*, 87 F.3d 50, 54-5 (2d Cir. 1996) (the "policy favoring the encouragement of civil settlements, sufficient to bar their admission in civil actions, is insufficient, in our view, to outweigh the need for accurate determinations in criminal cases where the stakes are higher"). It follows that statements and offers made during negotiations to settle a criminal case are not protected by Rule 408. *See United States v. Graham,* 91 F.3d 213, 218-219 (D.C. Cir. 1996) (declaring that Rule 408 "does not address the admissibility of evidence concerning negotiations to 'compromise' a criminal case" and that "the very existence" of Rule 410 "strongly support[s] the conclusion that Rule 408 applies only to civil matters").

Statements and offers by a prosecuting attorney during plea negotiations are likewise

not protected under Rule 408. Some courts have held that the "principles" of Rule 408 justify protection of such statements and offers. *See United States v. Verdoorn*, 528 F.2d 103, 107 (8th Cir. 1976) (noting that offers by the prosecutor are not protected under Rule 410, but reasoning that the "principles" of Rule 408 warranted exclusion of the government's offers in a criminal case). After considering this case law, the Committee concluded that if any amendment is necessary to protect prosecution statements and offers in guilty plea negotiations, that amendment should be placed in Rule 410 and not Rule 408. Even without a change to Rule 408 or Rule 410, statements and offers by a prosecutor remain subject to exclusion under Rule 403. *See, e.g.*, *United States v. Delgado*, 903 F.2d 1495 (11th Cir. 1990) (plea agreement and statements by the prosecutor cannot be offered as an admission by the government, because the deal may have been struck for reasons other than the government's belief in the innocence of the accused; relying upon Rule 403).

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*, 5th ed. 1999 at 186 ("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, 1545-6 (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 settlement).

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 would itself reveal the fact that the adversary entered into settlement negotiations. Thus, it would not be fair to hold that the protections of Rule 408 can 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").

Model Three: Inadmissible in a Criminal Case, addition of "clear disagreement" language, no change to third sentence of the Rule.

Rule 408. Compromise and Offers to Compromise

Evidence of (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 ~~which was disputed~~ claim on which the parties had expressed clear disagreement as to either validity or amount, is not admissible on behalf of any party in a civil or criminal case to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness (but not including impeachment through contradiction or prior inconsistent statement) , negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Proposed Committee Note to Model Three

Rule 408 has been amended to emphasize and effectuate the public policy of encouraging settlement of civil cases. Under the amendment, evidence of compromise of a civil claim is inadmissible to prove guilt in a subsequent criminal case, thus resolving a dispute among the circuits. *See, e.g., United States v. Bailey,* 327 F.3d 1311, 1104-6 (10th Cir. 2003) (discussing case law on both sides of the question, and concluding that "we agree with those courts which apply Rule 408 to bar settlement evidence in both criminal and civil proceedings"). If civil compromise evidence could be used in subsequent criminal litigation, defendants may be reluctant to settle civil claims and compensate victims, a result that is contrary to the policy of encouraging compromise that animates Rule 408. *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.").

While Rule 408 can be invoked in both civil and criminal cases, it does not exclude statements or offers made in an effort to settle *criminal* charges. Statements or offers to settle criminal cases, to be protected, must fall within the confines of Rule 410. The amendment therefore does not affect the result in cases such as *United States v. Graham,*

91 F.3d 213, 218-219 (D.C. Cir. 1996), where a criminal defendant invoked Rule 408 to exclude statements made to criminal investigators. Those statements were not protected under Rule 410 because they were not made to an attorney for the prosecuting authority. The court held that Rule 408 "does not address the admissibility of evidence concerning negotiations to 'compromise' a criminal case" and that "the very existence" of Rule 410 and the corresponding Criminal Rule "strongly support the conclusion that Rule 408 applies only to civil matters."

Statements and offers by a prosecuting attorney during plea negotiations are likewise not protected under Rule 408. Some courts have held that the "principles" of Rule 408 justify protection of such statements and offers. *See United States v. Verdoorn*, 528 F.2d 103, 107 (8th Cir. 1976) (noting that offers by the prosecutor are not protected under Rule 410, but reasoning that the "principles" of Rule 408 warranted exclusion of the government's offers in a criminal case). After considering this case law, the Committee concluded that if any amendment is necessary to protect prosecution statements and offers in guilty plea negotiations, that amendment should be placed in Rule 410 and not Rule 408. Even without a change to Rule 408 or Rule 410, statements and offers by a prosecutor remain subject to exclusion under Rule 403. *See, e.g.*, *United States v. Delgado*, 903 F.2d 1495 (11th Cir. 1990) (plea agreement and statements by the prosecutor cannot be offered as an admission by the government, because the deal may have been struck for reasons other than the government's belief in the innocence of the accused; relying upon Rule 403).

The amendment does not disturb the case law holding that a defendant's civil settlement can be admitted in a subsequent criminal case to prove that the defendant was notified through the settlement that his conduct was illegal. *See, e.g., United States v. Hauert,* 40 F.3d 197 (7th Cir. 1994) (proper in a tax prosecution to admit settlement documents that the defendant signed with the IRS relating to earlier tax years, as this evidence showed the defendant's knowledge that his earnings were taxable, and was not offered to prove civil tax liability or the amount of such liability); *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).

The amendment clarifies that a claim can be in dispute even before litigation has begun. The protections of the Rule are triggered whenever a party communicates in an attempt to resolve a clear disagreement between the parties as to the validity or amount of a claim. *See, e.g., Affiliated Manufacturers, Inc. v. Aluminum Co. of America,* 56 F.3d 521, 527 (3rd Cir. 1995) {noting that "the Rule 408 exclusion applies where an actual dispute or a difference of opinion exists, rather than when discussions crystallize to the point of threatened litigation" and that the Rule is triggered when there is "a clear difference of opinion between the parties").

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*, 5th ed. 1999 at 186 ("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, 1545-6 (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 settlement).

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 would itself reveal the fact that the adversary entered into settlement negotiations. Thus, it would not be fair to hold that the protections of Rule 408 can 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").

Model Four: Inadmissible in a Criminal Case, no change to disputed claim language, deletion of third sentence of the Rule.

Rule 408. Compromise and Offers to Compromise

Evidence of (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 claim ~~which~~ that was disputed as to either validity or amount, is not admissible on behalf of any party in a civil or criminal case to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. ~~This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.~~ This rule ~~also~~ does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness (but not including impeachment through contradiction or prior inconsistent statement) , negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Proposed Committee Note to Model Four

Rule 408 has been amended to emphasize and effectuate the public policy of encouraging settlement of civil cases. Under the amendment, evidence of compromise of a civil claim is inadmissible to prove guilt in a subsequent criminal case, thus resolving a dispute among the circuits. *See, e.g., United States v. Bailey,* 327 F.3d 1311, 1104-6 (10th Cir. 2003) (discussing case law on both sides of the question, and concluding that "we agree with those courts which apply Rule 408 to bar settlement evidence in both criminal and civil proceedings"). If civil compromise evidence could be used in subsequent criminal litigation, defendants may be reluctant to settle civil claims and compensate victims, a result that is contrary to the policy of encouraging compromise that animates Rule 408. *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.").

While Rule 408 can be invoked in both civil and criminal cases, it does not exclude statements or offers made in an effort to settle *criminal* charges. Statements or offers to settle criminal cases, to be protected, must fall within the confines of Rule 410. The amendment therefore does not affect the result in cases such as *United States v. Graham,* 91 F.3d 213, 218-219 (D.C. Cir. 1996), where a criminal defendant invoked Rule 408 to exclude statements made to criminal investigators. Those statements were not protected

under Rule 410 because they were not made to an attorney for the prosecuting authority. The court held that Rule 408 "does not address the admissibility of evidence concerning negotiations to 'compromise' a criminal case" and that "the very existence" of Rule 410 and the corresponding Criminal Rule "strongly support the conclusion that Rule 408 applies only to civil matters."

Statements and offers by a prosecuting attorney during plea negotiations are likewise not protected under Rule 408. Some courts have held that the "principles" of Rule 408 justify protection of such statements and offers. *See United States v. Verdoorn*, 528 F.2d 103, 107 (8th Cir. 1976) (noting that offers by the prosecutor are not protected under Rule 410, but reasoning that the "principles" of Rule 408 warranted exclusion of the government's offers in a criminal case). After considering this case law, the Committee concluded that if any amendment is necessary to protect prosecution statements and offers in guilty plea negotiations, that amendment should be placed in Rule 410 and not Rule 408. Even without a change to Rule 408 or Rule 410, statements and offers by a prosecutor remain subject to exclusion under Rule 403. *See, e.g., United States v. Delgado*, 903 F.2d 1495 (11th Cir. 1990) (plea agreement and statements by the prosecutor cannot be offered as an admission by the government, because the deal may have been struck for reasons other than the government's belief in the innocence of the accused; relying upon Rule 403).

The amendment does not disturb the case law holding that a defendant's civil settlement can be admitted in a subsequent criminal case to prove that the defendant was notified through the settlement that his conduct was illegal. *See, e.g., United States v. Hauert,* 40 F.3d 197 (7th Cir. 1994) (proper in a tax prosecution to admit settlement documents that the defendant signed with the IRS relating to earlier tax years, as this evidence showed the defendant's knowledge that his earnings were taxable, and was not offered to prove civil tax liability or the amount of such liability); *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).

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*, 5th ed. 1999 at 186 ("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, 1545-6 (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 settlement).

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 would itself reveal the fact that the adversary entered into settlement negotiations. Thus, it would not be fair to hold that the protections of Rule 408 can 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 third sentence of the Rule has been deleted as superfluous. See Advisory Committee Note to Maine Rule of Evidence Rule 408 . 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 there is no reason to think that the Rule could be read to protect pre-existing information simply because it was presented to the adversary in discovery.

Model Five: Inadmissible in a Criminal Case, no change to disputed claim language, change to "admissible" in third sentence of the Rule.

Rule 408. Compromise and Offers to Compromise

Evidence of (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 claim ~~which~~ that was disputed as to either validity or amount, is not admissible on behalf of any party in a civil or criminal case to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise ~~discoverable~~ admissible merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness (but not including impeachment through contradiction or prior inconsistent statement) , negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Proposed Committee Note to Model Five

Rule 408 has been amended to emphasize and effectuate the public policy of encouraging settlement of civil cases. Under the amendment, evidence of compromise of a civil claim is inadmissible to prove guilt in a subsequent criminal case, thus resolving a dispute among the circuits. *See, e.g., United States v. Bailey,* 327 F.3d 1311, 1104-6 (10th Cir. 2003) (discussing case law on both sides of the question, and concluding that "we agree with those courts which apply Rule 408 to bar settlement evidence in both criminal and civil proceedings"). If civil compromise evidence could be used in subsequent criminal litigation, defendants may be reluctant to settle civil claims and compensate victims, a result that is contrary to the policy of encouraging compromise that animates Rule 408. *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.").

While Rule 408 can be invoked in both civil and criminal cases, it does not exclude statements or offers made in an effort to settle *criminal* charges. Statements or offers to settle criminal cases, to be protected, must fall within the confines of Rule 410. The amendment therefore does not affect the result in cases such as *United States v. Graham,* 91 F.3d 213, 218-219 (D.C. Cir. 1996), where a criminal defendant invoked Rule 408 to exclude statements made to criminal investigators. Those statements were not protected

under Rule 410 because they were not made to an attorney for the prosecuting authority. The court held that Rule 408 "does not address the admissibility of evidence concerning negotiations to 'compromise' a criminal case" and that "the very existence" of Rule 410 and the corresponding Criminal Rule "strongly support the conclusion that Rule 408 applies only to civil matters."

Statements and offers by a prosecuting attorney during plea negotiations are likewise not protected under Rule 408. Some courts have held that the "principles" of Rule 408 justify protection of such statements and offers. *See United States v. Verdoorn*, 528 F.2d 103, 107 (8th Cir. 1976) (noting that offers by the prosecutor are not protected under Rule 410, but reasoning that the "principles" of Rule 408 warranted exclusion of the government's offers in a criminal case). After considering this case law, the Committee concluded that if any amendment is necessary to protect prosecution statements and offers in guilty plea negotiations, that amendment should be placed in Rule 410 and not Rule 408. Even without a change to Rule 408 or Rule 410, statements and offers by a prosecutor remain subject to exclusion under Rule 403. *See, e.g., United States v. Delgado*, 903 F.2d 1495 (11th Cir. 1990) (plea agreement and statements by the prosecutor cannot be offered as an admission by the government, because the deal may have been struck for reasons other than the government's belief in the innocence of the accused; relying upon Rule 403).

The amendment does not disturb the case law holding that a defendant's civil settlement can be admitted in a subsequent criminal case to prove that the defendant was notified through the settlement that his conduct was illegal. *See, e.g., United States v. Hauert,* 40 F.3d 197 (7th Cir. 1994) (proper in a tax prosecution to admit settlement documents that the defendant signed with the IRS relating to earlier tax years, as this evidence showed the defendant's knowledge that his earnings were taxable, and was not offered to prove civil tax liability or the amount of such liability); *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).

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*, 5th ed. 1999 at 186 ("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, 1545-6 (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 settlement).

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 would itself reveal the fact that the adversary entered into settlement negotiations. Thus, it would not be fair to hold that the protections of Rule 408 can 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 third sentence of the Rule has been amended to change the reference from "discoverable" to "admissible" information. The Rules of Evidence are concerned with admissibility, not discovery. The intent of the sentence is 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). This intent is best expressed by referring to "otherwise admissible" evidence. See 23 Wright and Graham, *Federal Practice and Procedure* § 5310 (noting that in every explanation of the provision in the Congressional documents, "one can substitute the word 'admissible' for 'discoverable' without destroying the sense of what is said").

Note that there are other permutations, any of which can be put together from the above models. These include:

1. Admissible in a criminal case, change to "clear disagreement" no change to third sentence.

2. Admissible in a criminal case, change to "clear disagreement", deletion of third sentence.

3. Inadmissible in a criminal case, change to "clear disagreement" language, change

to "admissible" in third sentence.

And so forth. These variations would be easy to implement after the Committee decides just which variations, if any, it wants to propose. The sections from the Committee Note that explain each change can be mixed and matched.

IV. "Restylized" Rule 408, Incorporating Changes Agreed Upon By the Committee

The previous section incorporated the various changes that might be agreed upon by the Committee into the framework of the existing Rule. It can be argued that some of the changes fit awkwardly into the existing structure–for example, the impeachment limitation is placed in a sentence that talks about permissible purposes for compromise evidence (a sentence that is unnecessary at any rate because the Rule applies only when the evidence is offered to prove the validity or amount of a disputed claim).

It is no secret that the existing Rule is poorly structured; and while substantive changes are obviously the most important, the Committee may wish to consider whether a structural but stylistic change might improve the rule. It is important to note that the restructuring below does *not* change the central premise that compromise evidence is excluded only when offered to prove the validity or amount of the claim. It is only a stylistic reconstruction.

What follows is a structural "restylization" of Rule 408. It includes, for purposes of illustration, the following substantive changes: 1) Inadmissible in a criminal case; 2) no impeachment for prior inconsistent statements or contradiction; and 3) compromise evidence cannot be offered by any party. In other words, this is a restylization of Model One from Section III. Other substantive changes could be plugged in to the restylized structure, depending on the Committee's decisions.

"Restylized" Version (Clean Version)

Rule 408. Compromise and Offers to Compromise

(a) General rule. – The following is not admissible in any case on behalf of any party, when offered to prove liability for or invalidity of a claim or its amount or for the impeachment purposes of prior inconsistent statement or contradiction:

(1) Evidence of furnishing or offering or promising to furnish, or accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim that was disputed as to validity or amount; and

(2) Evidence of conduct or statements made in negotiations over a claim that was disputed as to validity or amount.

(b) Pre-existing information presented in compromise negotiations. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.

(c) Other purposes. – This rule does not require exclusion when the evidence is offered for a purpose not prohibited by this rule. Examples include: proving bias or prejudice of a witness; negativing a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.

"Restylized" Version (Blacklined Version)

Rule 408. Compromise and Offers to Compromise

(a) General rule. -- ~~Evidence of~~ The following is not admissible in any case on behalf of any party, when offered to prove liability for or invalidity of a claim or its amount or for the impeachment purposes of prior inconsistent statement or contradiction:

(1) Evidence of 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 claim that ~~which~~ was disputed as to either validity or amount~~, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of~~

(2) Evidence of conduct or statements made in ~~compromise~~ negotiations ~~is likewise not admissible~~ over a claim that was disputed as to validity or amount.

(b) Pre-existing information presented in compromise negotiations.-- This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.

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

Proposed Committee Note for Restylized Version

Rule 408 has been ~~amended~~ restructured stylistically, and amended substantively in three respects, in order to emphasize and effectuate the public policy of encouraging settlement of civil cases.

Under the amendment, evidence of compromise of a civil claim is inadmissible to prove guilt in a subsequent criminal case, thus resolving a dispute among the circuits. *See, e.g., United States v. Bailey,* 327 F.3d 1311, 1104-6 (10th Cir. 2003) (discussing case law on both sides of the question, and concluding that "we agree with those courts which apply Rule 408 to bar settlement evidence in both criminal and civil proceedings"). If civil compromise evidence could be used in subsequent criminal litigation, defendants may be reluctant to settle civil claims and compensate victims, a result that is contrary to the policy of encouraging compromise that animates Rule 408. *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.").

While Rule 408 can be invoked in both civil and criminal cases, it does not exclude statements or offers made in an effort to settle *criminal* charges. Statements or offers to settle criminal cases, to be protected, must fall within the confines of Rule 410. The amendment therefore does not affect the result in cases such as *United States v. Graham,* 91 F.3d 213, 218-219 (D.C. Cir. 1996), where a criminal defendant invoked Rule 408 to exclude statements made to criminal investigators. Those statements were not protected under Rule 410 because they were not made to an attorney for the prosecuting authority. The court held that Rule 408 "does not address the admissibility of evidence concerning negotiations to 'compromise' a criminal case" and that "the very existence" of Rule 410 and the corresponding Criminal Rule "strongly support the conclusion that Rule 408 applies only to civil matters."

Statements and offers by a prosecuting attorney during plea negotiations are likewise not protected under Rule 408. Some courts have held that the "principles" of Rule 408 justify protection of such statements and offers. *See United States v. Verdoorn*, 528 F.2d 103, 107 (8th Cir. 1976) (noting that offers by the prosecutor are not protected under Rule 410, but reasoning that the "principles" of Rule 408 warranted exclusion of the government's offers in a criminal case). After considering this case law, the Committee concluded that if any amendment is necessary to protect prosecution statements and offers in guilty plea negotiations, that amendment should be placed in Rule 410 and not Rule 408. Even without a change to Rule 408 or Rule 410, statements and offers by a prosecutor remain subject to exclusion under Rule 403. *See, e.g.*, *United States v. Delgado*, 903 F.2d 1495 (11th Cir. 1990) (plea agreement and statements by the prosecutor cannot be offered as an admission by the government, because the deal may have been struck for reasons other

than the government's belief in the innocence of the accused; relying upon Rule 403).

The amendment does not disturb the case law holding that a defendant's civil settlement can be admitted in a subsequent criminal case to prove that the defendant was notified through the settlement that his conduct was illegal. *See, e.g., United States v. Hauert,* 40 F.3d 197 (7th Cir. 1994) (proper in a tax prosecution to admit settlement documents that the defendant signed with the IRS relating to earlier tax years, as this evidence showed the defendant's knowledge that his earnings were taxable, and was not offered to prove civil tax liability or the amount of such liability); *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).

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*, 5th ed. 1999 at 186 ("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, 1545-6 (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 settlement).

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 would itself reveal the fact that the adversary entered into settlement negotiations. Thus, it would not be fair to hold that the protections of Rule 408 can 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").

2003 WL 1958047
327 F.3d 1131
(Publication page references are not available for this document.)

United States Court of Appeals,
Tenth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Steven E. BAILEY, Defendant-Appellant.

No. 02-3187.

April 25, 2003.

Defendant was convicted by jury in the United States District Court for the District of Kansas, Monti L. Belot, J., of wire fraud and money laundering. Defendant appealed. The Court of Appeals, Stephen H. Anderson, Circuit Judge, held that: (1) as a matter of apparent first impression, rule barring admission of settlement evidence applies in both criminal and civil proceedings; (2) evidence permitted inference that defendant acted with requisite intent; (3) indictment adequately alleged wire fraud; (4) prejudicial variance between indictment and proof at trial did not exist; (5) erroneous admission of evidence regarding settlement between defendant and his investment partners did not rise to level of plain error; (6) evidence supported sentence enhancement for abuse of position of trust; and (7) defendant was not entitled to sentence reduction for acceptance of responsibility.

Affirmed.

West Headnotes

[1] Criminal Law 1139
110k1139 Most Cited Cases

[1] Criminal Law 1152(1)
110k1152(1) Most Cited Cases

Under certain circumstances, Court of Appeals reviews district court's decision to disqualify counsel for an abuse of discretion only, but when defendant's Sixth Amendment right to counsel is implicated, and district court's decision is premised not on in-court conduct but on the interpretation of ethical norms as applied to undisputed facts, review is de novo. U.S.C.A. Const.Amend. 6.

[2] Constitutional Law 268(3)
92k268(3) Most Cited Cases

[2] Criminal Law 593
110k593 Most Cited Cases

Denial of continuance in connection with defendant's decision to retain his third attorney a few weeks before trial commenced did not violate defendant's due process rights where defendant was represented by attorney whose representation was not shown to be other than exemplary after his first attorney was disqualified, district court informed third attorney before his representation began that no continuance would be granted if defendant changed attorneys, and third attorney nonetheless replaced second attorney, making no formal request for continuance. U.S.C.A. Const.Amend. 5.

[3] Criminal Law 1139
110k1139 Most Cited Cases

[3] Criminal Law 1144.13(3)
110k1144.13(3) Most Cited Cases

Court of Appeals reviews the denial of a motion for judgment of acquittal de novo, viewing the evidence in the light most favorable to the government.

[4] Criminal Law 1134(8)
110k1134(8) Most Cited Cases

[4] Criminal Law 1159.2(9)
110k1159.2(9) Most Cited Cases

[4] Criminal Law 1159.4(1)
110k1159.4(1) Most Cited Cases

In reviewing denial of motion for judgment of acquittal, Court of Appeals must determine whether there is evidence from which a jury could find defendant guilty beyond a reasonable doubt; in reviewing that evidence, however, Court of Appeals does not weigh the evidence or consider the credibility of the witnesses.

[5] Criminal Law 1159.2(7)
110k1159.2(7) Most Cited Cases

On review of denial of motion for judgment of acquittal, Court of Appeals may reverse jury's verdict only if no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

[6] Telecommunications 362

372k362 Most Cited Cases

To establish wire fraud, government must prove (1) a scheme or artifice to defraud and (2) use of interstate wire communications to facilitate that scheme. 18 U.S.C.A. § 1343.

[7] United States ⚷34
393k34 Most Cited Cases

Money laundering requires a specific intent to launder the proceeds from a known illegal activity. 18 U.S.C.A. § 1957(a).

[8] Fraud ⚷58(3)
184k58(3) Most Cited Cases

Because it is difficult to prove intent to defraud from direct evidence, jury may consider circumstantial evidence of fraudulent intent and draw reasonable inferences therefrom.

[9] Fraud ⚷50
184k50 Most Cited Cases

Intent to defraud may be inferred from evidence that defendant attempted to conceal activity, from defendant's misrepresentations or his knowledge of a false statement, or from evidence that defendant profited or converted money to his own use.

[10] Fraud ⚷58(3)
184k58(3) Most Cited Cases

Evidence of defendant's indifference to the truth of statements can amount to evidence of fraudulent intent.

[11] Telecommunications ⚷363
372k363 Most Cited Cases

[11] United States ⚷34
393k34 Most Cited Cases

Jury could infer that defendant charged with wire fraud and money laundering acted with intent to defraud from evidence that defendant transferred funds by wire from account of investment partnership for which he was managing partner and placed funds in his personal account, that defendant used funds in personal account to invest in high-risk investments, in direct contravention of terms of partnership agreement, that defendant hid these actions from his partners, and that defendant misrepresented to partners the status of partnership account, including profits allegedly made and amount of commissions he withdrew. 18 U.S.C.A. §§ 1343, 1957(a).

[12] Telecommunications ⚷363
372k363 Most Cited Cases

Indictment, challenged for first time post-verdict, adequately alleged crime of wire fraud when it alleged that defendant, for purposes of executing scheme to defraud and obtaining money or property by means of false or fraudulent pretenses, transmitted "by means of wire communication in interstate commerce, writings, signs, signals or sounds which transferred" money from account belonging to investment partnership to defendant's personal bank account, and then listed 17 transfers and details of those transfers, notwithstanding contention that indictment failed to allege that subject transfers had "communicative aspect." 18 U.S.C.A. § 1343.

[13] Criminal Law ⚷1032(5)
110k1032(5) Most Cited Cases

When defendant first challenges after a jury verdict the absence of an element of the offense, indictment will be deemed sufficient if it contains words of similar import to the element in question; as long as the indictment contained words sufficient to inform defendant of the charge against him, indictment will be upheld.

[14] Criminal Law ⚷1032(5)
110k1032(5) Most Cited Cases

Reviewing court will find indictment sufficient, when challenged for first time after jury verdict, unless it is so defective that, by any reasonable construction, it fails to charge the offense for which defendant is convicted.

[15] Telecommunications ⚷362
372k362 Most Cited Cases

Transfers underlying wire fraud charges were communicative, notwithstanding contention that evidence failed to show use of wire "communications" to further fraudulent scheme, in that transfers conveyed information about accounts from and into which funds were to be transferred and amounts to be transferred, and they in fact transferred those funds. 18 U.S.C.A. § 1343.

[16] Criminal Law ⚷1030(1)
110k1030(1) Most Cited Cases

Plain error standard of review applied to claims raised for first time on appeal. Fed.Rules Crim.Proc.Rule 52(b), 18 U.S.C.A.

[17] Indictment and Information ⚷171
210k171 Most Cited Cases

A variance arises when the evidence adduced at trial establishes facts different from those alleged in the indictment, and denigrates the Sixth Amendment right to be informed of the nature and cause of the accusation. U.S.C.A. Const.Amend. 6.

[18] **Criminal Law** 1167(1)
110k1167(1) Most Cited Cases

Variance is reversible error only if it affects the substantial rights of accused.

[19] **Criminal Law** 1167(1)
110k1167(1) Most Cited Cases

Defendant is substantially prejudiced in his defense due to variance between indictment and proof at trial, as will require reversal, either because he cannot anticipate from the indictment what evidence will be presented against him, or because he is exposed to the risk of double jeopardy. U.S.C.A. Const.Amend. 5.

[20] **Telecommunications** 363
372k363 Most Cited Cases

No prejudicial variance existed between wire fraud charge set forth in indictment and proof at trial, despite contention that indictment charged scheme involving fraudulent promise not to invest partnership money in high- risk investments and unauthorized transfer of partnership funds to defendant's personal accounts to accomplish those investments, while government introduced evidence of false quarterly reports to partners, inasmuch as government established that defendant's scheme to defraud consisted of defrauding his partners by using their investment funds without their knowledge to make personal trades in types of investments specifically prohibited by partners, and showed, as a part of such scheme, that defendant misrepresented to partners status of their accounts with partnership. 18 U.S.C.A. § 1343.

[21] **Criminal Law** 872.5
110k872.5 Most Cited Cases

Although elements of an offense must be found unanimously by the jury, jury need not agree unanimously on the means by which an element is proven.

[22] **Criminal Law** 822(1)
110k822(1) Most Cited Cases

Court of Appeals examines instructions as a whole to determine whether the jury may have been misled, upholding the judgment in the absence of substantial doubt that the jury was fairly guided.

[23] **Telecommunications** 362
372k362 Most Cited Cases

Good faith defense to wire fraud charges, which arose out of defendant's use of partners' investment funds without their knowledge to make personal trades in types of investments specifically prohibited by partners, could not be established by proof of defendant's honest belief that everything would work out. 18 U.S.C.A. § 1343.

[24] **Criminal Law** 408
110k408 Most Cited Cases

[24] **Evidence** 213(1)
157k213(1) Most Cited Cases

Evidentiary rule barring admission of settlement evidence applies in both criminal and civil proceedings. Fed.Rules Evid.Rules 408, 1101(b), 28 U.S.C.A.

[25] **Criminal Law** 1036.1(3.1)
110k1036.1(3.1) Most Cited Cases

Erroneous admission of evidence regarding settlement between defendant and his investment partners did not rise to level of plain error, in trial for wire fraud and money laundering, given that ample other evidence established substance of testimony regarding settlement, which did not indicate that defendant furnished or offered to furnish valuable consideration, but rather simply recounted defendant's conduct. 18 U.S.C.A. §§ 1343, 1957(a); Fed.Rules Evid.Rule 408, 28 U.S.C.A.

[26] **Criminal Law** 1139
110k1139 Most Cited Cases

[26] **Criminal Law** 1158(1)
110k1158(1) Most Cited Cases

Court of Appeals reviews district court's interpretation of the Sentencing Guidelines de novo, and its factual findings for clear error, giving due deference to the district court's application of the guidelines to the facts. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

[27] **Sentencing and Punishment** 736
350Hk736 Most Cited Cases

Findings that $600,000 which defendant borrowed from his parents and put into accounts of investment partnership for which he was general manager could not be traced back to partners, so as to reduce loss attributable to fraudulent scheme in which defendant

used partners' investment funds without their knowledge to make personal trades in types of investments specifically prohibited by partners, were not clearly erroneous, and thus supported court's loss calculation under Sentencing Guidelines. U.S.S.G. § 2B1.1, comment. (n.2(C, E), 18 U.S.C.A.

[28] Sentencing and Punishment ⚿758
350Hk758 Most Cited Cases

Two-level sentence enhancement, under Sentencing Guidelines, for abuse of position of trust was supported by evidence that defendant, who was convicted of wire fraud and money laundering in connection with his management of investment partnership, held himself out to be legitimate investment broker. 18 U.S.C.A. §§ 1343, 1957(a); U.S.S.G. § 3B1.3, 3B1.3, comment. (n.2), 18 U.S.C.A.

[29] Sentencing and Punishment ⚿765
350Hk765 Most Cited Cases

Defendant convicted of wire fraud and money laundering failed to show entitlement to Sentencing Guidelines reduction for acceptance of responsibility when, throughout trial, defendant denied having acted with any intent to defraud and did not acknowledge that his actions were criminal. 18 U.S.C.A. §§ 1343, 1957(a); U.S.S.G. § 3E1.1, 18 U.S.C.A.

[30] Criminal Law ⚿1158(1)
110k1158(1) Most Cited Cases

District court's determination as to whether defendant is entitled to sentence reduction under Sentencing Guidelines based on acceptance of responsibility is subject to the clearly erroneous standard of review. U.S.S.G. § 3E1.1, 18 U.S.C.A.

[31] Sentencing and Punishment ⚿963
350Hk963 Most Cited Cases

Defendant bears the burden of proving acceptance of responsibility when seeking sentence reduction under Sentencing Guidelines on such grounds. U.S.S.G. § 3E1.1, 18 U.S.C.A.

[32] Sentencing and Punishment ⚿765
350Hk765 Most Cited Cases

In rare situations, defendant may receive credit for acceptance of responsibility under Sentencing Guidelines even though he exercised his right to a trial. U.S.S.G. § 3E1.1, 18 U.S.C.A.

Daniel E. Monnat, Monnat & Spurrier, Chtd., Wichita, KS, for Defendant- Appellant.

Alan G. Metzger, Assistant United States Attorney (Eric F. Melgren, United States Attorney and Nancy Landis Caplinger, Assistant United States Attorney, on the brief), Topeka, KS, for Plaintiff-Appellee.

Before LUCERO, Circuit Judge, McWILLIAMS and ANDERSON, Senior Circuit Judges.

STEPHEN H. ANDERSON, Circuit Judge.

Steven Bailey appeals his conviction following a jury verdict on seventeen counts of wire fraud and five counts of money laundering in violation of 18 U.S.C. §§ 1343 and 1957(a). We affirm.

BACKGROUND

While working at the Boeing Aircraft Company in Wichita, Kansas, for eleven years, Bailey developed an interest in financial markets. In 1993, he left Boeing to pursue investing in the stock market, utilizing investment strategies which he developed himself. He never received any formal training in stock market investments. In May 1996, he formed the Bailey Investment Management Partnership, a general partnership, consisting of Investing Partners and Bailey as the Managing Partner. All the partners were family members and/or close friends of Bailey's. At its inception, the Partnership consisted of Bailey and eleven partners.

The Partnership Agreement was year-to-year, so investing partners entered or reentered the Partnership each year. The Partnership Agreement provided as follows with respect to Bailey's authority as Managing Partner:

> The Managing Partner shall be authorized to and delegated the responsibility of investing the Partnership's funds in common stocks of companies which exhibit high earnings growth and high stock appreciation potential, with a goal of the Partnership to maximize capital growth. The Managing Partner shall have no authority to invest in and shall be specifically prohibited from investing Partnership funds in real estate, oil and gas properties, commodities, futures, options, or any other high risk investment not specifically authorized in this paragraph.

App. Vol. I at 244. Investing partners sent Bailey capital to be invested around the beginning of each year. Bailey opened a Partnership checking account at Commerce Bank in Wichita and opened on-line accounts with DATEK Online and Discover Direct

Brokerage, all in the name of the "Steve Bailey Partnership."

After the first year, more friends and acquaintances of Bailey's joined Bailey Investment Management Partnership. Bruce Wilgers, the chief financial officer at Fidelity Bank in Wichita, Jim Ruane, Fidelity's senior vice president and general counsel, and John Laisle, Fidelity's executive vice president, all eventually joined the Partnership.

Between May 1998 and May 1999, Bailey made seventeen wire fund transfers from the Partnership's DATEK account to his personal account at Boeing Wichita Employees Credit Union. Bailey used those transferred funds to obtain "contracts for futures" in his personal account at various institutions which traded in futures. None of these transactions were authorized by the Partnership Agreement or the other partners. As indicated, the Partnership Agreement specifically prohibited Bailey from investing in futures or "any other high risk investment." Bailey also apparently used funds transferred from the Partnership accounts to his personal accounts to pay for a new home he built for his family.

Bailey was required by the Partnership Agreement to provide quarterly reports to the partners. Those reports falsely reported the Partnership capital, Partnership earnings and Bailey's Partnership income. They also failed to reveal that Bailey was investing in futures, in contravention of the Partnership Agreement.

After initially experiencing success in the stock index market, taking the initial Partnership investment of $200,000 and increasing that amount to $1.4 million, Bailey ended up losing virtually all of the Partnership investment money. In a report to the partners dated June 30, 1999, Bailey listed the ending capital of the Partnership as $2,418,292.26. App. Vol. II at 477; App. Vol. III at 618. In reality, at that point, the Partnership capital was something less than $2000. App. Vol. II at 478; App. Vol. III at 618-19.

On June 30, 1999, Bailey's parents loaned him $600,000, which Bailey placed in the Partnership accounts. Bailey gave his parents a mortgage on his new home to secure the loan. Apparently, Bailey lost most of that $600,000 as well.

From the beginning of the Partnership until its termination in August 1999, the Investing Partners invested more than $1,941,000.00 in the Partnership. At the time of its termination, the Partnership consisted of Bailey and more than 50 investors. The Partnership account contained $369,676.00 upon its termination. None of the partners made money from their investments; rather, virtually all of them lost their investments. [FN1]

In August 1999, Laisle filed suit against Bailey, alleging that Bailey had committed various acts in violation of the Partnership Agreement. The suit sought termination of the Partnership and to have an accounting. Another investor, James Ruane, filed another civil action against Bailey, his wife and his parents, alleging that they had participated in a fraudulent conveyance, that the mortgage on the Bailey home should be set aside, and that the home should be held in trust for the partners. Eventually, the two suits were certified as class actions and were consolidated.

The civil suits resulted in a settlement. The government thereafter charged Bailey with seventeen counts of wire fraud and five counts of money laundering. On March 7, 2001, Bailey was indicted in a twenty-two count indictment. Counts one through seventeen alleged seventeen separate wire transfers from the DATEK Partnership account to Bailey's personal account at the Boeing Wichita Employee's Credit Union, in violation of the wire fraud statute, 18 U.S.C. § 1343. Counts eighteen through twenty-two alleged five incidents where he transferred funds from his personal account at Boeing Employee's Credit Union to other accounts under his control, in violation of the money laundering statute, 18 U.S.C. § 1957(a).

Bailey initially retained Stephen M. Joseph as defense counsel. On May 7, 2001, the government filed a motion to disqualify Joseph because of his pre-indictment relationship with Ruane, one of the investors in the Partnership and a plaintiff in the civil suits against Bailey. The district court by written order granted the government's motion.

Bailey then retained Jack Focht as defense counsel, who entered his appearance on July 31, 2001. As explained more fully below, Bailey filed a substitution of counsel on November 12, 2001, substituting Steve Rosel for Jack Focht.

Trial to a jury commenced on November 27. At the close of the government's evidence, and at the close of all evidence, Bailey moved for a judgment of acquittal which was denied. On December 3, 2001, the jury found Bailey guilty of all seventeen counts of wire fraud in violation of 18 U.S.C. § 1343 and all five counts of money laundering in violation of 18 U.S.C. § 1957(a).

The Presentence Investigation Report ("PSIR") indicated a guideline range of 63 to 78 months. Bailey

filed a number of objections to the PSIR, to which the government responded. Applying the 2001 sentencing guidelines, the court grouped the money laundering and wire fraud counts pursuant to USSG § 3D1.2. Because Bailey's money laundering counts resulted in the highest offense level, the court calculated Bailey's base offense level under § 2S1.1, which applies to money laundering. Acknowledging that, pursuant to USSG § 2B1.1, the amount of loss is to be reduced by any amount returned "to the victim" of the crime before the offense was detected, the court considered whether the $600,000 returned to Bailey and placed in the Partnership accounts was returned "to the victim." The court concluded that there was no evidence that all of the $600,000 was actually given to the victims before Bailey's crimes were detected. The court further imposed a two-level increase for abuse of a position of trust, and declined to reduce Bailey's base offense level for acceptance of responsibility. The court imposed a 57-month sentence on each of the 22 counts, to run concurrently, and imposed restitution in the amount of $949,044.52.

Bailey appeals. He also filed with the district court a motion for release pending appeal. The district court denied the motion, and we affirmed that denial. Bailey has renewed his appeal of the district court's denial of release pending appeal, and we have again affirmed that denial.

Bailey argues: (1) he was denied his right to counsel of choice when the district court disqualified his attorney, Steven Joseph, over Bailey's objection; (2) the government's evidence was insufficient to overcome Bailey's good-faith defense and sustain his conviction beyond a reasonable doubt; (3) the indictment failed to allege a crime and the evidence was insufficient as a matter of law to prove that Bailey used a wire communication to further a fraudulent scheme; (4) at trial, the government relied on a scheme not charged in the indictment and there was therefore an unconstitutional variance between the indictment and the proof at trial; (5) the court's good-faith instruction was internally inconsistent and confusing; (6) the government erred in presenting rebuttal testimony concerning the terms of the civil settlement and the court committed plain error in admitting that evidence; and (7) the court erred in its interpretation and application of the sentencing guidelines in (a) calculating the amount of loss; (b) enhancing Bailey's sentence for abuse of a position of trust; and (c) refusing to reduce his base offense level for acceptance of responsibility.

DISCUSSION

I. Disqualification of Counsel

[1] Under certain circumstances, we review the district court's decision to disqualify counsel for an abuse of discretion only. However, where a defendant's Sixth Amendment right to counsel is implicated, and where the district court's decision is premised not on in-court conduct but on the interpretation of ethical norms as applied to undisputed facts, our review is de novo. *United States v. Anderson,* 319 F.3d 1218, 1221 (10th Cir.2003) (citation omitted). The government moved to disqualify Steven Joseph, Bailey's first trial counsel, on the ground that one of Bailey's investing partners, and a plaintiff in the civil suit against Bailey, James Ruane, had met with Joseph to discuss Joseph's possible representation of Ruane and the class of plaintiffs in that civil suit. [FN2] Also at the time of that meeting, Ruane was "of counsel" to the law firm of Redmond & Nazar, L.L.P., where William Wooley, a personal friend of Ruane's, was an associate. Ruane had retained Wooley to represent him and the other plaintiffs in the civil action against Bailey. In December 1999, Wooley, Ruane and Joseph met for approximately three hours to discuss the possibility of Joseph representing Ruane and the plaintiffs in the civil action. Ruane and Joseph met again, at a later date, where Joseph proposed a fee structure to Ruane that Ruane determined was not acceptable. Accordingly, Ruane did not in fact retain Joseph as counsel in the civil case.

When this criminal action was brought against Bailey, he retained Joseph to represent him. The government subsequently filed a motion to disqualify Joseph, arguing that, even though Ruane did not pay Joseph a fee, the evidence, primarily in the form of affidavits from Ruane, demonstrates that an attorney- client relationship existed between Ruane and Joseph for the purposes of Rule 1.9(a) of the Model Rules of Professional Conduct, which has been codified in the Kansas Rules of Professional Conduct. Rule 1.9(a) provides:

> Conflict of Interest: Former Client
>
> A lawyer who has formerly represented a client in a matter shall not thereafter:
>
> (a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or
>
> (b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client or when the information has become generally known.

Model Rules of Prof'l Conduct R. 1.9; Kan. Rules of Prof'l Conduct R. 1.9.

The only issue the parties dispute in this case is the "threshold question" of "whether there was an attorney-client relationship [between Ruane and Joseph] that would subject a lawyer to the ethical obligation of preserving confidential communications." *Cole v. Ruidoso Mun. Schs.*, 43 F.3d 1373, 1384 (10th Cir.1994). We have further stated that:

> For there to have been an attorney-client relationship, the parties need not have executed a formal contract. Nor is the existence of a relationship dependent upon the payment of fees. However, a party must show that (1) it submitted confidential information to a lawyer and (2) it did so with the reasonable belief that the lawyer was acting as the party's attorney.

Id. (citation omitted).

[2] Ruane and Joseph submitted affidavits under seal, which the district court carefully evaluated to assess whether Ruane provided any confidential information to Joseph. [FN3] The court held that he had, and therefore an attorney-client relationship existed between Ruane and Joseph for purposes of Rule 1.9. After conducting our own *de novo* review of the entire record in this case, we agree with that conclusion, for substantially the reasons set forth in the district court's memorandum and order granting the government's motion to have Joseph disqualified from representing Bailey. [FN4]

II. Sufficiency of Evidence

At both the close of the government's case and at the close of all the evidence, Bailey moved for a judgment of acquittal, which was denied. He argues that the district court erred in denying his motion, contending that the government's evidence "failed to prove beyond a reasonable doubt that Mr. Bailey--who was shown to have made every effort to increase the value of the partnership--had the requisite intent to defraud his partners." Appellant's Br. at 30.

[3][4][5] We review the "denial of a motion for judgment of acquittal *de novo,* viewing the evidence in the light most favorable to the government." *United States v. Austin*, 231 F.3d 1278, 1283 (10th Cir.2000). We must determine whether there is evidence "from which a jury could find the defendant guilty beyond a reasonable doubt." *Id.* In reviewing that evidence, however, we do not "weigh the evidence or consider the credibility of the witnesses in making [our] determination." *Id.* We may reverse the jury's verdict "only if no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Haslip*, 160 F.3d 649, 652 (10th Cir.1998) (quotation omitted).

[6][7][8][9][10][11] To establish wire fraud, the government had to prove "(1) a scheme or artifice to defraud and (2) use of interstate wire communications to facilitate that scheme." *United States v. Janusz*, 135 F.3d 1319, 1323 (10th Cir.1998). Similarly, money laundering requires a specific intent to launder the proceeds from a known illegal activity. *See United States v. Rahseparian*, 231 F.3d 1257, 1261 (10th Cir.2000). Because it is difficult to prove intent to defraud from direct evidence, a jury may consider circumstantial evidence of fraudulent intent and draw reasonable inferences therefrom. Thus, "[i]ntent may be inferred from evidence that the defendant attempted to conceal activity. Intent to defraud may be inferred from the defendant's misrepresentations, knowledge of a false statement as well as whether the defendant profited or converted money to his own use." *United States v. Prows*, 118 F.3d 686, 692 (10th Cir.1997) (quotation omitted). Further, "[e]vidence of the schemer's indifference to the truth of statements can amount to evidence of fraudulent intent." *United States v. Trammell*, 133 F.3d 1343, 1352 (10th Cir.1998) (quotation omitted).

The record contains evidence that Bailey transferred funds by wire from the Partnership account and placed them in his personal account; that he used the funds in his personal account to invest in high risk investments, in direct contravention of the terms of the Partnership Agreement; that he hid these actions from his partners; and that he misrepresented to his partners the status of the Partnership account, including the profits allegedly made and the amount of commissions he withdrew. There was accordingly sufficient evidence from which the jury could infer that he acted with the requisite culpable mental state.

III. Sufficiency of Indictment and Evidence of Wire Fraud

[12] Next, Bailey alleges that "the indictment failed to allege a crime and the evidence was insufficient as a matter of law to prove that Mr. Bailey used wire *communications* to further a fraudulent scheme." Appellant's Br. at 34. Bailey's argument appears to be that the indictment failed to allege that the wire transfers by which Bailey transferred funds from the Partnership accounts to his personal accounts had a "communicative aspect" and therefore it failed to allege wire fraud under the statute.

[13][14] Bailey failed to challenge the adequacy of the indictment until after the jury rendered its guilty verdict.

> Where a defendant first challenges the absence of an element of the offense after a jury verdict, the

> indictment will be deemed sufficient if it contains words of similar import to the element in question. As long as the indictment contained words sufficient to inform the defendant of the charge against him, the indictment will be upheld. We will find the indictment sufficient unless it is so defective that by *any reasonable construction,* it fails to charge the offense for which the defendant is convicted. Because of this liberal construction rule, an indictment challenged for the first time post-verdict may be found sufficient, even though that indictment would have been found wanting had it been challenged pre-verdict.

United States v. Avery, 295 F.3d 1158, 1174 (10th Cir.2002) (citations and quotations omitted); *see also United States v. Hathaway,* 318 F.3d 1001, 1009-10 (10th Cir.2003).

[15] The wire fraud statute makes it illegal to "transmit[ ] or cause[ ] to be transmitted by means of wire ... communication in interstate ... commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing [a] scheme or artifice [to defraud]." 18 U.S.C. § 1343. The indictment alleged that Bailey:

> did knowingly and willfully devise a scheme or artifice to defraud, for the purpose of executing the scheme to defraud and for obtaining money or property by means of false or fraudulent pretenses, representations or promises, did transmit by means of wire communication in interstate commerce, writings, signs, signals or sounds which transferred the following partnership money from Datek ... to the defendant's personal account....

App. Vol. I at 16-17. The indictment then listed each of the seventeen transfers with the date the transfer was made and the amount transferred. The government introduced evidence at trial of those transfers. The indictment adequately alleged the crime of wire fraud. It "set[ ] forth the elements of the offense charged, [and] put[ ] the defendant on fair notice of the charges against which he [had to defend]." *Hathaway,* 318 F.3d at 1009. Further, the wire transfers were "communicative" in that they conveyed information about the accounts from which and into which funds were to be transferred and the amounts to be transferred, and they in fact transferred those funds. Finally, we have previously found a conviction for wire fraud supported by wire transfers of money. *See Janusz,* 135 F.3d at 1324.

IV. Variance

Bailey argues there was a fatal variance between the indictment and the proof at trial, in that the indictment alleged a scheme involving the fraudulent promise not to invest Partnership money in high risk investments, and the unauthorized transfer of Partnership funds to his own personal accounts to accomplish those investments, but the government introduced at trial evidence of false quarterly reports to the partners. Bailey argues he was prejudiced by this variance because he had no notice that the government would "pursue a theory of fraud based on Mr. Bailey's inaccurate quarterly reports" and because it "created the possibility either that the jury may have convicted Mr. Bailey of an uncharged scheme, or that the jury's verdict was not unanimous as to which alleged scheme--the futures fraud or the uncharged quarterly-reports fraud--supported the convictions." Appellant's Br. at 41.

[16] Bailey failed to argue below that there was a variance between the indictment and the proof at trial, so we review the issue under the plain error standard. *See United States v. Dennis,* 237 F.3d 1295, 1300 (11th Cir.2001); *United States v. Young,* 862 F.2d 815, 820 (10th Cir.1988). "To notice plain error under Fed.R.Crim.P. 52(b), the error must (1) be an actual error that was forfeited; (2) be plain or obvious; and (3) affect substantial rights, in other words, in most cases the error must be prejudicial, i.e., it must have affected the outcome of the trial," *United States v. Haney,* 318 F.3d 1161, 1166 (10th Cir.2003) (en banc), in that it "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *United States v. Olano,* 507 U.S. 725, 736, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993).

[17][18][19][20] "A variance arises when the evidence adduced at trial establishes facts different from those alleged in the indictment, and denigrates the Sixth Amendment right 'to be informed of the nature and cause of the accusation.' " *United States v. Caballero,* 277 F.3d 1235, 1243 (10th Cir.2002) (quoting U.S. Const. amend. VI) (citation omitted). "Any such variance is reversible error only if it affects the substantial rights of the accused." *United States v. Hanzlicek,* 187 F.3d 1228, 1232 (10th Cir.1999). "A defendant is substantially prejudiced in his defense either because he cannot anticipate from the indictment what evidence will be presented against him, or because the defendant is exposed to the risk of double jeopardy." *Caballero,* 277 F.3d at 1243.

Consistent with the wire fraud statute, the indictment alleged that Bailey "did knowingly and willfully devise a scheme or artifice to defraud, for the purpose of executing the scheme to defraud and for obtaining money or property by means of false or fraudulent pretenses, representations or promises." App. Vol. I at 16. It then alleged that Bailey "transmitt[ed] by means of wire communication in interstate commerce,

writings, signs, signals or sounds which transferred ... partnership money...." *Id.* The jury was instructed that to sustain its burden of proof on the wire fraud charge, the government had to prove that (1) "Defendant knowingly devised and specifically intended to devise a scheme or artifice to defraud for obtaining, or attempting to obtain, money by means of false or fraudulent pretenses, representations or promises;" and (2) that "Defendant used interstate wire communications for the purpose of carrying out the scheme." *Id.* at 157. [FN5] *See Janusz*, 135 F.3d at 1323 (noting that "[t]o establish wire fraud under 18 U.S.C. § 1343, the government must prove (1) a scheme or artifice to defraud and (2) use of interstate wire communications to facilitate that scheme").

[21] We perceive no prejudicial variance between the indictment and the evidence at trial. The government established that Bailey's scheme to defraud consisted of defrauding his partners by using their investment funds without their knowledge to make personal trades in types of investments specifically prohibited by the partners. As a part of that scheme, indeed to facilitate its success, Bailey misrepresented to his partners the status of their accounts with the Partnership. The government did not allege two separate schemes, one involving false quarterly reports and one involving the wire transfers, but one single scheme to defraud accomplished by various means. "Elements [of an offense] ... must be found unanimously by the jury." *United States v. Powell*, 226 F.3d 1181, 1196 (10th Cir.2000). "On the other hand, the jury need not agree unanimously on the *means* by which an element is proven." *Id.* We therefore find no prejudicial variance, no risk that the jury did not reach a unanimous verdict, and therefore no error, let alone a plain error, in this case.

V. Good Faith Instruction

Bailey next argues that the court's good-faith instruction "was internally inconsistent and confusing." Appellant's Br. at 46. Bailey initially requested a modification to the court's proposed good faith instruction, presenting to the court an alternative instruction he thought was less confusing. The court considered Bailey's proposed instruction, apparently made a slight modification to the good-faith instruction it had originally proposed, and then proposed to the parties the good-faith instruction to which Bailey now objects. At the subsequent jury instruction conference, the court submitted the modified good- faith instruction, to which Bailey made no objection.

[22] Because Bailey failed to object to the instruction given at the time, we review his assertion of error now under the plain error standard. *See United States v. Fabiano*, 169 F.3d 1299, 1302 (10th Cir.1999). Under this standard we may correct an error only if it "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 732, 113 S.Ct. 1770 (quotation omitted). "[W]e examine [instructions] as a whole to determine whether the jury may have been misled, upholding the judgment in the absence of substantial doubt that the jury was fairly guided." *United States v. Wiktor*, 146 F.3d 815, 817 (10th Cir.1998) (quotation omitted).

[23] We find no plain error in the good-faith instruction. Bailey does not argue that the instruction was legally incorrect; he just asserts it was internally inconsistent and confusing, thereby preventing the jury from giving effect to his good-faith defense. We disagree. The "honest belief" portion of the instruction to which Bailey now objects correctly informed the jury that, having committed fraud, an honest belief by Bailey that everything would work out does not establish a good faith defense. *See United States v. Pappert*, 112 F.3d 1073, 1076 (10th Cir.1997) (approving instruction that "it is no defense to a charge of mail fraud or wire fraud that the defendant honestly believes in the ultimate success of his business"). We are confident that the jury was not misled, and we have no doubt that it was fairly guided in evaluating Bailey's good faith defense.

VI. Testimony About Civil Settlement

As indicated, Bailey was sued by a number of his partners in a civil suit, which resulted in a settlement. The written settlement agreement contained the following:

> **1.2. *Summary of Settlement.*** Bailey acknowledges that the settlement due hereunder represents a partial return to the Partnership of funds which Bailey withdrew from Partnership accounts and placed in accounts controlled by him personally, which withdrawals were not authorized under the Partnership Agreement, by the other Partners or by the Partnership itself. Further, Bailey acknowledges that such withdrawals were made between April 1, 1996 and September 30, 1999, in the total net amount of One Million Three Hundred Forty- One Thousand Dollars ($1,341,000.00) after credit for a Six Hundred Thousand Dollar ($600,000.00) deposit.

App. Vol. I at 79. At trial, after Bailey rested, the government presented one rebuttal witness, Bruce Wilgers, a partner and plaintiff in the civil suit, and asked him the following three questions about the settlement agreement:

> Q Did the Defendant agree and admit that he had withdrawn from partnership accounts and placed in

> accounts controlled by him personally withdrawals which were not authorized under the partnership agreement?
> ....
> Q Did the Defendant admit that the partners had never given--individual partners had never given him permission to withdraw funds from his--from the partnership accounts and deposit them into his personal account?
> ....
> Q And did the Defendant admit that he had, without authority and authorization, withdrawn over $1,313,000?

App. Vol. III at 753-54. Wilgers answered all three questions affirmatively. Bailey made no objection to the testimony, so we again review only for plain error. Bailey argues the admission of this testimony violates Fed.R.Evid. 408, that the government's presentation of it was misconduct and that the court's failure to exclude it was plain error.

Rule 408 provides in pertinent part:

> Evidence of (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 claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount.

Fed.R.Evid. 408. Pursuant to Fed.R.Evid. 1101(b), the Federal Rules of Evidence "apply generally ... to criminal cases and proceedings."

Our circuit has not yet addressed the question of whether Rule 408 applies to both criminal and civil proceedings, or whether it only applies to civil proceedings in which a party seeks to admit evidence regarding a settlement. The Second, Sixth, and Seventh Circuits have held that it applies only to civil proceedings. Thus, in those circuits the Rule does not bar the introduction in a criminal proceeding of evidence of a settlement. *See United States v. Logan*, 250 F.3d 350, 367 (6th Cir.2001) ("[W]e conclude, as have the Second and Seventh Circuits, that Rule 408 does not serve to prohibit the use of evidence from settlement negotiations in a criminal case."); *Manko v. United States*, 87 F.3d 50, 54-55 (2d Cir.1996) ("[W]e reaffirm our conclusion in [*United States v.] Gonzalez* [,748 F.2d 74 (2d Cir.1984)] that the underlying policy considerations of Rule 408 are inapplicable in criminal cases."); *United States v. Prewitt*, 34 F.3d 436, 439 (7th Cir.1994) ("Rule 408 should not be applied to criminal cases.").

The Fifth Circuit has held it applies in both civil and criminal proceedings. *See United States v. Hays*, 872 F.2d 582, 588-89 (5th Cir.1989) (holding that Rule 408 applies in a criminal proceeding as well as a civil proceeding to bar evidence of a settlement agreement). The Fourth Circuit and the D.C. Circuit have suggested in dicta that Rule 408 may apply in a criminal proceeding. *See United States v. Graham*, 91 F.3d 213, 218 (D.C.Cir.1996) ("The subject of [Rule 408] is the admissibility of evidence (in a civil or criminal case) of negotiations undertaken to 'compromise a claim.' "); *United States v. Peed*, 714 F.2d 7, 9-10 (4th Cir.1983) (noting that defendant characterized certain statements as "an offer to compromise a civil claim, which under Fed.R.Evid. 408 cannot be introduced [in the criminal proceeding before it] as evidence of liability"); *see also United States v. Skeddle*, 176 F.R.D. 254, 256 (N.D.Ohio 1997) (disagreeing with government's argument that Rule 408 does not apply in criminal proceedings, noting that "[n]othing in Rule 408 limits its application to civil litigation that was preceded by or included settlement negotiations"); *State v. Gano*, 92 Hawai'i 161, 988 P.2d 1153, 1159-60 (Haw.1999) (discussing cases and concluding that "Rule 408 does apply in criminal proceedings").

Commentators are divided on the point, although a majority appear to agree with the Fifth Circuit's position that Rule 408 should bar evidence of settlements in both civil and criminal proceedings. *See, e.g.*, 2 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 408.08[6] (2d ed.1997) (stating that evidence of settlement should be barred in both criminal and civil proceedings); 23 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5308 (Supp.2002) ("Rule 408 would make covered compromise evidence inadmissible in criminal as well as civil proceedings."); John W. Strong, *McCormick on Evidence* § 266 (5th ed. 1999) ("If the transaction on which the prosecution is based also gives rise to a civil cause of action, a compromise or offer of compromise to the civil claim should be privileged when offered at the criminal trial if no agreement to stifle the criminal prosecution was involved."); Todd W. Blanche, *When Two Worlds Collide: Examining the Second Circuit's Reasoning in Admitting Evidence of Civil Settlements in Criminal Trials*, 67 Brook. L.Rev. 527, 528 (2001) (noting that "[m]ost other courts and leading evidence treatises conclude that settlements and negotiations should be protected under Rule 408 not only in civil trials, but also in criminal proceedings").

The Sixth, Seventh and Second circuits have relied upon what they call the "plain language" of the Rule as well as "the primary policy consideration that underlies the purpose of Rule 408" to find it applicable only to civil proceedings. *Logan*, 250 F.3d at 367. Thus,

"words such as 'validity' and 'claim' establish that the drafters of the Rule intended for it to apply solely in a civil context." *Id.* (discussing *United States v. Baker*, 926 F.2d 179, 180 (2d Cir.1991)); *see also Prewitt*, 34 F.3d at 439 ("The clear reading of this rule suggests that it should apply only to civil proceedings, specifically the language concerning validity and amount of a claim."). Additionally, those courts conclude that the policy considerations underlying Rule 408--to encourage the settlement of civil cases--either has no application to criminal cases, or is "heavily outweighed by the public interest in prosecuting criminal matters." *Logan*, 250 F.3d at 367.

On the other hand, those courts and commentators who conclude that Rule 408 should apply in both civil and criminal proceedings to bar evidence of settlements also rely on the language of Rule 408 and the Rules of Evidence generally, as well as the dramatic effect evidence of an admission of liability could have upon a criminal defendant. Thus, "Rule 1101(b) explicitly states that the rules of evidence 'apply generally' to criminal cases and criminal proceedings." *Skeddle*, 176 F.R.D. at 256. Further, nothing in the language of the Rule explicitly excludes its application to criminal proceedings.

Additionally, Rule 408 specifically states that it "does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution." Fed.R.Evid. 408. Courts approving Rule 408's application in criminal proceedings note that "[t]o construe the rule as applying only in civil proceedings would render the final sentence of the rule unnecessary." *Gano*, 988 P.2d at 1159; *see also Skeddle*, 176 F.R.D. at 257 (noting its "agree [ment] with defendants that if Rule 408 did not apply in criminal cases, there would be no need to carve out an exception for certain circumstances in criminal cases"). Finally, those courts cite other powerful policy concerns suggesting that Rule 408 should bar settlement evidence in criminal cases: "It does not tax the imagination to envision the juror who retires to deliberate with the notion that if the defendants had done nothing wrong, they would not have paid the money back." *Hays*, 872 F.2d at 589; *Gano*, 988 P.2d at 1159 ("[W]e believe that the potential impact of evidence regarding a civil settlement agreement is even more profound in criminal proceedings than it is in civil proceedings.").

[24] Although the question is a very close one, we agree with those courts which apply Rule 408 to bar settlement evidence in both criminal and civil proceedings. We reach this conclusion for essentially the same reasons stated by those courts: the Federal Rules of Evidence apply generally to both civil and criminal proceedings; nothing in Rule 408 explicitly states that it is inapplicable to criminal proceedings; [FN6] the final sentence is arguably unnecessary if the Rule does not apply to criminal proceedings at all; and the potential prejudicial effect of the admission of evidence of a settlement can be more devastating to a criminal defendant than to a civil litigant.

[25] Having concluded that it was error to admit evidence of the settlement, we must determine whether it was plain error, which requires a finding that the error affected substantial rights by "affect[ing] the outcome of the trial." *Haney*, 318 F.3d at 1166. We conclude that it did not. There was ample other evidence establishing the substance of what Wilgers testified the settlement agreement contained--that Bailey had knowingly and intentionally taken money from the Partnership accounts and placed it in his own account, in contravention of the Partnership Agreement; that the partners did not give him permission to do that; and that he had withdrawn in excess of $1 million without authorization from the partnership. Moreover, the testimony did not indicate that Bailey was "furnishing or offering or promising to furnish ... a valuable consideration" under Rule 408. It simply recounted Bailey's conduct in connection with the Partnership. While evidence that Bailey had admitted such conduct in the civil settlement added to the body of evidence before the jury about Bailey's conduct, it did not affect the outcome of the trial.

VII. Application of the Sentencing Guidelines

[26] The district court sentenced Bailey to 57 months' imprisonment. Bailey argues the court erred in its calculation of loss, its application of the abuse-of-trust enhancement, and in its refusal to grant a two-level reduction for acceptance of responsibility. "We review a district court's interpretation of the Sentencing Guidelines de novo, and its factual findings for clear error, giving due deference to the district court's application of the guidelines to the facts." *United States v. Brown*, 314 F.3d 1216, 1222 (10th Cir.2003).

A. Amount of Loss

[27] The district court determined that the amount of loss attributable to Bailey's fraudulent scheme was $951,759.05. The guidelines state that "[t]he sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence. For this reason, the court's loss determination is entitled to appropriate deference." USSG § 2B1.1, comment. (n.2(C)). The guidelines further provide that the loss

"shall be reduced by ... [t]he money returned ... by the defendant ... to the victim before the offense was detected." USSG § 2B1 .1, comment. (n.2(E)). Bailey argues that the amount of loss should have been reduced by the $600,000 he borrowed from his parents and put into the Partnership accounts.

The district court made the following findings with respect to that $600,000:

> Although defendant's exhibit B shows $600,000 wired from defendant's account to partnership accounts, there is no evidence that all of those funds were actually given 'to the victim[s]' before his crimes were detected. After reinvesting the funds in partnership accounts, defendant apparently lost substantial sums before the victims received any benefit from defendant's cash infusion. The court has been provided with no means to track the infused funds after they were reinvested to sufficiently credit them against losses sustained. Ultimately, only $369,676.32 remained in the partnership account at the time it was dissolved. Although it might be argued that the investors benefitted from defendant's cash infusion to the extent that, without it, no money would have been left in the partnership account upon dissolution, there is no evidence by which a dollar amount of the benefit "to the victims" can be determined. The fact remains that defendant did not return any money directly to his investors before his offenses were detected.

Memorandum and Order at 7-8, App. Vol. I at 223-24. Those findings are not clearly erroneous. Giving appropriate deference to the district court's application of the guidelines to the facts, we affirm its determination of the amount of loss.

B. Abuse of Trust Enhancement

[28] The district court enhanced Bailey's sentence by two points for abuse of a position of trust under USSG § 3B1.3. Applying the standard of review set out above, we affirm the district court's enhancement of Bailey's sentence for abuse of a position of trust.

As the district court noted, the application notes to the guidelines specifically provide that the abuse-of-trust enhancement applies where a defendant holds himself out to be a legitimate investment broker as a part of a scheme to defraud:

> This adjustment ... applies in a case in which the defendant provides sufficient indicia to the victim that the defendant legitimately holds a position of private or public trust when, in fact, the defendant does not. For example, the adjustment applies in the case of a defendant who (A) perpetrates a financial fraud by leading an investor to believe the defendant is a legitimate investment broker.

USSG § 3B1.3. comment. (n.2). *See United States v. Queen*, 4 F.3d 925, 929 n. 3 (10th Cir.1993) ("To invoke § 3B1.3, the defendant must either occupy a formal *position* of trust or must create sufficient indicia that he occupies such a position of trust that he should be held accountable as if he did occupy such a position."). Bailey argues that he "never held himself out to his investors as anything more than an unlicenced, unregistered, amateur, experimental investor." Appellant's Br. at 58. We disagree. We affirm the district court's finding, after its careful review of the evidence in this case, that Bailey clearly held himself out to be a legitimate investment broker and accordingly abused a position of trust under § 3B1.3.

C. Acceptance of Responsibility

[29][30][31][32] Finally, Bailey argues the district court erred in refusing to grant him a sentence reduction for acceptance of responsibility. "The district court's acceptance of responsibility determination is subject to the clearly erroneous standard of review." *United States v. Quarrell*, 310 F.3d 664, 682 (10th Cir.2002). Further, "[b]ecause the 'sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility,' his or her decision is 'entitled to great deference on review.' " *Id.* (quoting USSG § 3E1.1, comment. (n.5)). Bailey bears the burden of proving acceptance of responsibility. *Id.* "In 'rare situations' a defendant may receive credit for acceptance of responsibility even though he exercised his right to a trial." *Id.*

We agree with the district court's assessment that "[t]he overall tenor of this case at trial was that, although defendant committed the acts, he actively denied any intent to defraud." Memorandum and Order at 12-13, App. Vol. I at 228-29. Bailey repeatedly asserted he may have made some mistakes, failed to keep accurate records, perhaps was sloppy, and continued to claim that at least some of his partners actually encouraged him to invest in futures. Bailey never admitted that he had any intent to defraud, nor did he acknowledge that his actions were criminal. We affirm the district court's finding that "there is absolutely no indication here that defendant accepted responsibility for any criminal conduct prior to trial, or after, for that matter." *Id.* at 230. *See United States v. Hill*, 197 F.3d 436, 446-47 (10th Cir.1999) (affirming denial of acceptance of responsibility reduction where defendant argued "that his conduct was innocent and without intention to defraud" victim). We therefore affirm the court's refusal to grant Bailey a reduction for acceptance of responsibility.

CONCLUSION

For the foregoing reasons, we AFFIRM Bailey's conviction and sentence.

FN1. A few partners had apparently "cashed out" of the Partnership, and Bailey had returned their money in full. The total sum "cashed out" was less than $100,000.

FN2. At the time Ruane and Joseph met, Ruane was the "proposed Class representative in the recently certified class action against" Bailey. Second Ruane Aff. at ¶ 4, App. Vol. VI at 914.

FN3. Bailey has filed a motion, referred to this panel, to unseal those documents and pleadings filed under seal. The motion is not opposed, in writing or at oral argument of this appeal, and the materials in the sealed portion of the record were discussed in the briefs and at oral argument. Further, we fully considered the entire record, including those parts under seal. The motion is granted.

FN4. At oral argument of this appeal, there was a suggestion that Bailey's argument about disqualification of Joseph was more properly framed as a claimed violation of his due process rights by the district court's denial of a continuance when Bailey decided to obtain a third attorney a few weeks before his trial commenced. Assuming, *arguendo,* that this issue is even properly before us, we conclude that Bailey's due process rights were not violated in this case.
After Joseph was disqualified, Bailey retained Jack Focht as his attorney. No one suggests that Focht's representation, which lasted more than three months, was anything other than exemplary. On November 7, 2001, some twenty days before trial was to commence, the district court was contacted by Steven Rosel, who stated that Bailey had contacted him about possibly representing Bailey but that he (Rosel) could not be ready to go to trial in twenty days. The court informed Rosel that it would grant no continuance. Nonetheless, on November 12, Rosel entered his appearance as Bailey's counsel, replacing Focht. Rosel made no formal motion for a continuance. Bailey suggests that the court's initial disqualification of Joseph, in conjunction with its denial of a continuance, set in motion a chain of events which led to his representation at trial by Rosel, whom he (Bailey) alleges was unprepared and provided poor representation in various ways. However, Bailey overlooks the fact that his own decision to terminate Focht's services, for reasons which he does not even attempt to explain, caused him to be represented at trial by Rosel.

FN5. The district court also instructed the jury that the government had to establish that Bailey's actions "occurred, in whole or in part, in Kansas." App. Vol. I at 157.

FN6. As the district court in *Skeddle* pointed out, the drafters of the Rules knew how to expressly exclude criminal proceedings from the Rules' application when they wanted to: "Rule 803(8)(b) provides that public records are not to be excluded as hearsay when setting forth matters observed pursuant to a duty imposed by law, except 'in criminal cases [involving] matters observed by police officers and other law enforcement personnel.' " *Skeddle,* 176 F.R.D. at 257 (quoting Fed.R.Evid. 803(8)(B)). We must assume that the drafters' failure to make any express exclusion in 408 for criminal proceedings was meaningful.

2003 WL 1958047, 327 F.3d 1131

END OF DOCUMENT

FORDHAM
University School of Law

Lincoln Center, 140 West 62nd Street, New York, NY 10023-7485

Daniel J. Capra
Philip Reed Professor of Law

Phone: 212-636-6855
e-mail:dcapra@law.fordham.edu
Fax: 212-636-6899

Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Possible Amendment to Rule 410
Date: November 1, 2003

This memorandum is intended to assist the Committee in its consideration of a possible amendment to Evidence Rule 410. The possibility of an amendment to Rule 410 arose out of the Committee's work on Rule 408. As the Committee and the Reporter considered a possible amendment to Rule 408, it encountered some case law holding that Rule 408 excluded statements and offers made by prosecutors in guilty plea negotiations. The Committee noted that the analysis in these cases was faulty, because Rule 408, by its terms, covers only those statements and offers that are made in the course of settling *civil* claims. The Committee determined that if statements and offers by prosecutors are to be protected, that protection should be provided by Rule 410–the Rule designed to cover statements and offers made in guilty plea negotiations.

The problem, however, is that Rule 410 does not, by its terms, protect the government. It provides that certain statements and offers in guilty plea negotiations cannot be admitted "against the defendant". The Committee at its Fall 2002 meeting determined that, on the merits, statements and offers made by the prosecutor during plea negotiations should be as protected as similar statements and offers by the defendant. The Committee directed the Reporter to prepare a memorandum discussing a possible amendment to Rule 410 that would provide such protection for prosecution statements and offers.

At the Spring 2003 meeting, the Committee considered the draft of an amendment to Rule 410 and directed the Reporter to prepare a memorandum for further consideration of an amendment to Rule 410 at the Fall 2003 meeting.

This memorandum is in four parts. Part One sets forth the existing Rule 410, and provides a short discussion of case law treatment of prosecution statements and offers under that Rule and under Rule 408. Part Two discusses Committee determinations on the Rule up to this point. Part Three discusses and addresses the suggestions and concerns that were expressed about the text of the proposed amendment at the Spring 2003 meeting. Part Four provides a model for amending Rule

410 should the Committee decide to proceed.

If the Committee does decide to proceed with an amendment, it can be carried forward as part of a possible "package" of amendments that could be presented to the Standing Committee in the Spring of 2004. Or it could be presented to the Standing Committee in January, 2004, for publication in August.

I. RULE 410 AND THE CASE LAW ON THE ADMISSIBILITY OF PROSECUTION STATEMENTS AND OFFERS MADE IN GUILTY PLEA NEGOTIATIONS

The Rule

Rule 410 provides as follows:

Rule 410. Inadmissibility of Pleas, Plea Discussions, and Related Statements

> Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible **against the defendant** who made the plea or was a participant in the plea discussions:
>
> (1) a plea of guilty which was later withdrawn;
>
> (2) a plea of *nolo contendere;*
>
> (3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or
>
> (4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.
>
> However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness to be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

The Case Law

There are only a handful of cases discussing the admissibility of statements and offers by prosecutors in guilty plea negotiations. What follows is a description of those cases:

1. *United States v. Verdoorn*, 528 F.2d 103, 107 (8th Cir. 1976): In this case, the defendant wanted to introduce offers and statements made by the government during plea negotiations; the government had apparently offered a deal to every living soul other than the defendant, and the defendant wanted to use that evidence to show something improper about governmental motivation. The problem for the government was that statements and offers by the prosecution are not protected under Rule 410. So the government relied on Rule 408. The court agreed with the government, reasoning that the "principles" of Rule 408 warranted exclusion of the government's offers in a criminal case.

Comment: While the result may be correct on the merits, the analysis is faulty. It is clear that Rule 408 does not cover anything that happens in guilty plea negotiations. It only covers efforts to settle a civil claim.

2. *United States v. Delgado,* 903 F.2d 1495 (11th Cir. 1990): The defendants argued that the government's agreement to drop conspiracy charges against a cooperating accomplice should have been admitted as a government admission that no conspiracy existed. The Court found no error in excluding the agreement. The Court noted that "by holding that the government admits innocence when it dismisses charges under a plea agreement, we would effectively put an end to the use of plea agreements to obtain the assistance of defendants as witnesses against alleged co-conspirators."

The *Delgado* Court did not rely on, or even mention, Rules 408 or 410. Rather, it concluded that the government's agreement to drop charges was properly excluded under Rule 403:

> Even if such evidence is relevant, it would not be admissible under Rule 403. If the evidence were admitted, the government's counsel likely would take the stand and testify that the charges were dropped for reasons unrelated to the guilt of the defendant. The reasons expressed by the government's counsel could be highly incriminating with regard to the defendant who is seeking to have the evidence admitted. Thus, the district court should probably hold the technically admissible opinion evidence inadmissible because it would open the door to evidence on collateral issues that would likely confuse the jury.

3. *United States v. Greene,* 995 F.2d 793, 798 (8th Cir.1993): This is a case, like *Verdoorn,* in which the defendant sought to admit statements by the government during plea negotiations. The court followed the circuit precedent of *Verdoorn* and concluded that "[u]nder the rationale of Fed.R.Evid. 408, which relates to the general admissibility of compromises and offers to compromise, government proposals concerning pleas should be excludable."

4. *United States v. Biaggi,* 909 F.2d 662 (2d Cir. 1990): One of the defendants wanted to admit the fact that he had rejected an immunity deal offered by the government. His theory was that the rejection of immunity was evidence of "consciousness of innocence." The Court held that it was error to exclude the evidence. The government relied on Rule 410 as a source of exclusion. The Court analyzed the applicability of Rule 410 to the rejection of immunity agreements in the following passage:

> The Government also contends that evidence of immunity negotiations should be excluded because of the same considerations that bar evidence of plea negotiations. Preliminarily, we note that plea negotiations are inadmissible "against the defendant," Fed.

R. Crim. P. 11(e)(6); Fed. R. Evid. 410, and it does not necessarily follow that the Government is entitled to a similar shield. More fundamentally, the two types of negotiations differ markedly in their probative effect when they are sought to be offered against the Government. When a defendant rejects an offer of immunity on the ground that he is unaware of any wrongdoing about which he could testify, his action is probative of a state of mind devoid of guilty knowledge. Though there may be reasons for rejecting the offer that are consistent with guilty knowledge, such as fear of reprisal from those who would be inculpated, a jury is entitled to believe that most people would jump at the chance to obtain an assurance of immunity from prosecution and to infer from rejection of the offer that the accused lacks knowledge of wrongdoing. That the jury might not draw the inference urged by the defendant does not strip the evidence of probative force.

Rejection of an offer to plead guilty to reduced charges could also evidence an innocent state of mind, but the inference is not nearly so strong as rejection of an opportunity to preclude all exposure to a conviction and its consequences. A plea rejection might simply mean that the defendant prefers to take his chances on an acquittal by the jury, rather than accept the certainty of punishment after a guilty plea. We need not decide whether a defendant is entitled to have admitted a rejected plea bargain. *Cf.* United States v. Verdoorn, 528 F.2d 103 (8th Cir. 1976) (approving exclusion of a rejected plea bargain offered by a defendant to prove prosecutor's zeal, rather than defendant's innocent state of mind). The probative force of a rejected immunity offer is clearly strong enough to render it relevant.

The Court found that under the circumstances the probative value of rejection of complete immunity was not substantially outweighed by any prejudicial effect or confusion. Therefore it should have been admitted under Rule 403.

Comment: *Biaggi* does not deal directly with the question of whether statements and offers by the government are excluded by Rule 410 or any other Evidence Rule. The question in *Biaggi* was whether the defendant's *rejection* of a prosecutor's offer should be admitted. Moreover, the Court takes pains to distinguish rejection of immunity from rejection of an offer to plead guilty, so the case doesn't say much at all about statements and offers to plead guilty made by prosecutors. Nonetheless, the Court goes out of its way to point out that Rule 410, as written, is not a two-way street.

5. Brooks v. State, 763 So. 2d 859 (Miss. 2000): This is an interesting state case construing Mississippi Evidence Rule 410, which is virtually identical to the Federal Rule. The defendant contended that it was error for the prosecutor to argue in closing argument that the government offered the defendant a plea bargain and the defendant rejected it. The prosecutor contrasted the defendant's actions with those of a codefendant who did accept a plea bargain; thus the inference sought was that the defendant was guilty and was just wasting everyone's time by going to trial. The

Court agreed with the defendant that the prosecution violated Rule 410. It recognized that evidence of a plea offer made by the prosecution and rejected by the defendant "does not fall squarely under" any of the exclusionary language in Rule 410. It declared, however, that "the prosecutor's statement violates the spirit of Rule 410."

Comment: The Court is not completely correct that the evidence did not fall squarely under the language of the Rule. Part of the evidence did. The defendant's rejection of a plea bargain, when offered by the government, is clearly covered by the Rule, which excludes all statements made in the course of plea discussions that do not result in a guilty plea. The defendant's rejection of the government's offer in *Brooks* is certainly a "statement" covered by the Rule. But the prosecution's offer is not itself covered by the Rule, which is undoubtedly why the Court got somewhat confused.

6. United States v. Fell, 2002 U.S.Dist. Lexis 21402 (D.Vt.): The Court held that statements made by the government in failed plea negotiations would not be admissible. It recognized that Rule 410 did not directly exclude such statements. But it noted that if the prosecutor's statements were admitted, it would probably require some of the defendant's statements to be admitted as well, under the doctrine of completeness that is set forth in the last paragraph of Rule 410. Given these consequences, the Court exercised its discretion to exclude the prosecution's statements.

II. Committee Determinations on Proposed Amendment to Rule 410

As a policy matter, the Committee determined at its Fall 2002 meeting that government statements and offers in plea negotiations should be excluded from a criminal trial, in the same way that a defendant's statements are excluded. A mutual rule of exclusion would encourage a free flow of discussion that is necessary to efficient guilty plea negotiations; there is no good reason to protect only the statements of a defendant in a guilty plea negotiation. The Committee also determined, however, that if an amendment is required to protect government statements and offers in guilty plea negotiations, that amendment should be placed in Rule 410, not Rule 408, which, by its terms, covers statements and offers of compromise made in the course of attempting to settle a *civil* claim. Rule 410, which governs efforts to settle criminal charges, is the appropriate place for any amendment that would exclude statements and offers in guilty plea negotiations.

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

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

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

As to the applicability of the Rule to rejected and vacated pleas, the Committee was generally agreed that the question has not arisen often enough in the courts to justify an amendment on its own. However, if the Rule is to be amended on other grounds, the Committee agreed that it would be useful to clarify that the protections of the Rule are applicable to rejected and vacated pleas as well as to withdrawn pleas. Committee members noted that as a policy matter, there was no basis for distinguishing a withdrawn plea from a plea that is rejected or vacated. In any of these cases, the policy of protecting plea negotiations warrants protection from these subsequent unforeseen developments–otherwise negotiations are likely to be chilled by uncertainty.

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

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

Finally, the Committee agreed that the question of whether the protections of Rule 410 can be waived should be addressed in the Committee Note and not in the Rule. The Supreme Court has decided that the defendant can agree to the use of statements made in plea negotiations to impeach him should he testify at trial, but courts are still working out whether the power to waive the protections of Rule 410 extends to other situations. Thus, it would be counterproductive to codify a waiver rule in the text. But it would be important to acknowledge the waiver rule in the Committee Note, to prevent speculation that any amendment was rejecting Supreme Court precedent on the subject.

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

One point of contention among Committee members was how the amendment should apply in multiple defendant cases. For example, if the government makes a statement or offer to one defendant, could it be admitted against the government by another defendant not involved in the negotiations? Some members of the Committee suggested that the prosecutor's protections should be defendant-specific, and that any risk of prejudice to the government from the use of the prosecution's statements and offers in a multi-defendant case could be remedied by a limiting instruction. The Department of Justice objected that a limiting instruction would be ineffective, and that Rule 410 should be amended to preclude any use of prosecution statements and offers covered by the Rule, whether or not the defendant is the party to whom the statement or offer was made. The next section discusses this disagreement over the proper scope of the amendment.

III. Rule 410 and Defendant-Specific Admissibility of Prosecution Statements and Offers Made in Guilty Plea Negotiations

It appears that the only issue in dispute concerning an amendment to Rule 410 is whether a prosecution's statements and offers made to one defendant in guilty plea negotiations can be used by *another* defendant. The apparent consensus at the Spring 2003 meeting was that the protection should be defendant-specific, and that any harm to the government through use by another defendant can be corrected by a limiting instruction. Assume, for example, that in a multiple defendant case, the prosecutor offers a substantially lesser charge to one of the defendants, or makes a statement indicating his belief that the defendants might have a strong defense. Then the deal does not go through. Under a "defendant-specific" amendment, the defendant to whom the statement or offer was made could not admit any of this information. But a codefendant could admit this evidence as proof of the prosecution's recognition of the weakness of its case. The justification given at the meeting for a "defendant-specific" limitation is that the protection afforded to *defendants* under Rule 410 is party-specific (so that the statements otherwise protected under Rule 410 could be used against other defendants if otherwise admissible under a hearsay exception), so the same should be true for the protection afforded to the government.

The Department of Justice representative objected to this "defendant-specific" protection, for obvious reasons. It can be argued that the DOJ concerns are overstated, because the government can always seek protection under Rule 403. But on the other hand, it could be argued that the government's objection has merit in light of the policy of Rule 410, which is to protect and encourage guilty plea negotiations. The government is the unitary adversary against every defendant. If a prosecutor has to be concerned that statements and offers made to one defendant could be used by others, then it is probably less likely that such statements and offers will be made in the first place. In contrast, an individual defendant would not be concerned that his statements in guilty plea negotiations could be used against others. Presumably, he would only be concerned that such statements could be used against himself. Because the government is in a different position than any specific defendant, an argument can be made that the "defendant-specific" limitation should not be applied against the government. That is, in order to encourage guilty plea negotiations, each side should be completely protected from disclosure; and that would mean that the statements could not be used against the defendant who made the communications, or against the government (except under the limited, and justifiable, conditions of the last sentence of the Rule).

The Committee's previous discussion of a "defendant-specific" limitation in Rule 410 stemmed from an impromptu suggestion of a Committee member. It may be that the Committee may wish to discuss the question more fully at the Fall 2003 meeting. The object of the discussion would be how best to effectuate the policy of Rule 410, which is to encourage free discussions during guilty plea negotiations.

IV. MODELS FOR A POSSIBLE AMENDMENT TO RULE 410

This section sets forth two models for a possible amendment to Rule 410, should the Committee determine that such an amendment is necessary. Both models set forth the changes on which the Committee has tentatively agreed:

1. Statements and offers by the government should be protected.

2. The protections of the Rule should be extended to rejected and vacated pleas.

3. The term "against the government" should be changed to clarify that it is the statements and offers of the prosecutor that are protected.

4. The Committee Note should specify that there is no intent to affect or limit the waiver analysis applied by the Supreme Court in *Mezzanatto*.

Thus, the only difference between the models is that the first model includes a "defendant-specific" limitation in the Rule, while the second model does not.

Both models deal with the question of waiver and in the Committee Note, by indicating that there is no intent to affect that case and its progeny. If the Committee wishes to treat the problem of waiver in the text of the Rule, then the models can be adjusted accordingly.

Both models also deal with the *Biaggi* question–the admissibility of the defendant's rejection of an offer of immunity–in the Note.

Model One: Defendant-Specific Protection

Rule 410. Inadmissibility of Pleas, Plea Discussions, and Related Statements

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(1) a plea of guilty ~~which~~ that was later withdrawn, rejected or vacated;

(2) a plea of *nolo contendere;*

(3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or

(4) any statement made in the course of plea discussions with an attorney for the prosecuting authority ~~which~~ that do not result in a plea of guilty or ~~which~~ that result in a plea of guilty later withdrawn, rejected or vacated.; or

(5) any statement or offer made in the course of plea discussions by an attorney for the prosecuting authority, when proffered by the defendant to whom the statement or offer was made.

~~However, such a~~ Such a statement is admissible, however, (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness to be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

Model One Committee Note

Rule 410 has been amended to provide the following changes:

1. The government, as well as the defendant, is entitled to invoke the protections of the Rule. Courts have held that statements and offers by prosecutors during guilty plea negotiations are inadmissible, using a variety of theories. See, e.g., *United States v. Verdoorn,* 528 F.2d 103, 107 (8th Cir. 1976) (relying on the "principles" of Rule 408 even though that Rule, by its terms, only governs attempts to compromise a civil claim); *United States v. Delgado,* 903 F.2d 1495 (11th Cir. 1990) (government offer properly excluded under Rule 403 because it would have confused the jury); *Brooks v. State,* 763 So. 2d 859 (Miss. 2000) (relying on the "spirit" of state version of Rule 410 substantively identical to the Federal Rule). The amendment endorses the results of this case law, but provides a unitary source of

authority for excluding statements and offers by prosecutors during guilty plea negotiations. Protecting those statements and offers will encourage the unrestrained candor from both sides that produces effective plea discussions. The protection to the prosecution, however, applies only if the evidence is offered by the defendant who was the party to the guilty plea negotiations.

2. The protections of the Rule apply to statements and offers related to guilty pleas that are rejected by the court or vacated on appeal or collateral attack. Given the policy of the rule to promote plea negotiations, there is no reason to distinguish between guilty pleas that are withdrawn and those that are either rejected by the court or vacated on direct or collateral review.

Nothing in the amendment is intended to affect the rule and analysis set forth in *United States v. Mezzanatto*, 513 U.S. 196 (1995), and its progeny. The Court in *Mezzanatto* upheld an agreement in which the defendant knowingly and voluntarily waived the protections of Rule 410 insofar as his statements made in plea negotiations could be used to impeach him at trial. See also *United States v. Burch,* 156 F.3d 1315 (D.C. Cir. 1998) (reasoning that the holding in *Mezzanatto* logically extends to permit agreements to use the defendant's statements during the prosecution's case-in-chief); *United States v. Rebbe,* 314 F.3d 402 (9th Cir. 2002) (reasoning that the rationale in *Mezzanatto* applies equally to waivers permitting use of the defendant's statements in rebuttal). Nor is the amendment intended to cover the admissibility of the defendant's rejection of an offer of immunity from prosecution, when that rejection is probative of the defendant's consciousness of innocence. In such a case, the important evidence is the defendant's rejection, not the government's offer. *See generally United States v. Biaggi,* 909 F.2d 662, 690 (2d Cir. 1990) ("a jury is entitled to believe that most people would jump at the chance to obtain an assurance of immunity from prosecution and to infer from rejection of the offer that the accused lacks knowledge of wrongdoing").

Model Two: Government Protected From Proffer By Any Defendant

Rule 410. Inadmissibility of Pleas, Plea Discussions, and Related Statements

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(1) a plea of guilty ~~which~~ that was later withdrawn, rejected or vacated;

(2) a plea of *nolo contendere;*

(3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or

(4) any statement made in the course of plea discussions with an attorney for the prosecuting authority ~~which~~ that do not result in a plea of guilty or ~~which~~ that result in a plea of guilty later withdrawn, rejected or vacated~~.~~;

(5) any statement or offer made in the course of plea discussions by an attorney for the prosecuting authority.

~~However, such a~~ Such a statement is admissible, however, (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness to be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

Model Two Committee Note

Rule 410 has been amended to provide the following changes:

1. The government, as well as the defendant, is entitled to invoke the protections of the Rule. Courts have held that statements and offers by prosecutors during guilty plea negotiations are inadmissible, using a variety of theories. See, e.g., *United States v. Verdoorn,* 528 F.2d 103, 107 (8th Cir. 1976) (relying on the "principles" of Rule 408 even though that Rule, by its terms, only governs attempts to compromise a civil claim); *United States v. Delgado,* 903 F.2d 1495 (11th Cir. 1990) (government offer properly excluded under Rule 403 because it would have confused the jury); *Brooks v. State,* 763 So. 2d 859 (Miss. 2000) (relying on the "spirit" of state version of Rule 410 substantively identical to the Federal Rule). The amendment endorses the results of this case law, but provides a unitary source of authority for excluding statements and offers by prosecutors during guilty plea negotiations.

Protecting those statements and offers will encourage the unrestrained candor from both sides that produces effective plea discussions. The protection to the prosecution applies even if the evidence is offered by a defendant who was not a party to the guilty plea negotiations. The goal of the amendment is to assure that the prosecutor can speak freely, without concern that statements made by the prosecution in guilty plea negotiations can be used against the government. If the prosecutor must be concerned about use by other defendants, this will tend to deter the open negotiations that are the objective of the Rule.

2. The protections of the Rule apply to statements and offers related to guilty pleas that are rejected by the court or vacated on appeal or collateral attack. Given the policy of the rule to promote plea negotiations, there is no reason to distinguish between guilty pleas that are withdrawn and those that are either rejected by the court or vacated on direct or collateral review.

Nothing in the amendment is intended to affect the rule and analysis set forth in *United States v. Mezzanatto*, 513 U.S. 196 (1995), and its progeny. The Court in *Mezzanatto* upheld an agreement in which the defendant knowingly and voluntarily waived the protections of Rule 410 insofar as his statements made in plea negotiations could be used to impeach him at trial. See also *United States v. Burch,* 156 F.3d 1315 (D.C. Cir. 1998) (reasoning that the holding in *Mezzanatto* logically extends to permit agreements to use the defendant's statements during the prosecution's case-in-chief); *United States v. Rebbe,* 314 F.3d 402 (9th Cir. 2002) (reasoning that the rationale in *Mezzanatto* applies equally to waivers permitting use of the defendant's statements in rebuttal). Nor is the amendment intended to cover the admissibility of the defendant's rejection of an offer of immunity from prosecution, when that rejection is probative of the defendant's consciousness of innocence. In such a case, the important evidence is the defendant's rejection, not the government's offer. *See generally United States v. Biaggi,* 909 F.2d 662, 690 (2d Cir. 1990) ("a jury is entitled to believe that most people would jump at the chance to obtain an assurance of immunity from prosecution and to infer from rejection of the offer that the accused lacks knowledge of wrongdoing").

FORDHAM
University School of Law

Lincoln Center, 140 West 62nd Street, New York, NY 10023-7485

Daniel J. Capra
Philip Reed Professor of Law

Phone: 212-636-6855
e-mail:dcapra@law.fordham.edu
Fax: 212-636-6899

Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Possible Amendment to Rule 606(b)
Date: November 1, 2003

Rule 606(b) generally excludes juror affidavits or testimony concerning jury deliberations. The stated exceptions to the Rule are where the juror statements are offered "on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror."

The rule is silent on whether juror statements are admissible to prove that the verdict reported by the jury was different from that actually agreed upon by the jurors. Courts have generally allowed juror statements to prove errors in the rendering of the verdict, but there is dispute among the courts as to the scope of this court-created exception to the Rule.

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

This memorandum is divided into three parts. Part One sets forth the Rule, the Committee Note, and the legislative history that bears on the question of what will be referred to in this memorandum as a "differential" error, i.e., a difference between the result that the jury wished to reach and the actual verdict rendered. Part Two describes the Committee's work on the proposed amendment to this point. Part Three sets forth the proposed amendment and Committee Note that has been tentatively approved by the Committee. The Committee, if it wishes, can make changes to the proposal at the Fall 2003 meeting. The proposal can then be considered once again for a final review at the Spring 2004 Committee meeting; or it can be recommended to the Standing Committee at its January meeting, for release to the public in August.

I. RULE 606(b) AND THE RELEVANT LEGISLATIVE HISTORY

The Rule:

Rule 606(b) provides as follows:

Rule 606. Competency of Juror as Witness

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

(b) *Inquiry into validity of verdict or indictment.* — Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Advisory Committee Note:

The Advisory Committee Note to Rule 606(b) provides in pertinent part as follows:

Subdivision (b). Whether testimony, affidavits, or statements of jurors should be received for the purpose of invalidating or supporting a verdict or indictment, and if so, under what circumstances, has given rise to substantial differences of opinion. The familiar rubric that a juror may not impeach his own verdict, dating from Lord Mansfield's time, is a gross oversimplification. **The values sought to be promoted by excluding the evidence include freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment. McDonald v. Pless, 238 U.S. 264, 35 S. Ct. 785, 59 L. Ed. 1300 (1915). On the other hand, simply putting verdicts beyond effective reach can only promote irregularity and injustice. The rule offers an accommodation between these competing considerations.**

The mental operations and emotional reactions of jurors in arriving at a given result would, if allowed as a subject of inquiry, place every verdict at the mercy of jurors and invite tampering and harassment. See Grenz v. Werre, 129 N.W.2d 681 (N.D. 1964). The authorities are in virtually complete accord in excluding the evidence. Fryer, Note on Disqualification of Witnesses, Selected Writings on Evidence and Trial 345, 347 (Fryer ed. 1957); Maguire, Weinstein, et al., Cases on Evidence 887 (5th ed. 1965); 8 Wigmore § 2349 (McNaughton Rev. 1961). As to matters other than mental operations and emotional reactions of jurors, substantial authority refuses to allow a juror to disclose irregularities which occur in the jury room, but allows his testimony as to irregularities occurring outside and allows outsiders to testify as to occurrences both inside and out. 8 Wigmore § 2354 (McNaughton Rev. 1961). However, the door of the jury room is not necessarily a satisfactory dividing point, and the Supreme Court has refused to accept it for every situation. Mattox v. United States, 146 U.S. 140, 13 S. Ct. 50, 36 L. Ed. 917 (1892). Under the federal decisions the central focus has been upon insulation in the manner in which the jury reached its verdict, and this protection extends to each of the components of deliberation, including arguments, statements, discussions, mental and emotional reactions, votes, and any other feature of the process. **Thus testimony or affidavits of jurors have been held incompetent to show a compromise verdict, Hyde v. United States, 225 U.S. 347, 382 (1912); a quotient verdict, McDonald v. Pless, 238 U.S. 264 (1915); speculation as to insurance coverage, Holden v. Porter, 405 F.2d 878 (10th Cir. 1969) and Farmers Coop. Elev. Ass'n v. Strand, 382 F.2d 224, 230 (8th Cir. 1967), *cert. denied*, 389 U.S. 1014; misinterpretation of instructions, Farmers Coop. Elev. Ass'n v. Strand, *supra;* mistake in returning verdict, United States v. Chereton, 309 F.2d 197 (6th Cir. 1962); interpretation of guilty plea by one defendant as implicating others, United States v. Crosby, 294 F.2d 928, 949 (2d Cir. 1961).** The policy does not, however, foreclose testimony by jurors as to prejudicial extraneous information or influences injected into or brought to bear upon the deliberative process. Thus a juror is recognized as competent to testify to statements by the bailiff or the introduction of a prejudicial newspaper account into the jury room, Mattox v. United States, 146 U.S. 140 (1892). See also Parker v. Gladden, 385 U.S. 363 (1966).

This rule does not purport to specify the substantive grounds for setting aside verdicts for irregularity; it deals only with the competency of jurors to testify concerning those grounds. Allowing them to testify as to matters other than their own inner reactions involves no particular hazard to the values sought to be protected. The rule is based upon this conclusion. It makes no attempt to specify the substantive grounds for setting aside verdicts for irregularity.

Legislative History:

The legislative history that is pertinent to the scope of any exception for proving differential error was well described by Judge Jerry Smith in *Robles v. Exxon Corporation,* 862 F.2d 1201, 1205 (5th Cir. 1989). *Robles* was a case in which the jurors were instructed that if they found the plaintiff more than 50% negligent, the plaintiff would not be entitled to recovery. The jury found the plaintiff 51% negligent. The judge, before discharging the jury, observed that the plaintiff would take nothing. After the jury was discharged, several jurors reported to the marshal that there was a "misunderstanding"–the jury thought that if they found the plaintiff more than 50% negligent, then the judge rather than the jury would assess damages. The judge took statements from the jurors, found that there was a misunderstanding about the instructions and that the jury intended that the plaintiff should recover "some money." The judge instructed the jury to resume deliberations, and the jury thereafter found the plaintiff 49% liable and assessed damages. On appeal, the defendant argued that the judge erred in taking jury statements that were not permitted by Rule 606(b). The plaintiff argued that juror statements could be used to prove that the jury misunderstood the court's instructions.

Judge Smith rejected the plaintiff's argument, relying on the following legislative history:

> After the Supreme Court adopted the present version of rule 606(b) and transmitted it to Congress, the House Judiciary Committee, noting the restrictive scope of the proposed rule, rejected it in favor of a broader formulation that would have allowed juror testimony on "objective jury misconduct" occurring at any point during the trial or the jury's deliberations. *See* H.R.Rep. No. 93-650, 93d Cong., 2d Sess. 9-10 (1973), *reprinted in* 1974 U.S.Code Cong. & Admin.News 7051, 7083. The Senate Judiciary Committee did not disagree with the House Judiciary Committee's interpretation of the rule proposed by the Court, but it left no uncertainty as to its view of the effects or wisdom of the House's proposed rule:
>
> > Although forbidding the impeachment of verdicts by inquiry into the jurors' mental processes, [the House's proposed rule] deletes from the Supreme Court version the proscription against testimony 'as to any matter or statement occurring during the course of the jury's deliberations.' This deletion would have the effect of opening verdicts up to challenge on the basis of what happened during the jury's internal deliberations, *for example, where a juror alleged that the jury refused to follow the trial judge's instructions....*
> >
> > Permitting an individual to attack a jury verdict based upon the jury's internal deliberations has long been recognized as unwise by the Supreme Court....
> >
> > ....
> >
> > Public policy requires a finality to litigation. And common fairness requires that absolute privacy be preserved for jurors to engage in the full and free debate necessary to the attainment of just verdicts. Jurors will not be able to function effectively if their deliberations are to be scrutinized in post-trial litigation. In the interests of protecting the jury system and the citizens who make it work, rule 606

should not permit any inquiry into the internal deliberations of the jurors.

S.Rep. No. 93-1277, 93d Cong., 2d Sess. 13-14 (1974), *reprinted in* 1974 U.S.Code Cong. & Admin.News 7060 (emphasis added).

When the competing versions of rule 606(b) went to the Conference Committee, the Committee adopted, and Congress enacted, the version of rule 606(b) originally proposed by the Court and preferred by the Senate.

II. The Committee's Determinations Up To This Point

The Reporter's memorandum prepared for the last meeting addressed two problems under the current Rule 606(b): 1. All courts have found an exception to the Rule, allowing juror testimony on clerical errors in the reporting of the verdict, even though there is no language permitting such an exception in the text of the Rule; and 2. The courts are in dispute about the breadth of that exception–some courts allow juror proof whenever the verdict has an effect that is different from the result that the jury intended to reach, while other courts follow a narrower exception permitting juror proof only where the verdict reported is different from that which the jury actually reached because of some clerical error. The former exception is broader because it would permit juror proof whenever the jury misunderstood (or ignored) the court's instructions. For example, if the judge told the jury to report a damage award without reducing it by the plaintiff's proportion of fault, and the jury disregarded that instruction, the verdict reported would be a result different from what the jury actually intended, thus fitting the broader exception. But it would not be different from the verdict actually reached, and so juror proof would not be permitted under the narrow exception for clerical errors.

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

The Committee was also unanimous in its belief that if an amendment to Rule 606(b) is to be proposed, it should codify the narrower exception of clerical error. An exception that would permit proof of juror statements whenever the jury misunderstood or ignored the court's instruction was thought to have the potential of intruding into juror deliberations, and upsetting the finality of verdicts, in a large and undefined number of cases. As such, the broad exception is in tension with the policies of the Rule. In contrast, an exception permitting proof only if the verdict reported is different from that actually reached by the jury does not intrude on the privacy of jury deliberations, as the inquiry only concerns what the jury decided, not why it decided as it did.

The Committee tentatively decided to place a narrow amendment to Rule 606(b) on its list of a possible package of amendments that could be proposed in 2004. The Committee tentatively approved language providing that a juror may testify about whether "the verdict reported is the verdict that was decided upon by the jury."

III. THE PROPOSED AMENDMENT TENTATIVELY AGREED UPON BY THE COMMITTEE

Rule 606. Competency of Juror as Witness

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

(b) *Inquiry into validity of verdict or indictment.* — Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith~~; except that~~ But a juror may testify ~~on the question~~ about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) ~~or~~ whether any outside influence was improperly brought to bear upon any juror, or (3) whether the verdict reported is the verdict that was agreed upon by the jury. ~~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 rendered was tainted by a clerical error. 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. Co.,* 5 F.3d 1, 3 (1st Cir. 1993) ("A number of circuits hold, and we agree, that juror testimony regarding an alleged clerical error, such as announcing a verdict different than that agreed upon, does not challenge the validity of the verdict or the deliberation of mental processes, and therefore is not subject to Rule 606(b)."); *Teevee Toons, Inc., v. MP3.Com, Inc.,* 148 F.Supp.2d 276, 278 (S.D.N.Y. 2001) (noting that Rule 606(b) has been silent regarding inquiries designed to confirm the accuracy of a verdict).

In adopting the exception for proof of clerical errors, 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. Co.*, 880 F.2d 68, 74 (8th Cir. 1989) (error to receive juror testimony on whether verdict was the result of jurors' misunderstanding of instructions: "The jurors did not state that the figure written by the foreman was different from that which they agreed upon, but indicated that the figure the foreman wrote down was intended to be a net figure, not a gross figure. Receiving such statements violates Rule 606(b) because the testimony relates to how the jury interpreted the court's instructions, and concerns the jurors' 'mental processes,' which is forbidden by the rule."); *Robles v. Exxon Corp.*, 862 F.2d 1201, 1208 (5th Cir. 1989) ("the alleged error here goes to the substance of what the jury was asked to decide, necessarily implicating the jury's mental processes insofar as it questions the jury's understanding of the court's instructions and application of those instructions to the facts of the case"). Thus, the "clerical error" exception to the Rule is limited to cases such as "where the jury foreperson wrote down, in response to an interrogatory, a number different from that agreed upon the by the jury, or mistakenly stated that the defendant was 'guilty' when the jury had actually agreed that the defendant was not guilty." *Id.*

FORDHAM
University School of Law

Lincoln Center, 140 West 62nd Street, New York, NY 10023-7485

Daniel J. Capra
Philip Reed Professor of Law

Phone: 212-636-6855
e-mail:dcapra@law.fordham.edu
Fax: 212-636-6899

Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Consideration of Proposed Amendment to Evidence Rule 607
Date: November 1, 2003

At its Spring 2002 meeting the Evidence Rules Committee directed the Reporter to prepare a memorandum to advise the Committee on whether it is necessary to amend Evidence Rule 607. Rule 607 states categorically that a party can impeach any witness it calls. On its face, the Rule permits a party to call a witness solely for the purpose of "impeaching" them with evidence that would not otherwise be admissible, such as hearsay. For example, the Rule would appear to permit a party to call an adverse witness solely to "impeach" the witness with a prior inconsistent statement that would not otherwise be admissible. The purpose of that tactic could well be to evade the hearsay rule in the hope that the jury would ignore the court's limiting instruction and consider the inconsistent statement for its truth.

The question for the Committee is whether Rule 607 should be amended to prohibit a party from calling a witness for the sole purpose of impeaching that witness with evidence that would not otherwise be admissible. As will be seen, the courts have uniformly prohibited this abusive practice even though Rule 607 appears to permit it. So the real question is whether the Rule should be amended to "codify" this case law and thereby eliminate the divergence between the case law and the text of the Rule.

This memorandum is in five parts. Part One sets forth the existing Rule and Committee Note. Part Two discusses the case law prohibiting a party from calling a witness solely to introduce otherwise inadmissible evidence in the guise of impeachment. Part Three sets forth pertinent state law variations. Part Four provides a short discussion of the advantages and disadvantages of an amendment to Rule 607. Part Five sets forth a model amendment and Committee Note.

This memo does not by any means advocate an amendment to Rule 607. That is of course a question for the Committee.

II. Rule 607

Rule 607 currently provides as follows:

Rule 607. Who May Impeach

The credibility of a witness may be attacked by any party, including the party calling the witness.

The Advisory Committee Note provides as follows:

The traditional rule against impeaching one's own witness is abandoned as based on false premises. A party does not hold out his witnesses as worthy of belief, since he rarely has a free choice in selecting them. Denial of the right leaves the party at the mercy of the witness and the adversary. If the impeachment is by a prior statement, it is free from hearsay dangers and is excluded from the category of hearsay under Rule 801(d)(1). **[Note: This categorical statement is not correct. Congress changed the Advisory Committee's version of Rule 801(d)(1). As enacted, Rule 801(d)(1) exempts prior inconsistent statements from the hearsay rule only if the statements are made under oath at a formal proceeding.]** Ladd, Impeachment of One's Own Witness — New Developments, 4 U. Chi. L. Rev. 69 (1936); McCormick § 38; 3 Wigmore §§ 896-918. The substantial inroads into the old rule made over the years by decisions, rules, and statutes are evidence of doubts as to its basic soundness and workability. Cases are collected in 3 Wigmore § 905. Revised Rule 32(a)(1) of the Federal Rules of Civil Procedure allows any party to impeach a witness by means of his deposition, and Rule 43(b) has allowed the calling and impeachment of an adverse party or person identified with him. Illustrative statutes allowing a party to impeach his own witness under varying circumstances are Ill. Rev. Stats. 1967, c. 110, § 60; Mass. Laws Annot. 1959, c. 233 § 23; 20 N.M. Stats. Annot. 1953, § 20-2-4; NYCPLR § 4514 (McKinney 1963); 12 Vt. Stats. Annot. 1959, §§ 1641a, 1642. Complete judicial rejection of the old rule is found in United States v. Freeman, 302 F.2d 347 (2d Cir. 1962). The same result is reached in Uniform Rule 20; California Evidence Code § 785; Kansas Code of Civil Procedure § 60-420. See also New Jersey Evidence Rule 20.

III. Case Law On Impeachment With Otherwise Inadmissible Evidence

By its terms, Rule 607 would appear to permit an abusive practice, as shown by the following hypothetical: A party calls a witness who has made a previous statement implicating the adversary in wrongdoing relevant to the case; that statement would be excluded as hearsay if offered for its truth; the proponent knows that the witness has repudiated the statement and if called, will testify in favor of the adversary; nonetheless, the proponent calls the witness for the ostensible purpose of "impeaching" him with the prior inconsistent statement. The reason that this practice appears abusive is that there is no legitimate forensic purpose in calling a witness solely to impeach him. If impeachment were the real purpose, the witness would never be called, because the most that the proponent could accomplish would be a net result of zero. As one Court put it: "The maximum legitimate effect of the impeaching testimony can never be more than the cancellation of the adverse answer." *United States v. Crouch*, 731 F.2d 621, 623 (9th Cir. 1984). Thus, the proponent in the above example must have had some other purpose for calling a witness who has made a prior inconsistent statement not otherwise admissible, and that purpose is obvious: the proponent is trying to bring before the jury, in the guise of "impeachment," hearsay evidence that the jury could not otherwise consider.

Obviously such a practice should be prohibited. As Judge Posner put it, it would be an abuse of Rule 607 for a party "to call a witness that it knew would not give it useful evidence, just so it could introduce hearsay evidence * * * in the hope that the jury would miss the subtle distinction between impeachment and substantive evidence — or, if it didn't miss it, would ignore it." *United States v. Webster,* 734 F.2d 1191, 1192 (7th Cir. 1984).

Accordingly, despite the permissive language of Rule 607, the Courts have uniformly held that a party may not call a witness solely to impeach him with otherwise inadmissible evidence. *See, e.g., United States v. Ince,* 21 F.3d 576 (4th Cir. 1994) (conviction was reversed because the government's "only apparent purpose for impeaching one of its own witnesses was to circumvent the hearsay rule and to expose the jury to otherwise inadmissible evidence"); *United States v. Hogan,* 763 F.2d 697 (5th Cir. 1985) ("Because the government called a witness for the primary purpose of impeaching him with otherwise inadmissible hearsay evidence, we reverse."); *United States v. Crouch*, 731 F.2d 621, 623 (9th Cir. 1984) ("a party is not permitted to get before the jury, under the guise of impeachment, an ex parte statement of a witness, by calling him to the stand when there is good reason to believe he will decline to testify as desired"). This limitation on the flexibility provided by Rule 607 has most often been applied against prosecutors who call adverse witnesses. But it has also been applied against criminal defendants and civil litigants. *See, e.g., United States v. Sebetich,* 776 F.2d 412 (3d Cir. 1985) (criminal defendant cannot call a witness "for the purposes of circumventing the hearsay rule by means of Rule 607"); *United States v. Fay,* 668 F.2d 375 (8th Cir. 1981) (no error in refusing to permit a defendant charged with assault to call a witness for the sole purpose of offering a prior out-of-court statement not otherwise admissible as substantive evidence); *Whitehurst v. Wright*, 592 F.2d 834 (5th Cir. 1979) (plaintiff could not call a witness for the purpose of bringing out an inconsistent statement, when that statement was inadmissible for substantive purposes).

The above-stated limitation, however, applies only when the party calls the witness for the impermissible purpose of impeaching that witness with evidence not otherwise admissible. If instead the party calls the witness for a *good faith* purpose, then the Court-imposed limitation on Rule 607 will not apply. *See United States v. Kane*, 944 F.2d 1406, 1411 (7th Cir. 1991) ("The test is whether the prosecution exhibited bad faith by calling a witness sure to be unhelpful to its case."). *See also* Mueller and Kirkpatrick, *Federal Evidence* at 684 (impeachment is permitted where the proponent in "good faith" calls a witness from whom useful evidence is expected and uses prior statements to impeach only when the witness gives damaging testimony). For example, if a witness is called with the expectation that he will testify favorably, and the party is then surprised by negative testimony, the party is permitted to recoup its losses by impeaching the witness. *See, e.g., United States v. Peterman*, 841 F.2d 1474 (10th Cir. 1988) (impeachment was permissible after the prosecutor previously interviewed the witness and determined that the witness was going to give testimony favorable to the government's case; the prosecutor had not received any subsequent information that the witness had changed his mind).

Thus, the common-law doctrine of "surprise" has been revived in cases where a party calls a witness and then seeks to impeach him with otherwise inadmissible evidence. *See, e.g., United States v. Kane,* 944 F.2d 1406 (7th Cir. 1991) (the prosecution had not improperly called the defendant's wife merely to introduce inconsistent hearsay statements; the prosecution had a sincere reason to call her because she had firsthand knowledge of the scheme charged, and there was no reason to believe she would be hostile or would supply an opportunity for impeachment). Of course, the claim of surprise must be credible to permit impeachment with otherwise inadmissible evidence; it can't be a mere hope that the witness will have "seen the light" and change his stated course when he takes the stand. *See, e.g., United States v. Crouch,* 731 F.2d 621 (9th Cir. 1984) (prosecutor was not surprised by adverse testimony because the witness had already given testimony exculpatory to the defendant on *voir dire*; therefore it was impermissible for the prosecution to call the witness and impeach him with otherwise inadmissible evidence).

Surprise is not the only form of good faith, however. A party would be in good faith in impeaching a witness with otherwise inadmissible evidence if it "called an adverse witness that it thought would give evidence *both helpful and harmful to it*, but it also thought that the harmful aspect could be nullified by introducing the witness's prior inconsistent statement." *United States v. Webster,* 734 F.2d 1191, 1193 (7th Cir. 1984). *See also United States v. DeLillo*, 620 F.2d 939 (2d Cir.1980) (the Court upheld the government's impeachment of the unfavorable portions of its own witness's testimony where the overall testimony was favorable to the government in many respects). The party facing a witness who is both favorable and unfavorable is not put to the poor choice of either foregoing the witness's testimony or foregoing the impeachment. *See, e.g., United States v. Eisen,* 974 F.2d 246 (2d Cir. 1992) (no abuse of discretion in allowing the government to call witnesses that it had said "have refused to give up the lie"; where the government has called a witness whose corroborating testimony is instrumental in constructing its case, it has a right to question the witness, and to attempt to impeach him, about those aspects of his testimony that conflict with the government's account of the same events; the prejudicial effect of the impeachment in this case did not substantially outweigh the probative value of the favorable portions of the

testimony).

For similar reasons, a party has been allowed to call a witness, even when anticipating the need for impeachment with inadmissible evidence, when the failure to call the witness might lead the jury to draw a negative inference against the party. *See, e.g., United States v. Gilbert*, 57 F.3d 709 (9th Cir. 1995) (the government acted properly in calling two eyewitnesses and impeaching them with prior statements, not independently admissible, concerning the defendant's possession of a gun; if the government had not called these two witnesses, "the jury would have been left to ponder why the government was reluctant to question these eye-witnesses"). The need to avoid such a negative inference is certainly a good faith reason to call the witness.

Finally, the limitation on Rule 607 applies only if the impeachment evidence is not otherwise admissible. So for example, if a witness has made a prior statement *under oath* at a trial or hearing, the witness may be called and the statement may be introduced even if counsel *knows* that the witness will repudiate the statement and testify adversely. This is because such a prior inconsistent statement is admissible for its truth under Rule 801(d)(1)(A), and therefore the witness is not being called solely to be impeached with otherwise inadmissible evidence. *See, e.g., United States v. Medley,* 913 F.2d 1248 (7th Cir. 1990) (no error in permitting the government to impeach a witness when his testimony was inconsistent with his grand jury testimony; because the prior statement was under oath and thus admissible under Rule 801(d)(1)(A), the witness was not called to introduce otherwise inadmissible hearsay). There is no abuse of the hearsay rule in these circumstances.

For other cases following the rule that a party cannot call a witness in bad faith to bring in otherwise inadmissible evidence in the guise of "impeachment", see:

United States v. Johnson, 802 F.2d 1459 (D.C. Cir. 1986) (prosecution acted improperly in calling a witness for the sole purpose of bringing out the witness's post-arrest statement that was not independently admissible).

United States v. Zackson, 12 F.3d 1178 (2d Cir. 1993) (error for the prosecutor to call an unwilling witness solely to get before the jury inadmissible hearsay under the guise of refreshing recollection).

United States v. Livingston, 816 F.2d 184 (5th Cir. 1987) (prosecutor may not call a witness solely to introduce a prior inconsistent statement under the guise of impeachment; but in this case the prosecutor acted in good faith by introducing the witness's inconsistent statement in anticipation of impeachment by the defense).

United States v. Gomez-Gallardo, 915 F.3d 553 (9th Cir. 1990) (error when prosecutor called a witness it knew would repudiate a prior statement, and then impeached the witness with the prior statement).

United States v. Carter, 973 F.2d 1509 (10th Cir. 1992) (no error to call a witness and impeach the witness with a prior inconsistent statement, where the witness had said he was fearful and would not testify; this was not a sufficient showing that the witness would actually change his testimony on the stand, so the government was legitimately surprised).

Balogh's of Coral Gables, Inc., v. Getz, 798 F.2d 1356 (11th Cir. 1986) (en banc) ("a witness may not be called solely for the purpose of impeaching him and thereby obtaining otherwise inadmissible testimony").

Reporter's Observation on the Case Law

The case law seems uniform. It can be summarized as follows:

1. Despite the permissive language of Rule 607, a party may not call a witness to the stand in bad faith to impeach that witness with evidence that otherwise would be inadmissible (usually because it is hearsay).

2. "Good faith" will be found if the party is legitimately surprised by the witness's adverse testimony on direct. This will include situations in which the witness may seem reluctant, but the party legitimately believes that the witness will do the right thing at trial.

3. "Good faith" will be found where the witness gives substantially favorable and yet partially unfavorable testimony. The party has the right to impeach the witness with respect to the unfavorable testimony.

4. "Good faith" will be found if the party will suffer a negative inference from failing to call the witness.

5. There is no abuse of Rule 607 if the evidence is substantively admissible.

III. State Law Variation

Two states have rules specifically regulating the practice of calling a witness as a pretext to introducing otherwise inadmissible evidence under the guise of impeachment.

New Jersey Rule 607

> Except as otherwise provided by Rules 405 and 608, for the purpose of impairing or supporting the credibility of a witness, any party including the party calling the witness may examine the witness and introduce extrinsic evidence relevant to the issue of credibility, *except that the party calling a witness may not neutralize the witness' testimony by a prior contradictory statement unless the statement is in a form admissible under Rule 803(a)(1) or the judge finds that the party calling the witness was surprised.*

Reporter's Comment on New Jersey Provision:

The reference to Rule 803(a)(1) is to the New Jersey version of the hearsay exception for prior inconsistent statements. Like the Federal Rule, the New Jersey rule has a hearsay exception for prior inconsistent statements only if they were made under oath at a formal proceeding. All other prior inconsistent statements are admissible for impeachment only–thus creating the possibility of calling a witness solely to impeachment him with a prior inconsistent statement for which there is no hearsay exception.

The New Jersey limitation is excused upon a finding by the judge that the party was surprised by the witness' adverse testimony. It is clear that this is an insufficient exception. For example, a party should be allowed to impeach a witness who gives substantially favorable and yet partially unfavorable testimony, as in *Eisen, supra.* Even if the party is not surprised by the adverse testimony, she should be able to call the witness anyway and impeach the negative aspects of their testimony. Similarly, a party should be able to call a witness whom the jury will expect that party to call, even if the party knows that the witness will give adverse testimony. In other words, "surprise" is one reason for allowing impeachment of an adverse witness called by the party, but it should not be the only reason.

Ohio Rule 607

Evid R 607 Impeachment

(A) Who may impeach
The credibility of a witness may be attacked by any party except that the credibility of a witness may be attacked by the party calling the witness by means of a prior inconsistent statement only upon a showing of surprise and affirmative damage. This exception does not apply to statements admitted pursuant to Evid. R. 801(D)(1)(a), 801(D)(2), or 803.

(B) Impeachment: reasonable basis
A questioner must have a reasonable basis for asking any question pertaining to impeachment that implies the existence of an impeaching fact.

Reporter's Comment:

Like New Jersey, the only exception is for surprise. But there are other reasons why a party may in good faith wish to impeach a witness called by that party.

IV. Advantages and Disadvantages of an Amendment to Rule 607

Advantages

The main advantage of an amendment is to bring the text of the Rule in line with the case law. A case law divergence from the text of the Rule creates a potential trap for the unwary, because counsel may look at the text of the Rule and see no basis for making an objection when the adversary calls a witness solely to impeach that witness. This argument is tempered, however, when the practice addressed by the courts is so apparent and abusive that the adverse party is sure to howl without regard to the text of any Rule. Parties in the Federal Courts appear to be undeterred by the lack of protective language in Rule 607, as there are more than 20 circuit court decisions prohibiting a party from calling a witness in bad faith solely to impeach that witness.

Another argument in favor of amendment is that case law divergence is in tension with the Supreme Court's ruling in *Salerno v. United States,* 505 U.S. 317 (1992), which held that the Federal Rules of Evidence are to be construed by their plain meaning, i.e., courts are not permitted to add limitations to an Evidence Rule that are not apparent on the face of the text.

Finally, at least in principle an amendment to Rule 607 would appear uncontroversial, as it would merely codify the uniform case law on the subject; it would preclude a practice roundly criticized as abusive; it would not change the law in any circuit; and it is party-neutral, as it would prohibit all parties from calling a witness solely to introduce otherwise inadmissible evidence in the guise of impeachment.

Disadvantages

The major disadvantage of an amendment to Rule 607 is that it would be addressing an issue that has caused no problems in the courts; the courts are uniform in prohibiting the abusive practice that the amendatory language would prohibit. So there is no conflict in the courts to address.

It may also be difficult to write an amendment that would fully encompass all the situations in which a party *should* be allowed to call witnesses and impeach them with otherwise inadmissible evidence. New Jersey and Ohio have tried to do so and failed to cover all of the situtations that should be permitted. It could be argued that a broadly worded rule permitting impeachment whenever it is in "good faith" is not very helpful and risks adding confusion to a body of case law that is currently quite understandable and uniform. Thus, the risk of "codification" is that the drafters may not get it completely right, thereby generating confusion and perhaps creating an unintended substantive change. This risk may be ameliorated by a Committee Note, however.

It is obviously for the Committee to determine whether the advantages of an attempted codification of the case law outweigh the potential disadvantages. The next section proffers a possible starting point for an amendment should the Committee decide to proceed down that road.

V. Model for a Possible Amendment to Rule 607

The following model purports to codify the case law prohibiting a party from calling a witness in bad faith to impeach the witness with otherwise inadmissible evidence.

Rule 607. Who May Impeach

The credibility of a witness may be attacked by any party, including the party calling the witness. But a party may not call a witness to impeach that witness with evidence that is otherwise inadmissible, unless the party has a good faith reason for doing so.

Model for a Possible Committee Note

The amendment codifies the uniform case law providing that a party may not abuse Rule 607 by calling a witness for the bad faith purpose of introducing evidence in the guise of "impeachment" where that evidence is not otherwise admissible. *See, e.g., United States v. Ince*, 21 F.3d 576, 578 (4th Cir. 1994) (conviction was reversed because the government's "only apparent purpose for impeaching one of its own witnesses was to circumvent the hearsay rule and to expose the jury to otherwise inadmissible evidence"); *United States v. Hogan,* 763 F.2d 697, 699 (5th Cir. 1985) ("Because the government called a witness for the primary purpose of impeaching him with otherwise inadmissible hearsay evidence, we reverse."); *United States v. Crouch*, 731 F.2d 621, 623 (9th Cir. 1984) ("a party is not permitted to get before the jury, under the guise of impeachment, an ex parte statement of a witness, by calling him to the stand when there is good reason to believe he will decline to testify as desired"). This limitation on the flexibility provided by Rule 607 has most often been applied against prosecutors who call adverse witnesses, but it has also been applied against criminal defendants and civil litigants. *See, e.g., United States v. Sebetich,* 776 F.2d 412, 429 (3d Cir. 1985) (criminal defendant cannot call a witness "for the purposes of circumventing the hearsay rule by means of Rule 607"); *Balogh's of Coral Gables, Inc., v. Getz,* 798 F.2d 1356, 1358, n2 (11th Cir. 1986) (en banc) ("a witness may not be called solely for the purpose of impeaching him and thereby obtaining otherwise inadmissible testimony"). The amendment thus corrects a divergence between the case law and the text of the Rule. *See* Daniel Capra, *Case Law Divergence from the Federal Rules of Evidence,* 197 F.R.D. 531 (2001) (noting the problems for practitioners that may arise where the case law is divergent from the text of an Evidence Rule).

The amendment permits a party to impeach a witness with otherwise inadmissible evidence if the party has a good faith reason for calling that witness. *See United States v. Kane*, 944 F.2d 1406, 1411 (7th Cir. 1991) ("The test is whether the [party] exhibited bad faith by calling a witness sure to be unhelpful to its case."). Some good faith reasons include:

1) The party is surprised by the witness's damaging testimony. *See, e.g., United States v. Peterman*, 841 F.2d 1474 (10th Cir. 1988) (impeachment was permissible after the prosecutor previously interviewed the witness and determined that the witness was going to give testimony favorable to the government's case; the prosecutor had not received any subsequent information that the witness had changed his mind).

2) The witness is expected to give testimony that is substantially favorable in some respects and harmful in others. In such cases, the party should not be put to the choice of either not calling the witness or not impeaching the damaging testimony. *See, e.g., United States v. Eisen,* 974 F.2d 246 (2d Cir. 1992) (where the government has called a witness whose corroborating testimony is instrumental in constructing its case, it has a right to question the witness, and to attempt to impeach him, about those aspects of his testimony that conflict with the government's account of the same events; the prejudicial effect of the impeachment in this case did not substantially outweigh the probative value of the favorable portions of the testimony).

3) The party's failure to call a witness could result in a negative inference being drawn against the party. *See, e.g., United States v. Gilbert*, 57 F.3d 709, 712 (9th Cir. 1995) (the government acted properly in calling two eyewitnesses and impeaching them with prior statements, not independently admissible, concerning the defendant's possession of a gun; if the government had not called these two witnesses, "the jury would have been left to ponder why the government was reluctant to question these eye-witnesses").

The amendment does not preclude impeachment with a prior inconsistent statement that is independently admissible as either as "not hearsay" under Rule 801(d) or as an exception to the hearsay rule under Rule 803. A party is not abusing the hearsay rule by calling a witness for the sole purpose of introducing an out-of-court statement that is otherwise admissible as substantive evidence. *See, e.g., United States v. Medley*, 913 F.2d 1248 (7th Cir. 1990) (no error in permitting the government to impeach a government witness whose testimony was inconsistent with his grand jury testimony; because the prior statement was under oath and thus admissible under Rule 801(d)(1)(A), the witness was not called to introduce otherwise inadmissible hearsay).

FORDHAM
University School of Law

Lincoln Center, 140 West 62nd Street, New York, NY 10023-7485

Daniel J. Capra
Philip Reed Professor of Law

Phone: 212-636-6855
e-mail:dcapra@law.fordham.edu
Fax: 212-636-6899

Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Consideration of Proposed Amendment to Evidence Rule 609(a)
Date: November 1, 2003

At its Spring 2002 meeting the Evidence Rules Committee directed the Reporter to prepare a memorandum to advise the Committee on whether it is necessary to amend Evidence Rule 609(a). An investigation into this Rule indicates that the courts have encountered two problems resulting in conflicts in the courts: 1) Should the court should look into the underlying facts of a conviction to determine whether it is one that involves "dishonesty or false statement" and so *must* be admitted to impeach the witness's character for truthfulness under Rule 609(a)(2)?; and 2) Are theft of property crimes, drug crimes and tax crimes not obviously involving fraud automatically admissible under Rule 609(a)(2).

A third problem raised in the Rule is technical only, and was discovered as a result of the Committee's review of Rule 608(b). Rule 609 authorizes use of conviction for "the purpose of attacking the *credibility* of a witness." What it should say is that the Rule covers convictions that are offered for "the purpose of attacking the character for truthfulness of a witness." In other words, the change made in Rule 608(b) should also be made in Rule 609. This change is not necessary to correct any problem in the practice, but would be useful for symmetry purposes if the Rule is to be amended on other grounds.

This memorandum is divided into six parts. Part One discusses Rule 609(a) and some legislative history pertinent to the two substantive problems that have arisen under it. Part Two analyzes the problems of 1) inquiring into the facts behind the conviction, and 2) theft, drug and tax crimes, and discusses the case law on both sides of these issues. Part Three discusses the possible technical change from "credibility" to "character for truthfulness." Part Four discusses state law variations. Part Five summarizes the advantages and disadvantages of amending Rule 609(a). Part Six sets forth two models for amending Rule 609(a) if the Committee decides that amendment is justified.

It is for the Committee, of course, to determine whether an amendment to Rule 609(a) is justified. If the Committee decides to propose an amendment, it can be added as part of a package of amendments to be proposed to the Standing Committee at its Spring 2004 meeting; or if language can be agreed upon, the amendment could be proposed at the January Standing Committee meeting, with the proposal to be issued for public comment in August. 2004.

I. Rule 609, Description of Stucture, and Pertinent History

Rule 609 provides in its entirety as follows:

Rule 609. Impeachment by Evidence of Conviction of Crime

(a) *General rule.* — For the purpose of attacking the **credibility** of a witness,

(1) evidence that the 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 if it involved dishonesty or false statement, regardless of the punishment**.

(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 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.

The Original Advisory Committee Note pertinent to Rule 609(a) provides as follows:

As a means of impeachment, evidence of conviction of crime is significant only because it stands as proof of the commission of the underlying criminal act. There is little dissent from the general proposition that at least some crimes are relevant to credibility but much disagreement among the cases and commentators about which crimes are usable for this purpose. See McCormick § 43; 2 Wright, Federal Practice and Procedure: Criminal § 416 (1969). The weight of traditional authority has been to allow use of felonies generally, without regard to the nature of the particular offense, and of *crimen falsi*, without regard to the grade of the offense. This is the view accepted by Congress in the 1970 amendment of § 14-305 of the District of Columbia Code, P.L. 91-358, 84 Stat. 473. Uniform Rule 21 and Model Code Rule 106 permit only crimes involving "dishonesty or false statement." Others have thought that the trial judge should have discretion to exclude convictions if the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice. Luck v. United States, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965); McGowan, Impeachment of Criminal Defendants by Prior Convictions, 1970 Law & Soc. Order 1. Whatever may be the merits of those views, this rule is drafted to accord with the congressional policy manifested in the 1970 legislation. **[Note: The Rule ultimately adopted by Congress, and as amended in 1990, provides for Trial Court balancing of probative value and prejudicial effect as to convictions not involving dishonesty or false statement.]**

The proposed rule incorporates certain basic safeguards, in terms applicable to all witnesses but of particular significance to an accused who elects to testify. These protections include the imposition of definite time limitations, giving effect to demonstrated rehabilitation, and generally excluding juvenile adjudications.

Subdivision (a). For purposes of impeachment, crimes are divided into two categories by the rule: (1) those of what is generally regarded as felony grade, without particular regard to the nature of the offense, and (2) those involving dishonesty or false statement, without regard to the grade of the offense. Provable convictions are not limited to violations of federal law. By reason of our constitutional structure, the federal catalog of crimes is far from being a complete one, and resort must be had to the laws of the states for the specification of many crimes. For example, simple theft as compared with theft from interstate commerce. Other instances of borrowing are the Assimilative Crimes Act, making the state law of crimes applicable to the special territorial and maritime jurisdiction of the United States, 18 U.S.C. § 13, and the provision of the Judicial Code disqualifying persons as jurors on the grounds of state as well as federal convictions, 28 U.S.C. § 1865. For evaluation of the crime in terms of seriousness, reference is made to the congressional measurement of felony (subject to imprisonment in excess of one year) rather than adopting state definitions which vary considerably. See 28 U.S.C. § 1865, *supra*, disqualifying jurors for conviction in state or federal court of crime punishable by imprisonment for more than one year.

Congress Changed the Advisory Committee's proposal to differentiate between crimes that involved dishonesty or false statement and all other crimes. The pertinent report of the House and Senate Conferees provides as follows:

> Rule 609 defines when a party may use evidence of a prior conviction in order to impeach a witness. The Senate amendments make changes in two subsections of Rule 609.
>
> The House bill provides that the credibility of a witness can be attacked by proof of prior conviction of a crime only if the crime involves dishonesty or false statement. The Senate amendment provides that a witness's credibility may be attacked if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted or (2) involves dishonesty or false statement, regardless of the punishment.
>
> The Conference adopts the Senate amendment with an amendment. The Conference amendment provides that the credibility of a witness, whether a defendant or someone else, may be attacked by proof of a prior conviction but only if the crime: (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted and the court determines that the probative value of the conviction outweighs its prejudicial effect to the defendant; or (2) involved dishonesty or false statement regardless of the punishment.
>
> **By the phrase "dishonesty and false statement" the Conference means crimes such as perjury or 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 accused's propensity to testify truthfully**.
>
> The admission of prior convictions involving dishonesty and false statement is not within the discretion of the Court. Such convictions are peculiarly probative of credibility and, under this rule, are always to be admitted. Thus, judicial discretion granted with respect to the admissibility of other prior convictions is not applicable to those involving dishonesty or false statement.

* * *

Rule 609(a) was amended in 1990 for two purposes: 1) to clarify that civil plaintiffs and defendants are treated equally under the Rule; and 2) to clarify that admissible convictions can be admitted on direct as well as cross-examination. The Advisory Committee Note to the 1990 change explains as follows:

> The amendment to Rule 609(a) makes two changes in the rule. The first change removes from the rule the limitation that the conviction may only be elicited during cross-examination, a limitation that virtually every circuit has found to be inapplicable. It is common for witnesses to reveal on direct examination their convictions to "remove the sting" of the impeachment. *See, e.g., United States v. Bad Cob*, 560 F.2d 877 (8th Cir. 1977). The amendment does not contemplate that a court will necessarily permit proof of prior convictions through testimony, which might be time-consuming and more prejudicial than proof through a written record. Rules 403 and 611(a) provide sufficient authority for the court to protect against unfair or disruptive methods of proof.
>
> The second change effected by the amendment resolves an ambiguity as to the relationship of Rules 609 and 403 with respect to impeachment of witnesses other than the criminal defendant. *See Green v. Bock Laundry Machine Co.*, 109 S. Ct. 1981 [490 U.S. 504] (1989). The amendment does not disturb the special balancing test for the criminal defendant who chooses to testify. Thus, the rule recognizes that, in virtually every case in which prior convictions are used to impeach the testifying defendant, the defendant faces a unique risk of prejudice — *i.e.*, the danger that convictions that would be excluded under Fed. R. Evid. 404 will be misused by a jury as propensity evidence despite their introduction solely for impeachment purposes. Although the rule does not forbid all use of convictions to impeach a defendant, it requires that the government show that the probative value of convictions as impeachment evidence outweighs their prejudicial effect.
>
> Prior to the amendment, the rule appeared to give the defendant the benefit of the special balancing test when defense witnesses other than the defendant were called to testify. In practice, however, the concern about unfairness to the defendant is most acute when the defendant's own convictions are offered as evidence. Almost all of the decided cases concern this type of impeachment, and the amendment does not deprive the defendant of any meaningful protection, since Rule 403 now clearly protects against unfair impeachment of any defense witness other than the defendant. There are cases in which a defendant might be prejudiced when a defense witness is impeached. Such cases may arise, for example, when the witness bears a special relationship to the defendant such that the defendant is likely to suffer some spill-over effect from impeachment of the witness.
>
> The amendment also protects other litigants from unfair impeachment of their witnesses. The danger of prejudice from the use of prior convictions is not confined to criminal defendants. Although the danger that prior convictions will be misused as character evidence is particularly acute when the criminal defendant is impeached, the danger exists in other situations as well. The amendment reflects the view that it is desirable to protect all

litigants from the unfair use of prior convictions, and that the ordinary balancing test of Rule 403, which provides that evidence shall not be excluded unless its prejudicial effect substantially outweighs its probative value, is appropriate for assessing the admissibility of prior convictions for impeachment of any witness other than a criminal defendant.

The amendment reflects a judgment that decisions interpreting Rule 609(a) as requiring a trial court to admit convictions in civil cases that have little, if anything, to do with credibility reach undesirable results. *See, e.g., Diggs v. Lyons*, 741 F.2d 577 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 2157 (1985). The amendment provides the same protection against unfair prejudice arising from prior convictions used for impeachment purposes as the rules provide for other evidence. The amendment finds support in decided cases. *See, e.g., Petty v. Ideco*, 761 F.2d 1146 (5th Cir. 1985); *Czajka v. Hickman*, 703 F.2d 317 (8th Cir. 1983).

Fewer decided cases address the question whether Rule 609(a) provides any protection against unduly prejudicial prior convictions used to impeach government witnesses. Some courts have read Rule 609(a) as giving the government no protection for its witnesses. *See, e.g., United States v. Thorne*, 547 F.2d 56 (8th Cir. 1976); *United States v. Nevitt*, 563 F.2d 406 (9th Cir. 1977), *cert. denied*, 444 U.S. 847 (1979). This approach also is rejected by the amendment. There are cases in which impeachment of government witnesses with prior convictions that have little, if anything, to do with credibility may result in unfair prejudice to the government's interest in a fair trial and unnecessary embarrassment to a witness. Fed. R. Evid. 412 already recognizes this and excluded [*sic*] certain evidence of past sexual behavior in the context of prosecutions for sexual assaults.

The amendment applies the general balancing test of Rule 403 to protect all litigants against unfair impeachment of witnesses. The balancing test protects civil litigants, the government in criminal cases, and the defendant in a criminal case who calls other witnesses. The amendment addresses prior convictions offered under Rule 609, not for other purposes, and does not run afoul, therefore, of *Davis v. Alaska*, 415 U.S. 308 (1974). *Davis* involved the use of a prior juvenile adjudication not to prove a past law violation, but to prove bias. The defendant in a criminal case has the right to demonstrate the bias of a witness and to be assured a fair trial, but not to unduly prejudice a trier of fact. *See generally* Rule 412. In any case in which the trial court believes that confrontation rights require admission of impeachment evidence, obviously the Constitution would take precedence over the rule.

The probability that prior convictions of an ordinary government witness will be unduly prejudicial is low in most criminal cases. Since the behavior of the witness is not the issue in dispute in most cases, there is little chance that the trier of fact will misuse the convictions offered as impeachment evidence as propensity evidence. Thus, trial courts will be skeptical when the government objects to impeachment of its witnesses with prior convictions. Only when the government is able to point to a real danger of prejudice that is sufficient to outweigh substantially the probative value of the conviction for impeachment

purposes will the conviction be excluded.

The amendment continues to divide subdivision (a) into subsections (1) and (2) thus facilitating retrieval under current computerized research programs which distinguish the two provisions. **The Committee recommended no substantive change in subdivision (a)(2), even though some cases raise a concern about the proper interpretation of the words "dishonesty or false statement." These words were used but not explained in the original Advisory Committee Note accompanying Rule 609. Congress extensively debated the rule, and the Report of the House and Senate Conference Committee states that "[b]y the phrase 'dishonesty and false statement,' the Conference means 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*, commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully." The Advisory Committee concluded that the Conference Report provides sufficient guidance to trial courts and that no amendment is necessary, notwithstanding some decisions that take an unduly broad view of "dishonesty," admitting convictions such as for bank robbery or bank larceny.** Subsection (a)(2) continues to apply to any witness, including a criminal defendant.

Finally, the Committee determined that it was unnecessary to add to the rule language stating that when a prior conviction is offered under Rule 609, the trial court is to consider the probative value of the conviction *for impeachment*, not for other purposes. The Committee concluded that the title of the rule, its first sentence, and its placement among the impeachment rules clearly establish that evidence offered under Rule 609 is offered only for purposes of impeachment.

Description of the Operation of the Rule:

In some respects, Rule 609 covers the same ground as Rule 608. Both Rules are concerned with a particular form of impeachment: proving that a witness has a character for untruthfulness. Both Rules permit, with some limitations, an inquiry into specific conduct in the witness' past, to raise the inference that such conduct has some bearing on the witness' bad character for veracity. The

two Rules are different in scope and effect, however. If the misconduct was a bad act, it is covered by Rule 608, and inquiry into the act is dependent on balancing probative value and prejudicial effect under Rule 403; also, extrinsic evidence is not admissible to prove the act occurred. In contrast, if the misconduct resulted in a conviction, it is covered by Rule 609, and inquiry is controlled by a complex set of rules dependent in part on the type of conviction and in part on the witness being impeached; also, if inquiry is permitted, the conviction can be proved by extrinsic evidence.

One reason for the difference in treatment is that the drafters of the Rules, and Congress, felt that the exclusion on extrinsic evidence found in Rule 608(b) should not apply where the impeachment was with prior convictions. This is because a conviction, unlike a bad act, easily cab be proved if the witness denies it. There is no risk of a mini-trial on a collateral issue.

The more important reason for differential treatment is that prior convictions were thought to be more serious, and more probative of a propensity to lie on the stand than other bad acts. Whether this is true or not, it is clear that Rule 609 received much more attention in the drafting and approval process than did Rule 608.

Subdivision (a) is the dominant provision in the Rule, covering convictions that Congress considered to be "recent" enough to have substantial probative value as to the witness' character for veracity. The most crucial inquiry under Rule 609(a) is whether the conviction that is the subject of impeachment falls under subdivision (a)(1) or subdivision (a)(2). The legislative presumption is that crimes that involve dishonesty or false statement (covered by subdivision (a)(2)) are highly probative of the witness's character for truthfulness, while other convictions (covered by subdivision (a)(1)) are somewhat less probative.

Rule 609(a)(2) provides that if a witness has been convicted of any crime that "involved dishonesty or false statement," then the conviction "shall be admitted" to impeach the witness. See, e.g., *United States v. Kiendra,* 663 F.2d 349 (1st Cir. 1981) (convictions for crimes of dishonesty are automatically admissible because Rule 609(a)(2) provides that they "shall" be admitted; the trial judge has no discretion to exclude such convictions). In contrast, if the conviction did not involve dishonesty or false statement, then Rule 609(a)(1) provides that the conviction is admissible only if it is a felony and only if it satisfies a specified balancing test. If the conviction is covered by Rule 609(a)(1), the Judge must balance the conviction's probative value in proving the witness' untruthful character, against the prejudice that would arise from introducing the conviction. If the witness is a criminal defendant, the conviction can be admitted under Rule 609(a)(1) only if the probative value of the conviction outweighs its prejudicial effect. The conviction of any other witness is admissible so long as its probative value is not substantially outweighed by its prejudicial effect; that is, the general balancing test of Rule 403 applies if the witness is not the accused.

Probably no single Rule provoked as much controversy in Congress as Rule 609. In the House of Representatives, the prevailing view was that a prior conviction should only be introduced if the crime involved dishonesty or false statement.

Under the bill originally approved by the Senate, witnesses other than the accused could also be impeached by crimes punishable by death or imprisonment in excess of one year if the Court determined that the probative value of the evidence outweighed its prejudicial effect.

The actual Rule represents a compromise of sorts. More impeachment is permissible under the Rule than under the House draft. But felony convictions not amounting to *crimen falsi* can be used to impeach any witness, *including a criminal defendant*, which represents an abandonment of the Senate's limitation.

The Rule as originally promulgated was anomalous in several respects, however. First, it referred to proving convictions only on "cross-examination," but it is clear, especially in light of Rule 607, that a party should be able to bring out otherwise admissible prior convictions on direct examination as well. Second, Rule 609(a)(1) was ambiguous as to whether the trial judge could exclude unduly prejudicial convictions when offered against prosecution witnesses or witnesses in civil cases; the Rule referred only to prejudice "against the defendant." See *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504 (1989) (noting that the preamendment rule could not be applied as written, because it literally provided for automatic admissibility of all crimes of plaintiffs and their witnesses, while permitting possible exclusion of crimes of civil defendants and their witnesses pursuant to judicial balancing).

In 1990, the Rule was amended to delete the reference to cross-examination and to clarify that under Rule 609(a)(1), the trial judge must balance probative value and prejudicial effect as to all witnesses in all cases — though the balancing test is tilted more toward exclusion when the criminal defendant is the witness.

It is critical for the parties in both civil and criminal cases to determine whether a witness' conviction "involved dishonesty or false statement." The offering party will always wish to characterize a conviction as involving dishonesty or false statement, because then it will be automatically admitted. The nonoffering party will always wish to characterize a conviction as not involving dishonesty or false statement, because then there will be an opportunity to have the conviction excluded pursuant to the Rule 609(a)(1) weighing process.

If the conviction is found to involve dishonesty or false statement, it must be admitted no matter how prejudicial it is, no matter who the witness is, and no matter how cumulative it may be as to impeachment of the witness. While the Rule 403 test is applied as a backstop to many other Rules (see, e.g., Rules 404(b), 407, 608 and 702), this is not the case with Rule 609(a)(2). Rule 609(a)(2) is cast in mandatory language. Any possible doubt was erased by the 1990 amendment, which makes clear that the Rule 403 test is inapplicable to convictions involving dishonesty or false statement. The amendment added the Rule 403 test to govern most convictions offered under Rule 609(a)(1), but pointedly did not add such a test to Rule 609(a)(2).

II. Conflict in the Courts in Applying Rule 609(a)(2)

As the Advisory Committee observed in the 1990 Committee Note, Rule 609(a) does not define or list those crimes that involve dishonesty or false statement. Courts have disagreed on which crimes should qualify for mandatory admission under Rule 609(a)(2). This disagreement falls along two lines: 1) Assuming that the conviction is not on its face one that involves dishonesty or false statement (e.g., murder or robbery), is it possible for the conviction to qualify under Rule 609(a)(2) if the crime was committed in a dishonest manner?; and 2) Are crimes of theft and certain other "underhanded" crimes (especially drug and tax crimes automatically admissible under Rule 609(a)(2)? These questions are discussed in this section.

A. Looking At the Facts Underlying the Conviction

What if the witness was convicted of a crime that does not itself contain an element of deceit, but the crime was committed in a *manner* that involved deceit? For example, the crime of murder contains no statutory element of deceit, but a particular defendant may have acted dishonestly in order to get the victim to a certain place where the murder would occur. Can the Court go behind the conviction itself to the supporting facts and hold that the manner of committing the crime requires admission under Rule 609(a)(2)? The Courts are in dispute on this question.

Most Circuits have held that a conviction is subject to admission under Rule 609(a)(2), even where dishonesty or false statement is not an essential element of the crime, if the proponent can show that the conviction rested on facts indicating that the witness was actually dishonest or deceitful in committing the crime. Indicative of this view is the Court's analysis in *United States v. Hayes*, 553 F.2d 824 (2d Cir. 1977). Hayes was charged with five counts of bank robbery, and the question was whether he could be impeached by a year-old conviction for importation of cocaine. The Court held that a drug distribution conviction was not on its face automatically admissible under Rule 609(a)(2) because, unlike a conviction for perjury, the prosecution did not have to prove dishonesty or false statement as an element of the crime of cocaine distribution. The Court nonetheless held that the drug conviction would be admitted under Rule 609(a)(2) if the conviction "rested on facts warranting the dishonesty or false statement description."

[In *Hayes*, the government presented no underlying facts of dishonesty, but interestingly, the Court held that the conviction was admissible anyway under the balancing approach of Rule 609(a)(1). *Hayes* illustrates the practical point that even if a litigant succeeds in having a crime categorized under Rule 609(a)(1) rather than Rule 609(a)(2), it is still quite possible that the conviction will be admitted after application of the balancing test.]

Other cases authorizing the court to look to the underlying facts of a conviction to determine whether it "involves dishonesty or false statement" include:

First Circuit

United States v. Grandmont, 680 F.2d 867 (1st Cir. 1982) (conviction for purse snatching is not automatically admissible under Rule 609(a)(2) *unless* the underlying facts indicate dishonesty).

Second Circuit

Blake v. Coughlin, 2000 WL 233550 (2nd Cir.) (murder conviction admissible under Rule 609(a)(2) where, following the murder, the witness feigned a suicide in order to throw the police off his trail, changed his appearance and his name, and moved three times over the ensuing seven weeks).

Fourth Circuit

United States v. Cunningham, 638 F.2d 696 (4th Cir. 1981) (conviction for writing worthless checks could be admitted under Rule 609(a)(2) if the underlying facts demonstrate dishonesty or false statement).

Seventh Circuit

Altobello v. Borden Confectionary Products, Inc., 872 F.2d 215, 216-217 (7th Cir. 1989) (conviction fits Rule 609(a)(2) if the "manner in which" the witness committed it involved deceit).

Eighth Circuit

United States v. Yeo, 739 F.2d 385 (8th Cir. 1984) (the proponent has the burden of producing facts demonstrating that the particular conviction involved fraud or deceit).

Ninth Circuit

United States v. Mehrmanesh, 689 F.2d 822 (9th Cir. 1982) (a prior conviction for smuggling hashish was not automatically admissible on its face, because such surreptitious activity does not necessarily involve misrepresentation or falsification; however, the conviction would be

automatically admitted if the government presented proof that the witness had actually used fraud or deceit in the smuggling); *United States v. Foster*, 227 F.3d 1096 (9th Cir. 2000) (conviction for receipt of stolen property is not admitted automatically under Rule 609(a)(2) because the crime can be accomplished without any misrepresentation or deceit; however, the conviction can be admitted under Rule 609(a)(2) if the trial court finds that the crime "was actually committed by fraudulent or deceitful means").

Tenth Circuit

United States v. Dunson, 142 F.3d 1213 (10th Cir. 1998) (shoplifting conviction is not the type of crime that is automatically admitted under Rule 609(a)(2); however, the trial judge can, upon request, go behind the elements of the crime to determine whether the particular conviction rested on facts establishing dishonesty or false statement; in this case, the defendant proffered no underlying facts, so the conviction was not admissible against the prosecution witness under Rule 609(a)(2)); *United States v. Whitman*, 665 F.2d 313 (10th Cir. 1981) (larceny offense that was actually committed by fraudulent or deceitful means is automatically admitted under Rule 609(a)(2)).

At least two Circuits have held that the trial court must assess only the elements of the crime offered for impeachment. Thus, in these Circuits, the trial judge cannot look to the underlying facts of the conviction to determine whether it is automatically admissible under Rule 609(a)(2).

D.C. Circuit:

United States v. Lewis, 626 F.2d 940 (D.C. Cir. 1980):

> We do not perceive that it is the manner in which the offense is committed that determines its admissibility. Rather, we interpret Rule 609(a)(2) to require that the crime "involved dishonesty or false statement" as an element of the statutory offense. While narcotics may be sold in a manner that is "deceitful," which is one synonym for "dishonest," the statutory elements of offenses under the Controlled Substance Act do not require that the drugs be sold or possessed in a manner that involves deceit, fraud or breach of trust. If a narcotics pusher misrepresents the strength or quality of his heroin, as frequently happens, he may be defrauding the purchaser, but the statutory crime concerns itself only with the sale, not the fraud.

Third Circuit

Cree v. Hatcher, 969 F.2d 34 (3d Cir. 1992) ("the manner in which a particular defendant commits a crime is irrelevant; what matters is whether dishonesty or false statement is an element of the statutory offense").

Arguments in Favor of and Against a Rule Permitting Inquiry into the Underlying Facts of the Conviction:

As can be seen above, there is a clear split in the circuits over whether the trial court is permitted to inquire into the underlying facts of the conviction to determine whether it involves "dishonesty or false statement" under Rule 609(a)(2). If the Committee believes that this split of authority is important enough to rectify, it will have to determine which is the better view. While there are arguments in favor of an approach permitting inquiry into underlying facts (and while the majority of the courts have adopted that view) most commentators argue that inquiry into underlying facts should not be permitted: that is, the conviction should be assessed on its face to determine whether the elements of the conviction involve dishonesty or false statement. The view of the commentators is shared by the ABA and by the Uniform Rules drafters as well.

Arguments in favor of inquiry into underlying facts:

The argument in favor of inquiry into underlying facts is that it allows the judge to better evaluate the extent to which deception and dishonesty had pervaded the witness's conduct. Rule 609(a)(2) is based on the Congressional assessment that crimes involving dishonesty or false statement are highly probative of a witness's character for truthfulness. In this regard, a crime committed by dishonest means would seem to be as probative as a crime the elements of which involve dishonesty. Moreover, the actual elements of the conviction may not be a true indicator of the witness's misconduct, given the possibility of plea bargaining.

Arguments against inquiry into underlying facts:

The premise of an inquiry into underlying facts is that if the crime is committed in a deceitful manner, it is more probative of the witness's veracity than one not so committed. But if the conviction is admitted, the jury will generally hear only that the conviction was rendered and that a certain punishment was meted out. Rule 609 does not allow the jury to hear the underlying facts

of the conviction.[1] The Courts have consistently held that evidence of the conviction is limited to "the crime charged, the date, and the disposition."[2] This is part of the reasoning for dispensing with an extrinsic evidence exclusion such as that found in Rule 608(b)–the conviction itself can be proved easily, without a need to delve into the facts. Consequently, whatever greater probative value there is in the manner that a crime was committed will be lost on the jury when only the conviction itself is admitted.

More importantly, an approach permitting the trial court to go inquire into the underlying facts of the conviction is likely to make Rule 609(a)(2) the predominant rule, and not the exception. This is because there is probably some act of deceit in almost every crime. Thus, Rule 609(a)(2) will swallow up Rule 609(a)(1), even though the balancing approach of the latter Rule is more consistent with the general framework of the Federal Rules. Note also that the Conference Report on Rule 609(a)(2), set forth above, indicates a Congressional intent to limit the rule to convictions in which lying is an element of the crime.

Finally, it is to say the least an indeterminate inquiry for a trial court to decide retrospectively just what facts actually led to the witness' conviction. If a witness has been convicted of drug distribution, how is the trial judge to determine whether the jury in that prior case found beyond a reasonable doubt that the witness had acted deceitfully in committing the crime? The general verdict of guilty is obviously an insufficient indication. Should the trial judge look at the indictment? At the record? Should the trial judge hold a hearing and essentially retry the prior case, when the only goal is to determine whether the conviction is "automatically" admitted? The process of going behind the crime to the underlying facts hardly seems "automatic".

For these reasons, the ABA Section on Criminal Justice suggests adding the following sentence to the second sentence of Rule 609(a)(2): "This subsection (2) applies only to those crimes whose statutory elements necessarily involve untruthfulness or falsification." The Uniform Rules drafters adopted a similar proposal.

---

[1]. See United States v. Albers, 93 F.3d 1469 (10th Cir. 1996) (the trial judge erred, though harmlessly, in permitting the prosecutor to bring out the underlying facts of a prior conviction for grand theft: "the defendant was entitled to the protection of the rule that only the prior conviction, its general nature, and punishment of felony range were fair game for testing the defendant's credibility"); United States v. Pandozzi, 878 F.2d 1526 (1st Cir. 1989) (the underlying factual details of a conviction cannot be inquired into on cross-examination); Campbell v. Greer, 831 F.2d 700 (7th Cir. 1987) (when the witness was impeached with a rape conviction, it was error to inquire where a prior rape occurred); United States v. Beckett, 706 F.2d 519 (5th Cir. 1983) (a testifying witness is required "to give answers only as to whether he has been previously convicted of a felony, as to what the felony was, and as to when the conviction was had"); Radtke v. Cessna Aircraft Co., 707 F.2d 999 (8th Cir. 1983) (impeachment with a prior conviction is limited to the recitation of the conviction itself).

[2]. Gora v. Costa, 971 F.2d 1325, 1330 (7th Cir. 1992) ("it is error to elicit any further information for impeachment purposes").

Mueller and Kirkpatrick support the minority view, that the underlying facts of a conviction should be irrelevant under Rule 609(a)(2):

> There is something to be said for a formalistic approach in which a conviction fits [Rule 609(a)(2)] only if dishonesty or false statement is among the elements of the offense: It would simplify administration and spare courts and litigants from spending time on collateral inquiries. Scrutiny of underlying facts seems vaguely inconsistent with allowing inquiry only on the essentials of convictions (name of crime, punishment imposed, time, and sometimes place) with further details kept off limits: If the jury hears only the basics, why should the judge consider an elaboration of factual detail in deciding whether to permit the questioning? Also this approach would both cut down the number of convictions achieving "automatic admissibility" and exclude many misdemeanor convictions that, after all, could not qualify under [Rule 609(a)(1)] either.

Mueller and Kirkpatrick, *Federal Evidence* at 742.

Another commentator, Professor Stuart Green, puts the argument this way:

> There remains the question whether, even when the crime for which defendant was convicted does not require a showing of falsity or deceit, a court may look to the manner in which the crime was committed in order to determine whether a prior conviction involves deceit, and therefore falls within the scope of Rule 609(a)(2). According to Mueller and Kirkpatrick, "overwhelmingly ... the practice is to allow and even encourage inquiry into underlying facts." This is also the position endorsed by Richard Uviller, who argues that expanding the category of "dishonesty or false statement" crimes beyond the traditional list of crimen falsi offenses "accords with the governing concept of relevance: The behavior of the individual in committing the crime reveals a trait of character from which the inference of testimonial mendacity may be reasonably drawn. If anything, it is the actor's behavior that supports the inference, not the statutory definition of the crime." Richard Uviller, *Credence, Character, and the Rules of Evidence: Seeing Through the Liar's Tale*, 42 Duke L.J. 776, 791-92 (1993).
>
> There are, however, compelling reasons to question such a departure from the common law evidentiary approach to crimen falsi. The most commonly expressed argument centers on administrative concerns. Allowing courts to inquire into the underlying facts of a prior conviction tends to create confusion and administrative burdens. * * * A second reason for rejecting the fact-based inquiry approach is that it is at odds with the overall structure of the impeachment rules. By allowing (or requiring) courts to inquire into the underlying facts of the conviction, Rule 609(a)(1) is likely to be swallowed up by Rule 609(a)(2). Rule 609(a)(2) will become the rule, rather than the exception, even though the probative versus prejudicial weighing approach of the former rule is more representative of

the Federal Rules' approach generally.

> A third (and, I believe, the most compelling) reason for rejecting the majority approach rests on an understanding of criminal law and procedure, rather than the law of evidence. One needs to recognize that criminal offenses are defined by their elements, not by the facts of their commission. To admit conviction evidence is to tell the jury nothing more than that the elements of the crime of which the witness was convicted were proven beyond a reasonable doubt. Undoubtedly, a large majority of criminal acts do involve some form of deception. A rapist or kidnapper may use deception to lure a victim to a remote location. A perpetrator bent on violating the antitrust laws may use duplicity in doing so. But, in each case, the fact that deception was used will never have been found beyond a reasonable doubt. To allow a court to look to underlying facts in determining whether to admit a prior conviction as a crime of deceit is thus to invite a circumvention of the reasonable doubt standard itself.

Stuart Green, *Deceit and the Classification of Crimes: Federal Rule of Evidence 609(a)(2) and the Origins of Crimen Falsi,* 90 J. Crim.L.& Crim. 1087, 1121-23 (2000).

If the Committee decides that the Rule should be amended, it will have to determine whether to adopt the "factual inquiry" view of Rule 609(a)(2) or the "elements" view favored by most commentators. It should be noted that both points of view are value-neutral in their treatment of litigants. That is, neither view is especially "government-friendly" or "defendant-friendly", and neither is limited to criminal cases. Whatever view is taken, it will apply to impeachment of all witnesses in all cases, as that is the scope of Rule 609(a)(2).

It should also be noted that even if an "elements" approach is taken, the underlying facts of a conviction might still be a subject of impeachment when the witness testifies. For example, if a drug seller misrepresents the quality of his heroin, that misrepresentation may impeach the seller as a witness even though he was convicted for the sale, not the misrepresentation. In fact, the misrepresentation may be considered even if the seller was never convicted of any crime. This is because Rule 608 permits impeachment with the witness' prior bad acts, even if the acts did not result in conviction.

It must be remembered, however, that unlike convictions covered by Rule 609(a)(2), prior bad acts are not automatically admissible to impeach the witness' character for veracity. Rather, admissibility of such acts is regulated by the Rule 403 balancing test.[3] Also, because of Rule 608(b)'s

---

[3]. See, e.g., United States v. Hurst, 951 F.2d 1490 (6th Cir. 1991) (details of a conviction to which the defendant entered a guilty plea were not admissible under Rule 609, but they were the proper subject of inquiry under Rules 403 and 608 where they were probative of the defendant's character for untruthfulness and not unduly prejudicial).

exclusion of extrinsic evidence, the details on which the conviction is based cannot be proved if the witness denies them.

Interestingly, if the underlying facts are not permitted to bootstrap a conviction into automatic admission under Rule 609(a)(2), it may be the case, at least where the accused is the witness, that the deceitful manner in which the crime was committed may be a subject of inquiry while the conviction itself may not. This is because the conviction to be admissible would have to satisfy the accused-friendly balancing test of Rule 609(a)(1), whereas the deceitful acts can be brought out unless their prejudicial effect *substantially* outweighs their probative value under Rule 403. The Rule 609(a)(1) balancing test is far more beneficial to the criminal defendant than is the balancing test employed under Rules 403 and 608.

Finally, without regard to Rule 609(a)(2), the details underlying a conviction may be admissible to rebut the witness' attempt to explain away the conviction. See, e.g., *United States v. Valencia*, 61 F.3d 616 (8th Cir. 1995) (it was permissible to cross-examine on the details of a conviction where the defendant, on direct examination, attempted to minimize his guilt as to that conviction). The *Valencia* Court concluded that the government properly cross-examined the defendant in order to clarify the facts as to the prior conviction and thereby impeach his direct testimony. See also *United States v. Perry*, 857 F.2d 1346 (9th Cir. 1988) (the defendant opened the door to an inquiry into details of a prior misdemeanor convictions for embezzlement and false pretenses by attempting to explain them away and offering his own version of the underlying facts).

B. Does Rule 609(a)(2) Require Automatic Admission of Theft, Drug and Tax Crimes?

Courts are in conflict about whether the elements of theft, drug and tax crimes other than fraud necessarily involve dishonesty or false statement within the meaning of Rule 609(a)(2). This question is independent from that discussed above. The question here is whether a court, *without looking at the underlying facts*, can conclude that theft, drug and tax crimes not involving fraud are automatically admissible under Rule 609(a)(2).

When the Rule was amended in 1990, the Advisory Committee recognized that the courts were in conflict on the scope of Rule 609(a)(2), but refused to resolve the conflict. The Committee's explanation for not proposing an amendment to Rule 609(a)(2) is as follows:

> The Committee recommended no substantive change in subdivision (a)(2), even though some cases raise a concern about the proper interpretation of the words "dishonesty or false statement." These words were used but not explained in the original Advisory

> Committee Note accompanying Rule 609. Congress extensively debated the rule, and the Report of the House and Senate Conference Committee states that "by the phrase dishonesty and false statement, the Conference means 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, commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully." The Advisory Committee concluded that the Conference Report provides sufficient guidance to trial courts and that no amendment is necessary, notwithstanding some decisions that take an unduly broad view of "dishonesty," admitting convictions such as for bank robbery or bank larceny.

The Advisory Committee's explanation for refusing to clarify Rule 609(a)(2) by amendatory language is puzzling. If the Conference Report to the original Rule already provided sufficient guidance, then why had some courts taken "an unduly broad view of dishonesty"? Moreover, the Conference Committee Report interpreted the language *originally* proposed for Rule 609(a)(2): that the conviction must involve "dishonesty *and* false statement." But the Rule as adopted provides for mandatory admission of crimes that involve "dishonesty *or* false statement." Small wonder, then, that some courts have applied Rule 609(a)(2) to cover more crimes than the Conference Report had described.

There is some common ground among the courts, however. There is general agreement that crimes containing a statutory element requiring proof of deceit are covered by Rule 609(a)(2). Examples include perjury, fraud, falsifying government forms, and counterfeiting. A person cannot be convicted of these crimes unless the prosecution proves that she has been deceitful in some way. The fact that the witness has essentially been convicted for lying is obviously probative of whether she is lying on the stand — so probative, in fact, that Congress mandated admission no matter how prejudicial the convictions would be. See, e.g., *United States v. Tracy*, 36 F.3d 187 (1st Cir. 1994) (conviction for uttering a false prescription is automatically admissible to impeach a witness under Rule 609(a)(2)); *United States v. Noble*, 754 F.2d 1324 (7th Cir. 1985) (counterfeiting conviction is automatically admissible under Rule 609(a)(2)); *United States v. Hans*, 738 F.2d 88 (3d Cir. 1984) (conviction for knowingly transporting forged securities is automatically admissible to impeach the witness). As the Seventh Circuit has stated:

> The essential characteristic of these offenses [such as perjury, false statement, criminal fraud, embezzlement or false pretenses] is that the witness, acting in a calculated and deliberate manner, has committed acts of falsification for the very purpose of deceiving. It is this essential characteristic that makes these crimes probative of a witness' propensity to lie on the stand.

United States v. Cameron, 814 F.2d 403, 407 (7th Cir. 1987).

Theft of Property Crimes:

Some disagreement exists with respect to theft crimes. On the one hand, it can be argued that a shoplifter or burglar acted deceitfully or at least underhandedly, and that this activity is just as probative of a propensity to lie on the stand as is the dishonesty inherent in a perjury conviction. On the other hand, deceit is not necessarily a statutory element of a theft, nor is false statement; so it is not as obvious that the conviction is as probative of credibility as, for example, a conviction in which the government of necessity proved beyond a reasonable doubt that the witness had acted dishonestly and made a false statement. Some types of theft crimes, like bank robbery, are even more questionable as to their pertinence to the witness' credibility, because a person could rob a bank without engaging in a single act of deceit or falsification.

Most courts take the view that theft and property crimes are not automatically admissible on their face. The Ninth Circuit's en banc opinion in *United States v. Brackeen*, 969 F.2d 827 (9th Cir. 1992) is the leading case. Brackeen was tried for aiding and abetting an armed bank robbery, and when he took the stand, he was impeached with his guilty pleas to two unarmed bank robberies that occurred within days of the charged crime. The trial court allowed the impeachment, reasoning that the bank robberies were crimes involving dishonesty or false statement, and thus were to be automatically admitted under Rule 609(a)(2). But the Court of Appeals reversed. It concluded that "Congress intended Rule 609(a)(2) to apply only to those crimes that factually or by definition entail some *element* of misrepresentation or deceit, and not to those crimes which, bad though they are, do not carry with them a tinge of falsification."

The following cases follow the *Brackeen* view that theft crimes are not automatically admissible on their face:

D.C. Circuit

United States v. Fearwell, 595 F.2d 771 (D.C.Cir. 1978) (conviction for conspiracy to violate the Food Stamp Act was not automatically admissible under Rule 609(a)(2).

First Circuit

United States v. Grandmont, 680 F.2d 867 (1st Cir. 1982) (robbery and purse snatching are not automatically dishonesty crimes on their face).

Fifth Circuit

Coursey v. Broadhurst, 888 F.2d 338 (5th Cir. 1989) (a cattle theft conviction is not automatically admissible on its face).

Sixth Circuit

United States v. Scisney, 885 F.2d 325 (6th Cir. 1989) (purse snatching conviction is not automatically admissible on its face).

Seventh Circuit

United States v. Wiman, 77 F.3d 981 (7th Cir. 1996) (conviction for theft of gas was not automatically admissible on its face).

Tenth Circuit

United States v. Seamster, 568 F.2d 188 (10th Cir. 1978) (Rule 609(a)(2) covers only those convictions "involving some element of deceit, untruthfulness or falsification which would tend to show that a witness would be likely to testify untruthfully").

Eleventh Circuit

United States v. Farmer, 923 F.2d 1557, 1567 (11th Cir. 1991) (theft crime not automatically admissible on its face).

There are a few cases, however, holding that theft crimes are automatically admissible on their face.

First Circuit

United States v. Del Toro Soto, 676 F.2d 13 (1st Cir. 1982) (grand larceny automatically admissible on its face); *United States v. Brown*, 603 F.2d 1022 (1st Cir. 1979) (burglary and petit larceny are automatically admitted under Rule 609(a)(2)).

Third Circuit

Wagner v. Firestone Tire & Rubber Co., 890 F.2d 652 (3d Cir. 1989)(conviction for passing worthless checks is automatically admissible on its face).

Tenth Circuit

United States v. Mucci, 630 F.2d 737 (10th Cir. 1980) (conviction for passing worthless checks is automatically admissible on its face).

Arguments in favor of and against automatic admissibility of theft crimes:

The argument in favor of automatic admissibility of theft crimes is that people who commit theft are leading a life of deceit, and this is highly probative of their character for truthfulness. Moreover, Rule 609(a)(2) covers convictions that involved "*dishonesty or* false statement." The term "dishonesty" should have some independent meaning. An actual false statement should not be required for the conviction to be automatically admissible.

There are three arguments against the automatic admissibility of all theft crimes under Rule 609(a)(2). First, the Conference Report indicates that the Rule is to be narrowly construed to apply only to those crimes like perjury that require proof beyond a reasonable doubt that the witness lied in committing the crime. Second, Rule 609(a)(2) is an unusual provision, providing for automatic admissibility; as such it is contrary to the general approach of the Federal Rules, which gives trial courts discretion to exclude problematic evidence. Rule 609(a)(2) therefore should be the exception to the more broadly applicable balancing test of Rule 609(a)(1). Including theft crimes within the scope of Rule 609(a)(2) would likely result in the "exception" being used more often than the "rule." (See the discussion by Judge Posner in *Altobello v. Borden Confectionary Prods., Inc.*, 872 F.2d 215 (7th Cir. 1989), in which he concludes that Rule 609(a)(2) must be construed narrowly to avoid swallowing Rule 609(a)(1) and its balancing test.) Third, there is no practical reason to apply Rule 609(a)(2) so broadly, because theft convictions will still be good candidates for admissibility under the balancing test of Rule 609(a)(1); thus, a narrow construction of this unusual rule will not result in an unjustified exclusion of important evidence of impeachment.

Drug Crimes

The arguments in favor of and against inclusion of drug crimes are similar to those concerning theft crimes. On the one hand, drug crimes indicate a life of deceit. On the other hand, drug crimes do not ordinarily involve an *element* of deceit, and to include all drug crimes within Rule 609(a)(2) would allow that exceptional provision to swallow the balancing-based "rule" of Rule 609(a)(1).

A great majority of courts have held that drug crimes are not automatically admissible on their face under Rule 609(a)(2). These cases include:

D.C. Circuit

United States v. Logan, 998 F.2d 1025 (D.C.Cir. 1993) (drug distribution)

Second Circuit

United States v. Hayes, 553 F.2d 824 (2d Cir. 1997) (drug smuggling).

Ninth Circuit

Medrano v. City of Los Angeles, 973 F.2d 1499 (9th Cir. 1992) (drug use).

Tenth Circuit

Gust v. Jones, 162 F.3d 587 (10th Cir. 1998) (conviction for drug smuggling was not admissible under Rule 609(a)(2) because that crime did not "per se, involve dishonesty or false statement").

Two federal cases could be read as concluding that drug crimes are automatically admissible whenever the witness testifies. But neither case is long on analysis, and each case cites Rule 609(a) generally, rather than Rule 609(a)(2) specifically. Thus, reasonable minds can differ on whether these courts are in conflict with the majority rule that drug crimes are not automatically admissible on their face under Rule 609(a)(2). Those cases are:

United States v. Parrish, 736 F.2d 152 (5th Cir. 1984) (affirming admission of conviction for selling metamphetamine); and *United States v. Moore,* 735 F.2d 289 (8th Cir. 1984) (narcotics offenses).

Tax Crimes Other than Tax Fraud

While tax fraud is obviously automatically admissible under Rule 609(a)(2), other tax-related crimes are not as clear. One such crime is the wilful failure to file a tax return. Courts are in conflict about whether that crime is admissible on its face in Rule 609(a)(2). In *Cree v. Hatcher*, 969 F.2d 34 (3d Cir. 1992), the plaintiff in a malpractice case called an expert pathologist, who was impeached with his prior misdemeanor conviction for wilful failure to file a tax return in violation

of 26 U.S.C. § 7203. The trial court held that the conviction fell under Rule 609(a)(2) and therefore admission was required, but the Third Circuit reversed. The Court of Appeals reasoned that Rule 609(a)(2) should be narrowly construed, because it is a radical provision that deprives the trial judge of the discretion to weigh the prejudicial effect of admitting the evidence against its probative value in proving the witness' credibility. The Court noted that to obtain a conviction for wilful failure to file a tax return, the government is not required to show that a defendant acted with a deceitful purpose to conceal his tax liability. Rather, all that is required is proof that the defendant acted voluntarily and with the deliberate intent to violate the law. The Court concluded therefore that a conviction under section 7203 did not "necessarily connote dishonesty or a false statement within the narrow ambit of Rule 609(a)(2)."

The result in *Cree* is in conflict with the Eleventh Circuit's opinion in *United States v. Gellman*, 677 F.2d 65 (11th Cir. 1982), where the Court reasoned that a violation of section 7203 was "sufficiently reprehensible to meet the exception of Rule 609(a)(2)." See also *United States v. Wilson*, 985 F.2d 348 (7th Cir. 1993) (same). The *Cree* Court, however, pointed out in response to *Gellman* that Rule 609(a)(2) does not measure the reprehensibility or the severity of a crime, but rather focuses on whether the crime is especially probative of the witness' propensity to lie. It is the deceit factor in the conviction that makes it so probative of the witness' credibility that admission is mandated. [The Supreme Court granted certiorari in *Cree* to resolve this conflict in the federal cases, but then, almost immediately, certiorari was dismissed. See 506 U.S. 1017 (1992).]

It is notable that because a conviction under section 7203 is a misdemeanor (it is not punishable by a term of imprisonment in excess of one year), the result in *Cree* means that a witness can never be impeached under Rule 609(a)(1) with that conviction; while Rule 609(a)(2) provides for mandatory admission of all convictions covered by the Rule, Rule 609(a)(1) does not permit admission of misdemeanors. So it was critical to the plaintiff in *Cree* to have her expert's prior conviction defined as one that did not involve dishonesty or false statement.

Conclusion on Conflict as to the Scope of Rule 609(a)(2):

1. There is a direct conflict among the circuits as to whether the trial court is allowed to investigate the underlying facts of a conviction to determine if it was committed by deceitful means.

2. There is some conflict as to whether theft crimes are admissible on their face, but the great majority of courts do not find these crimes to be automatically admissible.

3. Almost all courts have held that drug crimes are not admissible on their face. However, there is some case law that could be construed as being in conflict.

4. There is a direct conflict in the circuits as to whether wilful failure to file a tax return is admissible on its face under Rule 609(a)(2), though admittedly this is a narrow question.

III. Technical Change From "Credibility" to "Character for Truthfulness"

The Committee's proposed amendment to Rule 608(b) substituted the term "character for truthfulness" for the overbroad term "credibility" that was used in that Rule. During the public comment on Rule 608(b), Professor Duane noted that the term "credibility" was also used in Rule 609(a), and suggested that it should also be changed to "character for truthfulness". The rationale is the same as for the amendment to Rule 608(b). Rule 609(a) uses the broad term "credibility" when it really means to use the more narrow term "character for truthfulness." The broad term is potentially problematic because it covers all forms of impeachment, e.g., prior inconsistent statement, bias, contradiction. Thus, the Rule could be misconstrued as limiting the use of convictions even though offered for a purpose other than an attack on the witness' character.

It is unlikely that this change would make much difference in practice. Professor Duane posits an example that in his opinion could lead to a problem in applying the overbroad term "credibility" in Rule 609. Suppose a police officer is charged with misconduct. A witness testifies against him and the officer wants to impeach the witness with evidence that the officer previously arrested and testified against that witness, who was then convicted and served a jail sentence. This evidence would be offered to prove bias, not character for untruthfulness. Yet if Rule 609 is read to cover any attempt to impeach "credibility" through the witness's convictions, the convictions would have to pass under the complicated tests for admissibility under Rule 609, rather than the Rule 403 balancing test that usually governs evidence of bias.

There are at least two reasons why the hypothetical misapplication of Rule 609 posited by Professor Duane has not arisen in the cases. First, presuming that a court applies Rule 609 to convictions offered to prove bias, the result will usually be the same as if the court had applied the Rule 403 test. This is because Rule 609 itself provides that the Rule 403 test applies to many of the convictions offered under that Rule–specifically convictions less than ten years old that do not involve dishonesty or false statement and are offered against witnesses other than an accused. Thus, the risk of misapplication of Rule 609 with respect to convictions offered for bias or other non-character forms of impeachment is limited by the fact that the Rule 403 test already applies to a good number of those convictions.

Second, the reported decisions indicate that the courts have found no difficulty in limiting Rule 609 to convictions offered to attack the witness' character for truthfulness. If a conviction is offered for an impeachment purpose other than character, such as contradiction, courts have held that Rule 609 is inapplicable and admissibility is governed by Rule 403. The following is an excerpt from *Federal Rules of Evidence Manual* that speaks to this point:

> The special rules set forth in Rule 609 are applicable only if the proponent is attempting to use prior convictions to impeach the witness' character for truthtelling. If there is another purpose for introducing the conviction, then Rule 609 poses no bar, and the Trial Court should admit the conviction subject to the balancing test of Rule 403. For example, in *United States v. Lopez*, 979 F.2d 1024 (5th Cir. 1992), the defendant in a drug case testified

to his innocence and implied that he had never been in contact with drugs. On cross-examination the government asked the defendant whether he had ever personally seen marijuana. He answered that he had not. The prosecution then offered in rebuttal, and the Trial Court admitted, the defendant's fifteen-year-old conviction for possession of marijuana. The jury was given a limiting instruction. The Court also held that Rule 609 did not apply because that Rule has nothing to say about "the admissibility of relevant evidence introduced to contradict a witness's testimony as to a material issue." The Court reasoned that the admissibility of the conviction should be determined under Rule 403, rather than under the more exclusionary balancing test of Rule 609(b). It found that Rule 403 provided valid grounds to admit Lopez's prior conviction: because the defendant had brought up his unfamiliarity with drugs on his own, the prejudicial effect of the old conviction did not substantially outweigh the probative value.

See also *United States v. Norton*, 26 F.3d 240 (1st Cir. 1994) (in a felon-firearm prosecution, the court properly allowed the government to introduce the defendant's prior firearm conviction; the defendant had testified on direct that he had never possessed a gun in his life, so the prior conviction provided proper contradiction).

While the change will have little substantive effect, it certainly seems worthwhile to make the change if the Rule is going to be amended on other grounds. It makes sense to use the same terminology in Rules 608 and 609, as they both govern impeachment of a witness's character for truthfulness. The models in Part Six set forth the technical change suggested by Professor Duane.

IV. State Law Variations

There are a number of states that diverge from the Federal model in some respects. The most extreme examples are Montana, which prohibits impeachment with prior convictions, and North Carolina, which provides that all convictions are automatically admissible. Other states, such as Maryland, reject the distinction between Rule 609(a)(1) and 609(a)(2) and substitute a general balancing test for all convictions. This memorandum assumes that a total reconception of Rule 609 is not justified, especially in light of the careful consideration that was given to the Rule in Congress when the Rule was initially proposed. The Rule represents a compromise approach, a balance of interests, that undoubtedly should not be revisited in the absence of compelling circumstances. Accordingly, this section sets out those few state versions that provide a different view concerning the basic issues addressed in this memorandum: 1) whether inquiry into the underlying facts of a conviction is permissible under Rule 609(a)(2); and 2) whether Rule 609(a)(2) automatically covers theft, drug and all tax crimes.

Michigan

> RULE 609. IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME
> (a) General Rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been elicited from the witness or established by public record during cross examination, and
> (1) the crime contained an element of dishonesty or false statement, or
> (2) the crime contained an element of theft, and
> (A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and
> (B) the court determines that the evidence has significant probative value on the issue of credibility and, if the witness is the defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs its prejudicial effect.

Michigan prohibits an inquiry into underlying facts. But it has expanded the elements that justify automatic admissibility, to include theft. Thus, all theft crimes are automatically admissible on their face.

Vermont

Rule 609. IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME
(a) General Rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or, if denied by the witness, if established by extrinsic evidence, but only if the crime:

(1) Involved untruthfulness or falsification regardless of the punishment, unless the court determines that the probative value of admitting this evidence is substantially outweighed by the danger of unfair prejudice. **This subsection (1) applies only to those crimes whose statutory elements necessarily involve untruthfulness or falsification.**

2) Was a felony conviction under the law of Vermont or was punishable by death or imprisonment in excess of one year under the law of another jurisdiction, under which the witness was convicted, and the court determines that the probative value of this evidence substantially outweighs its prejudicial effect.

The court shall articulate on the record the factors considered in making its determination.

Vermont specifically applies a statutory elements test. Thus, it prohibits a factual inquiry, and it also excludes drug, theft and tax crimes that do not require the jury to find an act of untruthfulness in order to convict. Vermont also includes a 403 balancing test for crimes involving dishonesty or false statement, but that provision could not be added to the Federal Rule, as it would upset the compromise reached in the Rule providing that certain crimes should be automatically admissible.

V. Advantages and Disadvantages of an Amendment to Rule 609(a)(2)

The advantages and disadvantages of an amendment have been discussed above and can be summarized briefly here.

Advantages:

1. An amendment clarifying the scope of Rule 609(a)(2), and either prohibiting or permitting an inquiry into the underlying facts of a conviction, will resolve conflicts in the courts on various questions.

2. An amendment limiting admissibility under Rule 609(a)(2) to those convictions carrying an *element* of untruthfulness will have two important practical advantages beyond resolving a conflict in the courts. First, it will make the Rule 609(a)(2) determination more efficient and more uniform. The court would only have to look to the elements of the conviction to determine whether it is automatically admissible. There would be no murky and perhaps subjective inquiry into the underlying facts. Second, an elements approach will give Rule 609(a)(2) a limited base of applicability–and such a limited construction is consistent with congressional intent and with the general structure of the Federal Rules of Evidence.

3. An amendment could have the added benefit of correcting misuse of the overbroad term "credibility". This change would bring Rule 609 into line with the recent amendment to Rule 608.

Disadvantages

Beyond the ordinary costs of a rule amendment, it could be argued that the Rule was amended in 1990 and the Rule Committee specifically rejected the suggestion that the Rule be changed to clarify the term "dishonesty or false statement". As to conflict in the courts, there was conflict over the meaning of the Rule in 1990, but nothing was done about it, and the conflict seems no more serious now than it was before.

VI. Models for a Possible Amendment to Rule 609(a)(2)

Both of the models below include the suggested technical change from "credibility" to "character for truthfulness." The difference is that Model One focuses on the elements of the conviction while Model Two specifically permits the court to look at the facts underlying the conviction.

Model One: Automatically Admissible Only If Conviction Carries an Element of Dishonesty or False Statement

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 ~~if it involved dishonesty or false statement,~~ regardless of the punishment if the statutory elements of the crime necessarily involve dishonesty or false statement.

(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.

Proposed Committee Note to Model One

The amendment provides that a conviction is not automatically admissible under Rule 609(a)(2) unless the statutory elements of the crime for which the witness was convicted necessarily involve proof beyond a reasonable doubt that the witness committed an act of dishonesty or false statement. The Rule prohibits the court from determining that a conviction is "automatically admissible" by inquiring into the underlying facts of the crime. Such facts are often difficult to determine. *See Emerging Problems Under the Federal Rules of Evidence* at 173 (2d ed. 1998) ("The difficulty of ascertaining [facts underlying a conviction] especially from the records of out-of-state proceedings might make the broad approach operate unevenly and feasible only for local convictions. . . . A simple, almost mechanical, rule that only those convictions for crimes whose *statutory elements* include deception, untruthfulness or falsehood under Rule 609(a)(2) arguably would result in a more efficient, predictable proceeding.") (emphasis in original). Moreover, the probative value of the underlying facts of a conviction, when the conviction is offered to impeach the witness's character for truthfulness, is lost on the jury because the jury is not informed about the details of a conviction under Rule 609. *See, e.g., United States v. Beckett*, 706 F.2d 519 at n.1 (5th Cir. 1983) (a testifying witness is required "to give answers only as to whether he has been previously convicted of a felony, as to what the felony was, and as to when the conviction was had"); *Radtke v. Cessna Aircraft Co.*, 707 F.2d 999 (8th Cir. 1983) (impeachment with a prior conviction is limited to the recitation of the conviction itself).*See also* C. Mueller & L. Kirkpatrick, *Federal Evidence* at 742 (2d ed. 1999) ("Scrutiny of underlying facts seems vaguely inconsistent with allowing inquiry only on the essentials of convictions (name of crime, punishment imposed, time, and sometimes place) with further details kept off limits: If the jury hears only the basics, why should the judge consider an elaboration of factual detail in deciding whether to permit the questioning?").

The legislative history of Rule 609 indicates that the automatic admissibility provision of Rule 609(a)(2) was to be narrowly construed. This amendment comports with that intent. See Conference Report to proposed Rule 609, at 9 ("By the phrase 'dishonesty and false statement' the Conference means crimes such as perjury or 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.").

It should be noted that while the facts underlying a conviction are irrelevant to the admissibility of that conviction under Rule 609(a)(2), those underlying facts might be a proper subject of enquiry under Rule 608. *See* e.g., *United States v. Hurst*, 951 F.2d 1490

(6th Cir. 1991) (underlying facts of a conviction were the proper subject of inquiry under Rules 403 and 608 where they were probative of the defendant's character for untruthfulness and not unduly prejudicial).

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 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.

Note: This model is lifted from the Uniform Rules provision, but it is notable that the Uniform Rule uses the term "untruthfulness or falsification" rather than "dishonesty or false statement." The model retains the term "dishonesty or false statement" in deference to the extensive legislative treatment that this Rule received when initially proposed. But if the Committee wishes, the language can be changed to replicate the Uniform Rule.

Note also that this model can be modified to *expand* the elements that would give rise to automatic admissibility. For example, the element of theft could be included as it is in Michigan. If the Committee desires such an addition, it can be added to the model easily, with a short addition to the Committee Note to indicate that theft crimes are especially probative of untruthfulness as they indicate a life of deceit. But also note that the addition of the element of theft goes beyond the original Congressional intent behind Rule 609(a)(2).

Model Two: Permitting Enquiry Into the Facts Underlying the Conviction

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 ~~if it involved dishonesty or false statement,~~ regardless of the punishment if the statutory elements of the conviction or the facts underlying the conviction indicate that the crime necessarily involved dishonesty or false statement.

(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.

Proposed Committee Note to Model Two

The amendment provides that a conviction is automatically admissible under Rule 609(a)(2) if its statutory elements or the underlying facts indicate that the witness engaged in an act of dishonesty or false statement in the course of committing the crime. The Rule codifies the majority view of the courts on this question. *See* C. Mueller & L. Kirkpatrick, *Federal Evidence* at 742 (2d ed. 1999) ("Routinely modern courts look at the facts underlying particular convictions and admit them under [Rule 609(a)(2)] if those facts indicate falsehood or dishonesty."). *See also Altobello v. Borden Confectionary Products, Inc.*, 872 F.2d 215, 216-17 (7th Cir. 1989) (conviction automatically admissible under Rule 609(a)(2) if the "manner in which" the witness committed it involved deceit). The justification for an inquiry into the facts underlying a conviction is that if the facts involved dishonesty or false statement, the conviction is highly probative of the witness's character for untruthfulness, and therefore warrants automatic admissibility under Rule 609(a)(2). *See* Richard Uviller, *Credence, Character, and the Rules of Evidence: Seeing Through the Liar's Tale*, 42 Duke L.J. 776, 791-92 (1993) ("The behavior of the individual in committing the crime reveals a trait of character from which the inference of testimonial mendacity may be reasonably drawn. If anything, it is the actor's behavior that supports the inference, not the statutory definition of the crime.").

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 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

FORDHAM
University School of Law

Lincoln Center, 140 West 62nd Street, New York, NY 10023-7485

Daniel J. Capra
Philip Reed Professor of Law

Phone: 212-636-6855
e-mail:dcapra@law.fordham.edu
Fax: 212-636-6899

Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Possible Amendment to Evidence Rule 801(d)(1)(B)
Date: November 1, 2003

At its Fall 2002 meeting the Committee directed the Reporter to prepare a memorandum on the advisability of proposing an amendment to Evidence Rule 801(d)(1)(B). Attached to this memorandum is a law review article co-authored by Judge Bullock, who has served as the Standing Committee's liaison to the Evidence Rules Committee. Judge Bullock has requested that this Committee consider whether Evidence Rule 801(d)(1)(B) should be amended in the manner suggested in the article.

The article proposes that Rule 801(d)(1)(B) be amended to provide that prior consistent statements are admissible under the hearsay exception whenever they would be admissible to rehabilitate the witness' credibility. The justification is that there is no meaningful distinction between substantive and rehabilitative use of prior consistent statements.

This memorandum is in six parts. Part One sets forth Rule 801(d)(1)(B) and its application by the Supreme Court in *Tome v. United States*. Part Two discusses the potential practical problems caused by a distinction between prior consistent statements admissible under the hearsay exemption and consistent statements admissible only to rehabilitate a witness's credibility. Part Three discusses the case law on the subject. Part Four sets forth pertinent state law variations on Rule 801(d)(1)(B). Part Five discusses the arguments in favor of and against an amendment that would extend the hearsay exception to any consistent statement admissible for rehabilitation. Part Six sets forth a model for amending Rule 801(d)(1)(B) in accordance with Judge Bullock's suggestion, and a model Committee Note.

It is important to note that this memorandum does not necessarily advocate the adoption of an amendment to Rule 801(d)(1)(B). It is intended only to provide background to the Committee on the problems posed by the existing Rule. It is for the Committee to determine whether the high costs of an amendment are justified in this circumstance.

I. Rule 801(d)(1)(B) and *Tome v. United States*

Rule 801(d)(1)(B) currently reads as follows:

Rule 801. Definitions

The following definitions apply under this article:

* * *

(d) *Statements which are not hearsay.* — A statement is not hearsay if —

(1) Prior statement by witness. — The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is * * * (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, * * *

The original Advisory Committee Note to Rule 801(d)(1)(B) reads as follows:

(B) Prior consistent statements traditionally have been admissible to rebut charges of recent fabrication or improper influence or motive but not as substantive evidence. Under the rule they are substantive evidence. The prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally.

Tome v. United States

At one time there was dispute among the courts about whether a statement can be admissible for its truth under Rule 801(d)(1)(B) when the witness is attacked for having a motive to falsify and the prior consistent statement was made *after* the motive to falsify arose. The Supreme Court resolved this dispute in *Tome v. United States*, 513 U.S. 150 (1995). The defendant in *Tome* was tried for sexual abuse of his young daughter. At trial the daughter implicated the defendant, basically by answering yes or no to a series of leading questions. On cross-examination defense counsel asked some questions that were designed to show that the daughter preferred living in her mother's neighborhood rather than where her father lived, and therefore the daughter might have had a motive to fabricate her accusations. The prosecution then called six witnesses, each of whom testified that the daughter had made statements to them accusing the defendant of sexual abuse. The Tenth Circuit held that all of these statements were properly admitted for their truth under Rule 801(d)(1)(B).

The Tenth Circuit rejected Tome's argument that the girl's consistent statements should not have been admitted because they were made at a time when she had the desire to live with her mother, i.e., they were made subject to the same motive to falsify as existed at the time the witness testified. That Court was of the opinion that Rule 801(d)(1)(B) does not require that a statement predate the charged motive to fabricate before it can be admitted as a prior consistent statement.

The Supreme Court, in an opinion by Justice Kennedy for five Justices, held that a prior consistent statement is not admissible for its truth under Rule 801(d)(1)(B) unless the statement was made *before* the charged fabrication or improper influence or motive arose. Because of this temporal limitation, the daughter's consistent statements in *Tome* could not be admitted as proof that the defendant abused her.

Justice Kennedy relied heavily on the common-law rule, under which prior consistent statements were not admissible to rebut a charge of recent fabrication or improper motive unless they were made before the fabrication or motive to falsify arose. According to Justice Kennedy, the drafters of the Federal Rules intended to preserve the common-law "pre-motive" timing requirement. He based this conclusion on several factors: (1) the "somewhat peculiar language" of Rule 801(d)(1)(B) tracked the language concerning prior consistent statements in common-law cases, thus implying an intent to carry over the common-law timing rule; (2) the Notes by the Advisory Committee "disclose a purpose to adhere to the common law in the application of evidentiary principles, absent express provisions to the contrary" and there is no indication in the Notes of an intent to abrogate the common-law pre-motive requirement with respect to prior consistent statements; (3) the common-law Courts uniformly adhered to the pre-motive requirement, and "with this state of unanimity confronting the drafters of the Federal Rules of Evidence, we think it unlikely that they intended to scuttle entirely [the common-law requirement]"; (4) imposing a pre-motive requirement on prior consistent statements was consistent with the Advisory Committee's generally cautious approach to prior consistent statements, or, as the Court put it, the Committee's "stated unwillingness to countenance the general use of prior prepared statements as substantive evidence."

It is odd that the *Tome* Court relied so heavily on the common law in finding a pre-motive requirement in Rule 801(d)(1)(B). The common-law rule concerned admissibility of prior consistent statements solely to rehabilitate the credibility of a witness. The common law did not provide that such statements could be admitted for their truth. So it is clear that the Advisory Committee *did* intend to change the common-law rule, in a rather fundamental way.

While the Court's reliance on the common law provides a weak basis for its decision, this does not mean that the Court was wrong to impose a pre-motive requirement for prior consistent statements offered as substantive evidence. Justice Kennedy seems correct in his assertion that a pre-motive requirement was implicit in Rule 801(d)(1)(B). Such a construction is required in order to make sense out of the categories of prior consistent statements that could qualify for substantive admissibility under the Rule. The Rule states that only those prior consistent statements that are offered to rebut a charge of fabrication, motive, or influence can be used substantively — i.e., for

the truth of the statement as opposed to rehabilitation of a witness' credibility. But many prior consistent statements could be offered for other kinds of rebuttal, e.g., to explain an inconsistency or failure of memory. If the drafters of the Federal Rules did not intend to impose a pre-motive requirement, then there would have been no need to carve out those statements offered to rebut a charge of fabrication, motive, or influence for special substantive treatment. It is only the pre-motive requirement that distinguishes prior consistent statements offered to rebut a charge of fabrication, motive, or influence from all other consistent statements. As Justice Scalia put it in his concurring opinion: "Only the premotive-statement limitation makes it rational to admit a prior corroborating statement to rebut a charge of recent fabrication or improper motive, but not to rebut a charge that the witness' memory is playing tricks."

In sum, as construed by the Supreme Court in *Tome,* Rule 801(d)(1)(B) grants substantive admissibility to certain prior consistent statements and not others. Only those statements that are made in rebuttal to a charge that the witness has a motive to fabricate testimony are admissible as substantive evidence under the Rule; and only those statements that predate the motive qualify, because statements that are made after the motive arose do not rebut the attack on the witness's credibility.

II. The Problem of Distinguishing Between Substantive and Rehabilitative Use of Prior Consistent Statements

The Court in *Tome* did not hold that the pre-motive requirement must always be satisfied before prior consistent statements may even be heard by the factfinder. As Judge Bullock points out in his article, prior consistent statements can be introduced for *credibility* purposes, to rehabilitate a witness, whenever they are responsive to an attack on the credibility of a witness. One such situation is where the consistent statement is offered to explain or to clarify an inconsistent statement introduced by the adversary. *See, e.g., United States v. Brennan*, 798 F.2d 581 (2d Cir. 1986) (prior statement was not admissible to rebut a charge of improper motive, but it was admissible to clarify an inconsistency: "prior consistent statements may be admissible for rehabilitation even if not admissible under Rule 801(d)(1)(B)"). If the witness claims, for example, that the apparently inconsistent statement was taken out of context, he can explain the context, and this explanation may include the introduction of statements consistent with his testimony. If offered on credibility, the hearsay rule is no bar to the statement. The evidence is relevant under Rule 401 and admissible under Rule 402 to rehabilitate the witness' credibility. *See United States v. Parodi,* 703 F.2d 768 (4th Cir. 1983) ("proof of prior consistent statements of a witness whose testimony has been allegedly impeached may be admitted to corroborate his credibility whether under Rule 801(d)(1)(B) or under traditional federal rules, irrespective of whether there was a motive to fabricate."). As the Court stated in *United States v. Harris*, 761 F.2d 394 (7th Cir. 1985), the general principle set forth in Rule 801(d)(1)(B) — i.e., "the motive to fabricate must not have existed at the time the statements were made or they are inadmissible" — "need not be met to admit into evidence prior consistent statements which are offered solely to rehabilitate a witness rather than as evidence of the matters asserted in those statements."

However, to be admitted *substantively*, in the absence of some other hearsay exception, a prior consistent statement must be relevant to rebut a charge of recent fabrication or improper influence or motive and must have been made before the motive to fabricate arose. *See, e.g., United States v. Awon,* 135 F.3d 96 (1st Cir. 1998) (error to admit statements under Rule 801(d)(1)(B); prosecution witnesses were attacked on the ground that they were seeking leniency, and the prior statements were made only after the witnesses were informed that the police knew they were involved in criminal activity and could benefit themselves by cooperating; therefore the consistent statements were made after the motive to falsify arose). Where a consistent statement is admissible for rehabilitative purposes such as to explain an inconsistency, and yet is not admissible as substantive evidence under Rule 801(d)(1)(B), the adversary is entitled to a limiting instruction as to the appropriate use of the evidence. *See, e.g., United States v. Castillo,* 14 F.3d 802 (2d Cir. 1994) (a prior consistent statement can be offered to rehabilitate the witness' credibility even though it is not admissible under Rule 801(d)(1)(B); however, a limiting instruction must be given and the prosecutor cannot abrogate "the court's limiting instructions by improperly arguing the truth of the hearsay testimony" during opening and closing arguments).

There are two basic practical problems in the distinction between substantive and credibility use as applied to prior consistent statements. First, as Judge Bullock notes, the necessary jury instruction is almost impossible for jurors to follow. The prior consistent statement is of little or no use for credibility unless the jury believes it to be true. Second, and for similar reasons, the distinction between substantive and impeachment use of prior consistent statements has no practical effect. The proponent has already presented the witness's trial testimony, so the prior consistent statement adds no real substantive effect to the proponent's case. This is in contrast to prior *inconsistent* statements under Rule 801(d)(1)(A), where the prior statement can have an important substantive effect as it by definition does not duplicate the witness's trial testimony.

An example of the lack of practical effect in the Rule 801(d)(1)(B) substantive/credibility distinction is *United States v. White*, 11 F.3d 1446 (8th Cir. 1993). Prior consistent statements were offered not to rebut a charge of improper motive, but to explain away an apparent inconsistency. The court noted that the rehabilitative statements "were admissible when accompanied by a limiting instruction," but they were not admissible for their truth under Rule 801(d)(1)(B) because they did not precede any motive that the witness might have had to fabricate his trial testimony. So the court held that the trial court erred in admitting the statements without a limiting instruction. But the error was by definition harmless because the prior consistent statements were "duplicative" of the witness' testimony at trial. Thus, as Judge Bullock points out, distinctions between substantive and nonsubstantive use of prior consistent statements "are normally distinctions without practical meaning." This is why Judge Bullock advocates that "the Federal Rules should explicitly provide that all prior consistent statements, when admissible to rehabilitate, are admissible as substantive evidence."

III. Case Law on the Substantive/Non-Substantive Distinction of Rule 801(d)(1)(B)

Most courts have held that if a prior consistent statement is probative to rehabilitate the credibility of a witness, it need not satisfy the pre-motive requirement of Rule 801(d)(1)(B)–that is, while Rule 801(d)(1)(B) controls whether a prior consistent statement is admissible for its truth, it does not govern admissibility of a consistent statement when offered solely to rehabilitate the witness. There is, however, some apparently conflicting case law holding that a prior consistent statement must be admissible under Rule 801(d)(1)(B) or not at all. Thus, an amendment to the Rule could be justified at least in part by the need to unify the case law.

Cases from the circuits are summarized in this section:

D.C. Circuit:

United States v. Stover, 329 F.3d 859 (D.C. Cir. 2003): The Court affirmed four defendants' drug-related convictions. It held that the Trial Judge properly admitted prior statements by a witness to the FBI on redirect examination after the witness was cross-examined concerning an inconsistency between the witness's trial testimony and one statement he made to the FBI. Thus, the statement was offered to explain an inconsistency, not to rebut a charge of recent fabrication or improper motive. The Court concluded that consistent statements not offered for their truth are not governed by Rule 801 (d)(1)(B) and the timing rule adopted by the Supreme Court in *Tome*. The Court reasoned as follows:

> [S]tatements may be introduced for reasons other than their truth. Suppose a witness testifies on direct examination to fact X and then on cross-examination is asked about his statement, made sometime before trial, suggesting that he believed not-X. Could the party who called the witness ask him to verify his prior consistent statements even though the witness made them after he had a motive to shade the truth? We think the answer is yes, and so do other courts of appeals. *See United States v. Simonelli,* 237 F.3d 19, 26-27 (1st Cir. 2001); *United States v. Ellis,* 121 F.3d 908 (4th Cir. 1997); *United States v. Pierre,* 781 F.2d 329, 331-33 (2d Cir. 1986); *United States v. Harris,* 761 F.2d 394, 399-400 (7th Cir. 1985). * * * These prior statements would not be offered for the truth of the matter asserted - fact X - and therefore would not need to satisfy Rule 801(d)(1)(B). They would be introduced to show that the witness did not give statements on direct that were inconsistent with what he had said before. * * * The prior statements would be admissible on this basis because of the cross-examination. They would be relevant, under Fed.R.Evid. 401, to a matter of consequence – namely, that the witness made inconsistent statements about fact X, which would tend to undermine his credibility. * * *
>
> Here, the only prior statements the Government introduced on redirect that clarified an apparent inconsistency were those concerning whether Ouaffai knew drug dealers other than Harrison. These statements were properly admitted (though not on the ground the

> District Court recited). The rest of Ouaffai's prior statements were not targeted at rebutting the inconsistencies probed during cross-examination, but served only to show that most of Ouaffai's testimony on direct examination was consistent with his earlier statements. It thus was error to admit them. See FED. R. EVID. 402.

Thus, the Court found that Rule 401 permits relevant rehabilitation but that some statements were not relevant to rebut inconsistencies. It held that the error in admitting the irrelevant statements was harmless.

First Circuit

United States v. Simonelli, 237 F.3d 19, 27 (1st Cir. 2001). The Court notes that "the line between substantive use of prior statements and their use to buttress credibility on rehabilitation is one which lawyers and judges draw but which may well be meaningless to jurors." The Court joined "the majority view" that "where prior consistent statements are not offered for their truth but for the limited purpose of rehabilitation, Rule 801(d)(1)(B) and its concomitant restrictions do not apply. When the prior statements are offered for credibility, the question is not governed by Rule 801." The Court held that prior grand jury statements of the witness were properly admitted in part for completeness and to explain inconsistencies. However, much of the grand jury testimony was erroneously admitted, because it was "not really for rehabilitation." Rather, the government "was just presenting again the testimony it presented on direct, this time through the testimony about statements to the grand jury."

However, the court found the improperly admitted consistent statements were harmless error: "The evidence was cumulative and the line between what was useful for completeness and what went beyond is a judgment call. At most the evidence was an extra helpiing of what the jury had heard before."

Second Circuit

United States v. Pierre, 781 F.2d 329, 333 (2d Cir. 1986): Prior consistent statements were properly admitted to explain an apparent inconsistency. As rehabilitation evidence, it did not have to meet the requirements of Rule 801(d)(1)(B).

Third Circuit

United States v. Casoni, 950 F.2d 893, 905-6 (3d Cir. 1991): The court holds that where prior consistent statements are not offered for their truth but for the limited purpose of rehabilitation, Rule 801(d)(1)(B) does not apply.

Fourth Circuit

United States v. Mohr, 318 F.3d 613, 626 (4th Cir. 2003): A government witness was cross-examined extensively about a written statement he had made. On redirect he was permitted to read portions of the written statement that were consistent with his in-court testimony. The defendant argued that Rule 801(d)(1)(B) was violated because the written statement was prepared after the witness had a motive to lie. But the Court noted:

> The flaw in this argument is, as we explained in *United States v. Ellis,* 121 F.3d 908 (4th Cir. 1997), that Rule 801(d)(1)(B) is not "the only possible avenue for admitting" prior consistent statements.

In this case, the prior consistent statements were found properly admitted under the doctrine of completeness. Defense counsel used only a portion of the statement for cross-examination, and thereby created a misleading impression that justified rebuttal with consistent parts of the statement.

Sixth Circuit

United States v. Denton, 246 F.3d 784 (6th Cir. 2001): Consistent statements were offered to rebut the contention that certain prior statements of the witness were inconsistent with her in-court testimony. Because the consistent statements were offered to rehabilitate the witness and not for their truth, there was no need to comply with the requirements of Rule 801(d)(1)(B).

Seventh Circuit

United States v. Harris, 761 F.2d 394 (7th Cir. 1985): The court holds that the requirements of Rule 801(d)(1)(B) "need not be met to admit into evidence prior consistent statements which are offered solely to rehabilitate a witness rather than as evidence of the matters asserted in those statements."

Eighth Circuit

United States v. Bowman, 798 F.2d 333 (8th Cir. 1986): The Court found that it was error to admit consistent statements of a cooperating witness under Rule 801(d)(1)(B), because they were made during plea bargaining and thus after a motive to falsify arose. However, the consistent statements were in the end properly admitted, albeit for the wrong reasons, because "the statements were admissible for the purpose of rehabilitating the witness, even if not admissible for the truth of the matters asserted in those statements."

Ninth Circuit

Unlike the other circuits, the Ninth Circuit holds that a prior consistent statement must be admissible under Rule 801(d)(1)(B) (and its premotive requirement) or not at all. Thus, in *United States v. Beltran,* 165 F.3d 1266 (9th Cir. 1999), the court held that it was error to instruct the jury that a prior consistent statement may be used solely for credibility. Judge Kozinski, concurring, noted that such an instruction is essentially worthless:

> The court here instructed the jurors to use the boy's prior consistent statements solely to evaluate his credibility. However, if they concluded the boy was telling the truth at trial, they also must have concluded that the substance of his statements - that Beltran gave him the heroin - was true as well. The credibility/substance distinction is illusory in this context.

In *United States v. Miller,* 874 F.2d 1255, 1272-73 (9th Cir.1989), the Court held specifically that a prior consistent statement must be admissible under the requirements of Rule 801(d)(1)(B) or not at all. The Court reasoned as follows:

> Svetlana testified that she and Miller attempted to penetrate the KGB on behalf of the FBI. After the government had used the sidebar to impeach Svetlana's testimony that Miller had never shown nor given her a classified document, Miller sought to introduce seven prior statements of Svetlana to rehabilitate her.
>
> Federal Rule of Evidence 801(d)(1)(B) provides that prior statements are admissible if they are (1) consistent with a witness' trial testimony and (2) offered to rebut a charge of recent fabrication or improper influence or motive. In this circuit, rehabilitative prior statements are admissible as substantive evidence under Rule 801(d)(1)(B) only if they were made before the witness had a motive to fabricate. *Breneman*, 799 F.2d at 473; *United States v. Rohrer*, 708 F.2d 429, 433 & n. 4 (9th Cir. 1983); *United States v. Rodriguez*, 452 F.2d 1146, 1148 (9th Cir. 1972). The district court refused to admit Svetlana's prior statements because they were all made after her arrest, a time when she clearly had a motive to fabricate. Miller argues that this decision was incorrect because, even if the statements were inadmissible as *substantive* evidence under Rule 801(d)(1)(B), they should have been admitted for the limited purpose of rehabilitating the witness' impeached credibility. When

introduced for that limited purpose, argues Miller, the statements are not hearsay because they are not being offered for the truth of the matter asserted. The government responds by arguing that the requirement of no motive to fabricate applies regardless of whether the statements are being introduced only for a limited purpose.

We begin by noting that at least two circuits have indeed held that the requirement that there be no motive to fabricate does not apply when the prior consistent statement has been offered solely for rehabilitation and not as substantive evidence. *See United States v. Brennan*, 798 F.2d 581, 587-88 (2d Cir. 1986); *United States v. Harris*, 761 F.2d 394, 398-400 (7th Cir. 1985). In order to decide whether we will follow this rule, we must first examine both the purpose of the requirement that there be no motive to fabricate and the nature of the requirement.

* * *

We reject the distinction drawn in both *Harris* and *Brennan*. We do so for two reasons. First, since the requirement of no prior motive to fabricate is rooted in Rules 402 and 403, and not in the terms of Rule 801(d)(1)(B), there is no basis for limiting the requirement to cases involving prior statements under Rule 801(d)(1)(B). Indeed, we fail to see how a statement that has no probative value in rebutting a charge of "recent fabrication or improper influence or motive," *see* Fed.R.Evid. 801(d)(1)(B), could possibly have probative value for the assertedly more "limited" purpose of rehabilitating a witness. If "repetition does not imply veracity," *see Harris*, 761 F.2d at 399, then proof of repetition cannot rehabilitate.

Second, the distinction drawn by *Harris* and *Brennan* is inconsistent with the legislative history of Rule 801(d)(1)(B). Prior to the adoption of Rule 801(d)(1)(B), prior consistent statements were traditionally only admissible for the limited purpose of rebutting a charge of recent fabrication or improper influence or motive. *See* Fed.R.Evid. 801(d)(1)(B) advisory committee's notes. The Rule goes one step further than the common law and admits all such statements as substantive evidence. The Rule thus does not change the type of statements that may be admitted; its only effect is to admit these statements as *substantive* evidence rather than solely for the purpose of rehabilitation. Accordingly, it no longer makes sense to speak of a prior consistent statement as being offered solely for the more limited purpose of rehabilitating a witness; any such statement is admissible as *substantive* evidence under Rule 801(d)(1)(B). In short, a prior consistent statement offered for rehabilitation is either admissible under Rule 801(d)(1)(B) or it is not admissible at all. The distinction drawn by *Brennan* and *Harris* is therefore untenable.

* * *

The Court in *Miller* seems to reject the proposition that a prior consistent statement could be used to rehabilitate credibility for purposes other than rebutting a charge of bad motive or recent fabrication. But a simple hypothetical can show that the court's position in *Miller* is too limited. Assume a witness who testifies that he saw the defendant murder the victim in a drive-by, gang-related shooting. On cross-examination, he is impeached with a prior inconsistent statement, i.e., that

when interviewed by the police shortly after the murder, he told the police that he saw nothing. On redirect, he explains that when he was approached by the police, he was afraid to get involved due to the nature of the crime. But when he talked it over with his wife later that week, he decided that he would "do the right thing" and testify against the defendant. The conversation between the witness and his wife involves a prior consistent statement. It is not offered to rebut a charge of recent fabrication or bad motive because the witness is not being so charged. Rather, it is being offered to explain an inconsistency–a purpose apparently not covered by Rule 801(d)(1)(B). Thus, the Court in *Miller* appears wrong in its premise, i.e., that prior consistent statements are only probative to rehabilitate a witness when they address a charge of recent fabrication or improper motive.

But the Court in *Miller* confusingly softened its disagreement with the majority view by taking an expansive view of the term "recent fabrication". The court elaborated as follows:

> This does not imply that we disagree with the result in either *Brennan* or *Harris*. Although we do not believe that prior consistent statements may be admitted for rehabilitation apart from Rule 801(d)(1)(B), we do not agree with the very strict manner in which those cases apply the requirement of no motive to fabricate. Indeed, the *Harris* and *Brennan* courts seem to have created an end run around Rule 801(d)(1)(B) in order to blunt the apparent harshness of the requirement. For example, in *Brennan*, the Second Circuit first concluded that the prior consistent statements made by a government witness (Mr. Bruno) before a grand jury were inadmissible under Rule 801(d)(1)(B) because Mr. Bruno's fear of prosecution gave him a reason to fabricate. The court then went on to conclude, however, that the statements were admissible for the limited purpose of rehabilitation. Bruno had been impeached with other statements he made during his grand jury testimony, and the court therefore concluded that the consistent statements were admissible because they helped to "amplif[y] and clarif[y]" the alleged inconsistent statements, and because they helped to "cast doubt . . . on whether the impeaching statement[s] [were] really inconsistent with the trial testimony." 798 F.2d at 589. *See also Harris*, 761 F.2d at 400 (despite presence of motive to fabricate, which barred admission under Rule 801(d)(1)(B), government was permitted to rehabilitate witness with consistent statements made during same interview as allegedly inconsistent ones; statements were relevant to "whether the impeaching statements really were inconsistent within the context of the interview"); *United States v. Pierre*, 781 F.2d 329, 333 (2d Cir. 1986) (Prior consistent statement that is inadmissible as substantive evidence under Rule 801(d)(1)(B) is admissible for limited purpose of rehabilitation where it "tends to cast doubt on whether the prior inconsistent statement was made or on whether the impeaching statement is really inconsistent with the trial testimony" or where it "will amplify or clarify the allegedly inconsistent statement.").

> We believe that these cases interpret the requirement of no motive to fabricate too strictly. The requirement should not be applied as a rigid *per se* rule barring all such prior consistent statements under Rule 801(d)(1)(B), without regard to other surrounding circumstances that may give them significant probative value. Indeed, our conclusion that

> the requirement emerges from the relevancy concerns of Rules 402 and 403 implies that trial judges should consider motivation to fabricate as simply one of several factors to be considered in determining relevancy-albeit a very crucial factor. Thus, the trial judge must evaluate whether, in light of the potentially powerful motive to fabricate, the prior consistent statement has significant "probative force bearing on credibility apart from mere repetition." *Pierre*, 781 F.2d at 333. This determination rests in the trial judge's sound discretion.

The meaning of the above passage is unclear. It could mean that the Ninth Circuit will admit as substantive evidence all of the consistent statements that other courts find admissible for rehabilitation only. In other words, statements that rebut a charge of inconsistency (as opposed to a motive to fabricate) are admissible *as substantive evidence* because of the court's expansive construction of the term "motive to fabricate." This construction is indicated by the court's statement that the prior consistent statements were not admissible *under Rule 801(d)(1)(A)* because "Svetlana's prior statements in no way help to explain or amplify the inconsistent statement with which she was impeached."

The difference, then, between the Ninth Circuit's view and the majority view appears to be that the statements admissible only for rehabilitation under the majority view appear to be admissible *for their substantive effect* under Ninth Circuit precedent. This is because of the Ninth Circuit's unjustifiably broad construction of the term "recent fabrication or improper influence or motive." The Ninth Circuit appears to construe this language to mean, "whenever the consistent statement is relevant to rehabilitate the witness."

In subsequent cases, the Ninth Circuit has appeared to backtrack from its statement in *Miller* that a prior consistent statement must be admissible under Rule 801(d)(1)(B) or not at all. See *United States v. Collicott,* 92 F.2d 973 (9th Cir. 1996) (noting that prior consistent statements can be admissible outside of Rule 801(d)(1)(A) if the adversary "opens the door" and the consistent statements are necessary to place the adversary's impeachment in proper context).

Tenth Circuit

No cases found.

Eleventh Circuit

United States v. Paradies, 98 F.3d 1266 (1th Cir. 1996) (consistent statement not admissible under Rule 801(d)(1)(B) because it was made after the witness's motive to falsify arose; however

it was admissible for rehabilitation purposes).

Conclusion on the Case Law

Whether there is a "conflict" in the case law construction of Rule 801(d)(1)(B) depends on what the Ninth Circuit is really saying when it says that "a prior consistent statement is admissible under Rule 801(d)(1)(B) or not at all." This broad statement must be tempered by the Ninth Circuit's broad construction of the Rule to permit admission of consistent statements under a type of totality of circumstances approach that appears to boil down to whether the statement is probative to rehabilitate the witness–which is the same analysis that other courts use to admit statements that they say are *not* covered by Rule 801(d)(1)(B).

This difference in analysis may not create a difference in result–prior consistent statements that are relevant to rebut impeachment other than for bad motive or recent fabrication apparently will be heard by the factfinder regardless of the circuit. But if the Ninth Circuit means what it implies in *Miller*, there will be a difference in procedure: courts in the Ninth Circuit should not give a limiting instruction that the prior consistent statement offered to explain an inconsistency or lack of memory is only admissible for credibility purposes. Courts in all of the other circuits with case law on the subject would give such an instruction.

What is more important than a conflict in procedure and analysis among the circuits, however, is the problematic distinction between use of a prior consistent statement for rehabilitation purposes rather than for its truth. This evanescent distinction is, as Judge Bullock points out, one that jurors are quite unlikely to appreciate. So the real question for the Committee is whether the costs of an amendment are justified by the benefits of eliminating this distinction as applied to prior consistent statements. In the process, an amendment would also solve the analytical confusion or conflict in the courts about the scope of Rule 801(d)(1)(B) and the process for using such statements for rehabilitation outside the text of the Rule.

IV. State Law Variations

Hawaii

Hawaii Rule 802.1 provides that consistent statements of testifying witnesses are admissible if offered in compliance with Hawaii Evidence Rule 613(c). Rule 613(c) attempts to set forth all of the situations in which a prior consistent statement is probative to rehabilitate the witness's credibility. So Rule 802.1 basically means that if a prior consistent statement is admissible for rehabilitation under the Rules, it is also admissible for its truth.

Hawaii Rule 613(c) provides as follows:

Rule 613. Prior Statements of Witnesses

* * *

(c) Prior Consistent Statement of Witness. Evidence of a statement previously made by a witness that is consistent with the witness' testimony at the trial is admissible to support the witness' credibility only if it is offered after:

(1) Evidence of the witness' prior inconsistent statement has been admitted for the purpose of attacking the witness' credibility, and the consistent statement was made before the inconsistent statement; or

(2) An express or implied charge has been made that the witness' testimony at the trial is recently fabricated or is influenced by bias or other improper motive, and the consistent statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen; or

(3) The witness' credibility has been attacked at the trial by imputation or inaccurate memory, and the consistent statement was made when the event was recent and the witness' memory fresh.

Comment on Hawaii provisions:

The Hawaii drafters were trying to be helpful by placing prior consistent statements in two separate rules–one dealing with impeachment and one dealing with hearsay. A lawyer looking to determine whether prior consistent statements are admissible for rehabilitation would probably look first in Article Six, not in Article Eight. (Under the Federal Rules, there is no specific Rule covering prior consistent statements offered for rehabilitation. Admissibility is therefore governed by Rule 403).

The problem with the Hawaii structure is that it is difficult to define with specificity just

when a prior consistent statement is probative to rehabilitate a witness. Hawaii Rule 613(c) is underinclusive in at least two respects. First, it does not cover situations in which a witness is impeached with a portion of a prior statement, and introduction of a consistent part of the statement is necessary to correct a misleading attack–what some courts refer to as the completeness principle and other courts refer to as "opening the door." Second, it requires that prior consistent statements offered in response to a prior inconsistent statement must have been made *before* the statement offered for impeachment. But it is clear that a consistent statement can explain away an apparent inconsistency even if it was made *after* the inconsistent statement. An example was given earlier in this memo of the witness who initially disclaims knowledge of a gang-related shooting due to fear, then changes his mind when he talks to his wife about it. Such a consistent statement would not be admissible under Hawaii Rule 613(b) (and therefore not admissible for its truth under Rule 802.1)–but it would be probative to rehabilitate the witness under Rule 403.

The bottom line is that it may make sense to provide a hearsay exception contiguous with rehabilitation (as Hawaii does), but it is problematic to try to define all of the ways in which a prior consistent statement may be admissible to rehabilitate a witness. It is arguably better to leave the question of admissibility for rehabilitation to the discretion of trial judges under Rule 403.

If the Committee decides, however, that the Hawaii structure is a useful one, then an amendment can be prepared accordingly–including a new subdivision (c) to Federal Rule 613.

Indiana

Indiana Rule 801(d)(1)(B) specifically provides that prior consistent statements are not admissible unless offered in response to a charge of recent fabrication or bad motive *"and made before the motive to fabricate arose"*;

Note: Montana, Oklahoma and South Carolina have substantively identical provisions.

Comment on Indiana Provision

Indiana codifies the pre-motive requirement found by the Court in *Tome.* While this is a useful addition, it seems quite unnecessary to add such a provision at the Federal level. *Tome* imposed the pre-motive requirement for all prior consistent statements offered under Rule 801(d)(1)(B), and none of the lower courts are in dispute about this point. Adding the Indiana provision to the Federal Rule would do nothing to solve the question of whether there should be a difference between statements offered under Rule 801(d)(1)(B) and those offered "solely for rehabilitation."

Minnesota

Minnesota Rule of Evidence 801(d)(1)(B) explicitly equates substantive use of prior consistent statements with their admissibility for rehabilitation, as advocated by Judge Bullock. Rule 801(d)(1)(B) provides that a statement is not hearsay if it is

> "consistent with the declarant's testimony and helpful to the trier of fact in evaluating the declarant's credibility as a witness;"

Comment on Minnesota Provision

The Minnesota rule abolishes the problematic distinction between substantive and rehabilitation evidence as applied to prior consistent statements. Minnesota trial judges do not have to give an instruction that is all but impossible to follow. One possible problem, however, is that the rule provides for substantive admissibility whenever the testimony is "helpful" in evaluating the declarant's credibility. Presumably the term "helpful" means "relevant"– and if that is so, the term "relevant" would be preferred for consistency. But the more important problem is that a prior consistent statement should not be admissible automatically to rehabilitate the credibility of a witness whenever it passes the minimal threshold of relevance under Rule 401. There will be occasions, though presumably rare, in which the probative value of a consistent statement for evaluating credibility will be substantially outweighed by the risk of prejudice or confusion. Thus, prior consistent statements should be subject to the same Rule 403 balancing test as is all other evidence offered for purposes of credibility. In sum, if the Committee wishes to follow the Minnesota approach of equating rehabilitation with substantive admissibility, it should do so by incorporating Rule 403 rather than a simple relevance standard.

Pennsylvania

In Pennsylvania, prior consistent statements are admissible *only* for rehabilitation purposes. See Pa. R. Evid. 613. Pennsylvania Rule 613 provides that prior consistent statements are admissible to rehabilitate the witness if they are offered

> (1) to rebut a charge of fabrication, bias, improper influence or motive, or faulty memory and the statement was made before that which has been charged existed or arose; or (2) having made a prior inconsistent statement, which the witness has denied or explained, and the consistent statement supports the witness' denial or explanation.

Comment on Pennsylvania Provision

The Pennsylvania provision solves the tension under the Federal Rules that arises because some prior consistent statements are admissible for their truth while others are admissible only for rehabilitation. But it does so by rejecting Federal Rule 801(d)(1)(B) entirely. And it requires a confusing limiting instruction to be given every time a prior consistent statement is admitted. This Committee would follow the Pennsylvania "solution" only if it desired to return to the common-law notion that prior consistent statements should never be admissible for their truth.

V. Advantages and Disadvantages of an Amendment to Rule 801(d)(1)(B)

A. Advantages

An amendment that would equate substantive admissibility with admissibility for rehabilitation would simplify the law and the practice with respect to prior consistent statements. It would end the difficulty of instructing the jury that a statement replicating the witness's testimony is not to be used as proof of the fact stated but only for purposes of assessing the witness's credibility. In reality, as Judge Kozinski observes, those two concepts cannot be separated when it comes to prior consistent statements. The jury must believe the prior statement to be true in order for it to be relevant to credibility.

Moreover, an amendment will eliminate a distinction that has no practical effect outside the jury box. At least with prior inconsistent statements, the distinction between substantive admissibility and use for impeachment has some practical effect. If a statement can be used only for credibility, it cannot be considered by the court in ruling on a motion for directed verdict or judgment n.o.v. . So if, for example, a prior inconsistent statement is admissible "for its truth" rather than solely for credibility, that can have a critical impact in close cases. There is no similar effect with prior consistent statements, because they by definition duplicate the substantive evidence that was already presented by the witness on the stand.

Finally, an amendment will rectify the analytical confusion at least within the Ninth Circuit as to whether prior consistent statements are admissible for rehabilitation other than under Rule 801(d)(1)(B). And it will eliminate an apparent conflict in practice between the Ninth and the other Circuits, concerning whether statements offered to explain an inconsistency or for completeness are admissible as substantive evidence.

It should be noted that Judge Bullock's suggested amendment does not mean that more prior consistent statements will be admitted than previously. It does not mean that witnesses would be able to carry all of their prior consistent statements into court and parade them before the factfinder. Rather, the amendment simply eliminates the distinction between substantive and rehabilitation use for consistent statement that are admissible under existing law.

B. Disadvantages

The disadvantages of an amendment of Rule 801(d)(1)(B) are mostly the same as are presented with any amendment–upsetting expectations and existing case law and creating traps for unwary lawyers who do not keep up with changes in the Federal Rules. But it could be argued that

there is an additional disadvantage in the amendment of Rule 801(d)(1)(B) in particular. An amendment would change a Rule that was construed by the Supreme Court relatively recently. It would change the apparent distinction between substantive admissibility and rehabilitation that the Court in *Tome* found in the Rule. And it would clearly change the specific ruling in *Tome*, because a pre-motive limitation would not apply to all statements admissible under an amended Rule 801(d)(1)(B).

An amendment to the language of Rule 801(d)(1)(B) could not be considered as *overruling Tome*, however. The *Tome* Court construed the language that it had before it. An amendment would not reject the construction of that language, but rather would substitute more expansive language that would eliminate the distinction between evidence admissible for substantive purposes and evidence admissible only for rehabilitation. The Court in *Tome* recognized that Congress could have enacted a more expansive Rule 801(d)(1)(B) to cover all prior consistent statements probative of rehabilitation–but the Court simply held that Congress did not do so. *See Tome,* 513 U.S. at 159.

On the other hand, the amendment would indeed expand the hearsay exception, and it could be argued that the majority in *Tome* was concerned about the expansive use of prior consistent statements as an exception to the hearsay rule. The majority at one point in the opinion addressed the government's arguments with the following concern:

> The case before us illustrates some of the important considerations supporting the Rule as we interpret it, especially in criminal cases. If the Rule were to permit the introduction of prior statements as substantive evidence to rebut every implicit charge that a witness' in-court testimony results from recent fabrication or improper influence or motive, the whole emphasis of the trial could shift to the out-of-court statements, not the in-court ones. The present case illustrates the point. In response to a rather weak charge that A.T.'s testimony was a fabrication created so the child could remain with her mother, the Government was permitted to present a parade of sympathetic and credible witnesses who did no more than recount A.T.'s detailed out-of-court statements to them. Although those statements might have been probative on the question whether the alleged conduct had occurred, they shed but minimal light on whether A.T. had the charged motive to fabricate. At closing argument before the jury, the Government placed great reliance on the prior statements for substantive purposes but did not once seek to use them to rebut the impact of the alleged motive.

513 U.S. at 165.

It is for the Committee to determine whether, in light of all of the above, the advantages outweigh the costs of an amendment to Rule 801(d)(1)(B). It should be noted, however, that the concerns expressed by the Court in *Tome* could be addressed by a court under Rule 403. See the draft Committee Note to the proposed amendment.

VI. Draft of Proposed Amendment To Evidence Rule 801(d)(1)(B)

What follows is a model draft of an amendment to Rule 801(d)(1)(B) that would provide for substantive admissibility of a prior consistent statement whenever the statement would be admissible to rehabilitate a witness. Because rehabilitation is governed by Rule 403, that standard is included explicitly in the text of the amendment.

Rule 801. Definitions

The following definitions apply under this article:

* * *

(d) *Statements ~~which~~ that are not hearsay.* — A statement is not hearsay if —

(1) Prior statement by witness. — The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is ~~offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive~~ admissible, subject to Rule 403, to rehabilitate the declarant's credibility as a witness, or (C) one of identification of a person made after perceiving the person; or

(2) Admission by party-opponent. — The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and

in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

Draft of Proposed Committee Note for Amendment to Rule 801(d)(1)(B)

Rule 801(d)(1)(B), as originally adopted, provided for substantive use of certain prior consistent statements of a witness subject to cross-examination. As the Advisory Committee noted, "[t]he prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally."

Though the original Rule 801(d)(1)(B) provided for substantive use of certain prior consistent statements, the scope of that Rule was limited. The Rule covered only those consistent statements that were offered to rebut charges of recent fabrication or improper motive or influence. The Rule did not provide for admissibility of, for example, consistent statements that are probative to explain what otherwise appears to be an inconsistency in the witness's testimony. Nor did it include consistent statements that would be probative to rebut a charge of bad memory. Thus, the Rule left many prior consistent statements potentially admissible for the limited purpose of rehabilitating a witness's credibility, but not admissible for their truth. See, e.g., *Tome v. United States,* 513 U.S. 150, 158-9 (1995) (noting that prior consistent statements that are probative to rebut a charge of bad memory might be admissible to rehabilitate the witness, but not for their truth). The original Rule also led to some conflict in the cases; some courts distinguished between substantive and rehabilitative use for prior consistent statements, while others held that prior consistent statements must be admissible under Rule 801(d)(1)(B) or not at all. *Compare United States v. Brennan,* 798 F.2d 581, 587-88 (2d Cir. 1986) (prior consistent statement was not admissible to rebut a charge of improper motive, but it was admissible to clarify what appeared to be an inconsistency: "prior consistent statements may be admissible for rehabilitation even if not admissible under Rule 801(d)(1)(B)"), *with United States v. Miller,* 874 F.2d 1255, 1273 (9th Cir. 1989) ("a prior consistent statement offered for rehabilitation is admissible under Rule 801(d)(1)(B)

or it is not admissible at all.").

The amendment provides that prior consistent statements are exempt from the hearsay rule whenever they are admissible under Rule 403 to rehabilitate the witness. *Compare* Minn.R.Evid. 801(d)(1)(B) (providing that a consistent statement is exempt from the hearsay rule when "helpful to the trier of fact in evaluating the declarant's credibility as a witness"). It extends the argument made in the original Advisory Committee Note to its logical conclusion. As commentators have stated, "[d]istinctions between the substantive and nonsubstantive use of prior consistent statements are normally distinctions without practical meaning," because "[j]uries have a very difficult time understanding an instruction about the difference between substantive and nonsubstantive use." Hon. Frank W. Bullock, Jr. and Steven Gardner, *Prior Consistent Statements and the Premotive Rule*, 24 Fla.St. L.Rev. 509, 540 (1997). *See also United States v. Simonelli,* 237 F.3d 19, 27 (1st Cir. 2001) ("the line between substantive use of prior statements and their use to buttress credibility on rehabilitation is one which lawyers and judges draw but which may well be meaningless to jurors").

Prior consistent statements were not admissible under the original Rule 801(d)(1)(B) when they were made after the declarant's alleged motive to falsify arose. *Tome v. United States,* 513 U.S. 150 (1995). The Court in *Tome,* in finding a "premotive" requirement in the original Rule, relied heavily on the language of that Rule and on the fact that it appeared to track the common law, which had similarly imposed a premotive requirement. The amendment changes the focus of the Rule by equating rehabilitative and substantive use, and as such it rejects any rigid adherence to a premotive requirement. This is not to say, however, that a prior consistent statement offered to rebut a charge of improper motive is always admissible regardless of when it is made. The fact remains that a consistent statement postdating the witness's motive to falsify is rarely rehabilitative of the witness's credibility, because it is usually made under the same cloud of improper motive as the witness's testimony. *See Tome, supra,* 513 U.S. at 158 (distinguishing between the probative force of statements made before and after the witness's motive to falsify arose). Moreover, under Rule 403, the trial judge has the discretion to exclude prior consistent statements when their rehabilitative value is substantially outweighed by the risk that the jury will use the statements improperly. For example, where the charge of improper motive or influence is weak, a trial judge might well exclude a prior consistent statement, lest "the whole emphasis of the trial * * * shift to the out-of-court statements, not the in-court ones." *Tome, supra,* 513 U.S. at 163.

Florida State University Law Review

Spring, 1997

*509 PRIOR CONSISTENT STATEMENTS AND THE PREMOTIVE RULE

Frank W. Bullock, Jr. [FNa1]

Steven Gardner [FNaa1]

I. INTRODUCTION 509

II. THE COMMON LAW AND PRIOR CONSISTENT STATEMENTS 511

A. Development of the Common-Law Rule 511

B. Circumstances Required for the Admission of Prior Consistent Statements Under the Common-Law Rule 514

1. Charge or Attack 514

2. Other Types of Impeachment 517

III. THE FEDERAL RULES OF EVIDENCE AND PRIOR CONSISTENT STATEMENTS 520

A. Prior Consistent Statements and Rule 801(d)(1)(B) of the Federal Rules of Evidence 520

B. The Premotive Rule Under the Federal Rules of Evidence 522

IV. THE TOME DECISION 527

A. The Majority Opinion 528

B. The Dissenting Opinion 531

V. OBSERVATIONS REGARDING RULE 801(D)(1)(B) AND THE CURRENT PREMOTIVE RULE 534

A. The Pitfalls of the Per Se Approach 534

B. Admissibility of Prior Consistent Statements Outside of Rule 801(d)(1)(B) 539

VI. CONCLUSION 542

I. INTRODUCTION

The admissibility of prior consistent statements has long been a difficult and contentious issue. [FN1] The issue impacts a wide variety of significant cases, including sex-abuse cases, [FN2] criminal drug cases, [FN3] civil rights cases, [FN4] and many other actions, both criminal and civil.

Several factors contribute to the difficulty of determining when a prior consistent statement should be admitted. Included among ***510** them is a tension between the theoretical analysis of the issue and the recognition that such an approach sometimes does not comport with the practicalities of a jury trial. This tension, combined with the desire for "bright-line" rules, resulted in the development of common-law evidence rules that sometimes needlessly prohibited the admission of evidence that would assist the jury in its deliberations.

The Federal Rules of Evidence, enacted in 1975, [FN5] sought to bring stability and provide guidance to evidence law in the federal courts. Rule 801(d)(1)(B) of the Federal Rules of Evidence exempts from the definition of hearsay certain prior statements made by a testifying witness who is subject to cross-examination concerning the statement. [FN6] Thus, prior consistent statements within Rule 801(d)(1)(B)'s scope are admissible as substantive evidence to show the truth of the matter asserted. The prior statement of a witness is exempted from the definition of hearsay if the statement is "consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." [FN7] Unfortunately, Rule 801(d)(1)(B) has given rise to much confusion regarding several issues.

In Tome v. United States, [FN8] the United States Supreme Court addressed one of the principal points of confusion associated with Rule 801(d)(1)(B): whether prior consistent statements made by the declarant after the alleged fabrication or improper influence or motive arose are admissible under Rule 801(d)(1)(B). The vast majority of courts addressing this question under the common law held such statements inadmissible. These courts reasoned that such statements were of no value because they could be the product of the

same improper influence charged at trial. [FN9] In a 5-4 decision, the Supreme Court reasoned that Rule 801(d)(1)(B) codified the common-law rule and held that a declarant's prior consistent statement may be admitted into evidence under Rule 801(d)(1)(B) only if the statement was made before the alleged fabrication or improper influence or motive arose. [FN10] In other words, the Court held that premotive, but not postmotive, prior consistent statements are admissible under Rule 801(d)(1)(B). [FN11] This time-line admissibility rule is known as the premotive rule.

***511** Some commentators have criticized the Tome Court's analysis and conclusion. [FN12] These commentators address the Court's holding that the Federal Rules of Evidence codified the common-law premotive rule. None of these commentators, however, addressed the vital issue: the premotive rule itself.

This Article examines the admissibility of prior consistent statements, concentrating on the premotive rule. **The Article concludes that the per se, time-line premotive rule codified in Rule 801(d)(1)(B) is overly restrictive in some instances.** The rule can hamper the jury's fact-finding mission by placing an often crucial factual determination where it does not belong--in the hands of the trial judge. Although a per se premotive rule compels the correct result in the vast majority of situations, it does not sufficiently take into account the ebb and flow of an individual's motives and emotions, the infinite array of factual situations in which the issue might arise, or the strength of the jury's ability to weigh evidence. A more flexible approach, one that takes account of the realities of a jury trial, is needed. This need can be met by amending the Federal Rules of Evidence.

Part II of this Article provides background and an historical discussion of the admissibility of prior consistent statements at common law. Part III examines the admissibility of prior consistent statements under the Federal Rules of Evidence, focusing on the premotive rule. Part IV describes the Tome case, including a discussion of the Supreme Court's majority and dissenting opinions. **Part V suggests that Rule 801(d)(1)(B) should be amended, and sets forth some issues that the amendment should address.**

II. THE COMMON LAW AND PRIOR CONSISTENT STATEMENTS

A. Development of the Common-Law Rule

Through the early 1700s, courts admitted witnesses' prior consistent statements as substantive evidence without limitation. [FN13] These courts reasoned that such statements effectively corroborated witnesses' in-court testimony. [FN14]

***512** Around 1675, common-law courts began to question the admissibility of hearsay. [FN15] However, common-law rules prohibiting the admission of hearsay were not prevalent until the mid-1700s. [FN16]

The hearsay rule's development impacted the admissibility of prior consistent statements. In the early 1700s, litigants began making hearsay objections to the admission of prior consistent statements. [FN17] In response, some courts began prohibiting the admission of prior consistent statements for their truth and content. [FN18] These courts, however, continued to allow the admission of such statements during direct testimony for independent, corroborative, nonsubstantive use, even though the witness had not yet been impeached. [FN19] Eighteenth-century evidence commentator Sir Geoffrey Gilbert explained the prevailing thought on the matter: although "hearsay evidence may not be allowed as direct evidence, ... it may be in corroboration of a witness's testimony to show that he affirmed the same thing before on other occasions, and that the witness is still consistent with himself." [FN20]

In the early 1800s, litigants began objecting to prior consistent statements on additional, other-than-hearsay grounds, including relevancy. [FN21] These objections brought about the common-law rule that a witness's testimony could not be bolstered until the witness's credibility was attacked. [FN22] Courts recognized that bolstering evidence offered before impeachment provided no value. [FN23] Courts thus reasoned that prior consistent statements offered before impeachment were no more probative than in-court statements and were unnecessarily cumulative. [FN24] Indeed, most courts agreed that "a falsehood may be repeated as often as the truth." [FN25] Based on this analysis, courts held prior consistent statements inadmissible when offered during direct testimony, and admitted such statements only after impeachment [FN26] of the declarant witness's credibility, and then for ***513** only rehabilitative, and not substantive, purposes. [FN27] This became the accepted and **prevailing common-law rule.** [FN28]

Beginning in the mid-1900s, several commentators advocated the alteration of the hearsay rules to allow admission of a witness's prior statements as nonhearsay. Scholars taking such a position included John H. Wigmore, [FN29] Edmund M. Morgan, [FN30] Charles T. McCormick, [FN31] and Jack B. Weinstein. [FN32]

The Uniform Rules of Evidence, promulgated in 1953, and the Model Code of Evidence, promulgated in 1942, incorporated these scholars' position. [FN33] Rule 63(1) of the Uniform Rules of Evidence provided that prior statements were not hearsay if the declarant was present at the trial and was available for cross-examination. [FN34] The Model Code of Evidence contained the same provision. [FN35] However, this position was not well-received. Only a few jurisdictions adopted the original Uniform Rules of Evidence. [FN36] No jurisdictions adopted ***514** the Model Code of Evidence. [FN37] The common- law rule described earlier remained the accepted rule regarding prior consistent statements.

B. Circumstances Required for the Admission of Prior Consistent Statements

Under the Common-Law Rule

Although the accepted common-law rule continued to govern, courts disagreed on what circumstances must precede the admission of a prior consistent statement. Courts' decisions in this regard generally depended on (1) what the impeachment charged or attacked, (2) the method by which

the impeachment was accomplished, and (3) the purpose for which the prior consistent statement was offered.

1. Charge or Attack

Courts overwhelmingly agreed that prior consistent statements were admissible to rebut impeachment that charged recent fabrication or improper influence or motive. [FN38] Such a charge can be accomplished by several means of impeachment, including opposing counsel's questions and the introduction of prior inconsistent statements.

Moreover, the vast majority of courts followed a time-line admissibility rule for prior consistent statements. Courts held that prior consistent statements made before, but not after, the alleged fabrication or improper influence or motive arose were admissible. [FN39] This time-line rule is known as the premotive rule.

Courts following the premotive rule reasoned that prior consistent statements made before the existence of the alleged motive directly rebut such impeachment by demonstrating that the declarant's in-court statement is consistent with out-of-court statements ***515** made when the declarant is not alleged to have had an improper motive to falsify his or her statement. [FN40] Conversely, these courts noted, prior consistent statements made afterwards could be the result of the same improper influence that generated the in-court statements, and therefore are of little value. [FN41]

In nearly all of these jurisdictions, a prior consistent statement's admissibility was decided in the same manner as other evidentiary questions that require predicate showings for admissibility. The trial judge determined whether a prior consistent statement was premotive or postmotive based on evidence presented to the jury up to the time the statement's admission was sought, evidence presented to the judge out of the jury's presence, or a combination of these two means. The judge's determination of this question would normally dictate the admissibility of the statement. [FN42]

The United States Court of Appeals for the Second Circuit, recognizing the strength and propriety of the jury's fact-finding ability, adopted a different, deferential standard of admissibility. The Second Circuit held that if it is "reasonably possible for the jury to say that the prior consistent statements did in fact antedate the motive disclosed on the cross-examination, the court should not exclude them." [FN43]

A small minority of courts held that prior consistent statements made after the alleged fabrication or improper influence or motive arose also could be admissible. [FN44] These courts reasoned that postmotive prior consistent statements and the circumstances surrounding such statements are relevant to the jury's evaluation of the declarant's motive and testimony. [FN45]

A witness's memory is sometimes attacked as faulty. Such an attack can be accomplished by opposing counsel's questions, prior inconsistent statements, negative evidence, and other impeachment means. [FN46] Several courts held prior consistent statements admissible following an attack on a witness's memory. [FN47] These courts reasoned ***516** that such statements indicate the witness's "true belief" [FN48] or demonstrate the witness's '@curacy of memory." [FN49] Moreover, these courts reasoned that such statements are "necessary to give the jury a complete basis upon which to judge the credibility" of the witness's testimony. [FN50] Given this rationale, many of these courts required that the prior consistent statement be made soon after the event in question. [FN51]

A few courts held prior consistent statements inadmissible in like circumstances. [FN52] These courts did not explicitly set forth their rationale in this regard. It appears, however, that their reasoning was based on a very strict adherence to the general common-law rule prohibiting the use of hearsay. [FN53]

Many courts construed an attack on a witness's memory to be a charge of recent fabrication. Thus, these courts admitted prior consistent statements to rebut such attacks under the well-recognized rule admitting such statements to rebut a charge of recent fabrication. [FN54] These courts took an expansive view of the term "fabricated." Courts recognized "fabricated" to mean "fabricat ion to meet the exigencies of the case." [FN55] However, "fabricated" normally indicates a ***517** conscious and purposeful falsification. [FN56] "Fabricate" is defined as "to make up for the purposes of deception." [FN57]

Although an attack on a witness's memory may include a charge of purposeful deception, such an attack does not always do so. For example, an attack charging inaccurate memory by showing the witness's simple forgetfulness or confusion may be made without charging purposeful deception. Common-law courts, however, often seemed to treat "recent fabrication" as a term of art, including non-purposeful deception within its definition. [FN58]

Other courts, in admitting prior consistent statements to rebut attacks on a witness's memory, recognized some distinction between such attacks and a charge of recent fabrication. These courts reasoned that such attacks created situations that were "sufficiently analogous" to the cases admitting prior consistent statements to rebut a charge of recent fabrication. [FN59]

2. Other Types of Impeachment

Common-law courts largely agreed that impeachment methods that did not charge a recent fabrication or improper influence or motive, or attack the witness's memory, did not open the door to the introduction of prior consistent statements. [FN60] Some methods received near-uniform treatment, while others resulted in disagreement.

Nearly all courts held prior consistent statements inadmissible to rebut impeachment by mere contradiction evidence. [FN61] If mere contradiction justified the admission of prior consistent statements, "then the witness who had repeated his story to the greatest number of people would be the most credible." [FN62]

Most courts, noting that a person of bad moral character could easily repeat a story, held prior consistent statements inadmissible ***518** to rebut impeachment by evidence of the declarant's bad moral character. [FN63] Following the same

general reasoning, nearly all courts held prior consistent statements inadmissible to rebut impeachment by evidence of the declarant's bad reputation for veracity. [FN64]

Courts split as to whether prior consistent statements were admissible following impeachment of the witness by prior inconsistent statements alone. [FN65] A majority of courts held prior consistent statements inadmissible following such impeachment. [FN66] These courts generally reasoned that "since the self-contradiction is conceded, it remains as a damaging fact, and is in no sense explained away by the inconsistent statement." [FN67] A number of courts, however, held that prior consistent statements were admissible following impeachment by prior inconsistent statements alone. [FN68] These courts generally reasoned ***519** that "if a contradictory statement counts against the witness, a consistent one should count for him." [FN69]

Moreover, some courts reasoned that prior consistent statements are admissible following impeachment by a prior inconsistent statement alone if the prior consistent statement is related to an explanation or denial of the alleged prior inconsistent statement. [FN70] In other words, courts held that prior consistent statements could be admitted to help explain that the previously admitted prior inconsistent statement is incorrect or misleading, or to help explain that the prior inconsistent statement was simply never made. [FN71] Appellate courts sometimes answered this difficult question by leaving the decision to the trial judge's sound discretion. [FN72]

This remained the state of the common law regarding prior consistent statements until the enactment of the Federal Rules of Evidence. Both state and federal common-law evidentiary rules were important to federal courts of the time. Before the enactment of the Federal Rules of Evidence, the admission of evidence in federal civil cases was primarily governed by Rule 43(a) of the Federal Rules of Civil Procedure. [FN73] Rule 43(a), enacted in 1938, provided for the admission of evidence in federal court in civil trials if the evidence was admissible under federal statute, federal common law or decisions, or under statutes or rules of the state where the district court sat. [FN74] ***520** Rule 26 of the Federal Rules of Criminal Procedure provided that the admissibility of evidence in federal criminal cases was generally governed by common law. [FN75]

III. THE FEDERAL RULES OF EVIDENCE AND PRIOR CONSISTENT STATEMENTS

A. Prior Consistent Statements and Rule 801(d)(1)(B) of the Federal Rules of Evidence

The Federal Rules of Evidence gave rise to a new era of evidence law. Congress enacted the Federal Rules of Evidence in 1975 "to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." [FN76] Moreover, the Rules sought to reduce inconsistency and arbitrariness in the admission of evidence in federal courts. [FN77]

Although much of the Federal Rules of Evidence is based on the Uniform Rules of Evidence, [FN78] the Federal Rules of Evidence did not incorporate the Uniform Rules of Evidence's position on prior statements as nonhearsay. [FN79] Instead, the Federal Rules of Evidence generally adhered to the prevailing common-law hearsay rules. [FN80]

Federal Rule of Evidence 801(c) defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." [FN81] Hearsay is generally excluded from evidence under Rule 802. [FN82]

Rule 801(d)(1)(B) addresses the admission of prior consistent statements by removing certain prior consistent statements from the definition of hearsay. Rule 801(d)(1)(B) provides:

> A statement is not hearsay if ... [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement,***521** and the statement is ... consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive. [FN83]

The most important aspect in which Rule 801(d)(1)(B) differs from the common-law rule governing the admission of prior consistent statements is that Rule 801(d)(1)(B) allows the admission of statements within its scope for substantive purposes. [FN84] The Advisory Committee noted that this aspect of Rule 801(d)(1)(B) rejects the "bulk of the case law" and is a "judgment ... more of experience than of logic." [FN85]

Many federal circuits hold that prior consistent statements offered for the limited purpose of rehabilitation, and not for substantive use, are not governed by Rule 801(d)(1)(B). [FN86] Evidence commentators agree with this conclusion. [FN87] Courts reason that Rule 801(d)(1)(B) applies only to statements offered for the truth of the matter asserted. [FN88] Because prior consistent statements offered for the limited purpose of rehabilitation are not offered for the truth, these courts reason, Rule 801(d)(1)(B) does not govern their admission. [FN89] Some courts state their belief that the Federal Rules of Evidence did not alter prior common-law rules in this regard. [FN90] In addition, some ***522** courts reason that admission of such statements furthers the principle of completeness promoted by Federal Rule of Evidence 106. [FN91] Essentially, these courts hold that the Federal Rules of Evidence impart to the trial courts great discretion to determine, under the rules of relevancy, the admissibility of prior consistent statements offered for the limited purpose of rehabilitation. [FN92]

Conversely, the Ninth Circuit holds that "a prior consistent statement offered for rehabilitation is either admissible under Rule 801(d)(1)(B) or it is not admissible at all." [FN93] The Ninth Circuit reasoned that prior to the Federal Rules of Evidence, "prior consistent statements were traditionally only admissible for the limited purpose of rebutting a charge of recent fabrication or improper influence or motive." [FN94] Examining the legislative history, the court determined that Rule 801(d)(1)(B)'s "only effect is to admit these statements

as substantive evidence." [FN95] Therefore, the court concluded, "it no longer makes sense to speak of a prior consistent statement as being offered solely for the more limited purpose of rehabilitating a witness." [FN96]

B. The Premotive Rule Under the Federal Rules of Evidence

The plain language of Rule 801(d)(1)(B) makes no express reference to a time-line premotive requirement. Some commentators maintain that the term "recent" embodies the premotive rule [FN97] while ***523** others consider the term "recent" superfluous. [FN98] Moreover, none of the cases examining the premotive rule focus on the term "recent."

The Advisory Committee's note to Rule 801(d)(1)(B) is very short and makes no express reference to a premotive requirement. The note states:

Prior consistent statements traditionally have been admissible to rebut charges of recent fabrication or improper influence or motive but not as substantive evidence. Under the rule they are substantive evidence. The prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally. [FN99]

Fueled in large part by this lack of explicit direction regarding the premotive rule from either Rule 801(d)(1)(B) itself or the Advisory Committee notes, federal circuit courts disagreed on whether Rule 801(d)(1)(B) embodies the premotive rule.

At the time of the Tome decision, the federal circuits were closely split as to this issue. The Second, Third, Fourth, Seventh, and Eighth Circuits held that postmotive prior consistent statements were inadmissible for substantive purposes but were admissible for the limited purpose of rehabilitation. [FN100] In adhering to the time-line ***525** premotive rule and denying the admission of postmotive prior consistent statements for substantive use, these courts reasoned that such statements are not relevant to rebut an allegation of recent fabrication. [FN101] These courts observed that such statements demonstrate only that the declarant said the same thing before trial as the declarant said at trial. [FN102] They noted that the alleged motive to fabricate existed at the time of all of these statements, and that "mere repetition does not imply veracity." [FN103] Some of these courts reasoned that the premotive requirement is not a literal requirement of Rule 801(d)(1)(B), but is a relevancy requirement examined under the relevancy rules. [FN104]

In admitting postmotive prior consistent statements for the limited purpose of rehabilitation, some of these courts reasoned that such statements are not hearsay under Rule 801 because they are not offered for the truth of the matter asserted. [FN105] Some courts noted that Rule 801(d)(1)(B) does not explicitly require the premotive element. [FN106] Courts also observed that such statements may be relevant to the declarant's credibility. [FN107] They explained that the statements may demonstrate the context of the impeachment evidence, and may help the jury weigh the impeachment evidence and thus determine the extent of the declarant's credibility. [FN108] Some of these courts also cite a "doctrine of completeness" promoted by Federal Rule of Evidence 106 in reasoning that the statements are admissible. [FN109]

***526** The Fifth, Sixth, Ninth, Tenth, Eleventh, and District of Columbia Circuits held that postmotive prior consistent statements were admissible for both substantive and rehabilitative purposes. [FN110] These courts recognized that whether a prior consistent statement is premotive or postmotive may affect the statement's materiality. [FN111] These courts, however, rejected a per se, time-line premotive requirement. These courts reasoned that a postmotive prior consistent statement may be relevant in some circumstances. [FN112] Some noted that ***527**Rule 801(d)(1)(B) does not explicitly state a premotive requirement. [FN113] These courts observed that other, nontemporal factors may indicate that a postmotive statement is reliable, and thus should be admissible under the Federal Rules. [FN114] These courts also stated that because the issue is one of relevancy under the Federal Rules, trial courts should have discretion in this matter. [FN115]

Moreover, in United States v. Miller, [FN116] the Ninth Circuit reasoned that the Federal Rules of Evidence make no distinction between substantive and rehabilitative use of prior consistent statements. [FN117] The court stated that "we fail to see how a statement that has no probative value in rebutting a charge of 'recent fabrication or improper influence or motive' could possibly have probative value for the assertedly more 'limited' purpose of rehabilitating a witness." [FN118] The court concluded that a prior consistent statement is "admissible as substantive evidence under Rule 801(d)(1)(B) . . . . or it is not admissible at all." [FN119] The court went on to reject a per se premotive rule. [FN120]

Recognizing the split between the circuits on the admissibility of postmotive prior consistent statements under Rule 801(d)(1)(B), the Supreme Court granted certiorari to address the problem.

IV. The Tome Decision

In Tome v. United States, [FN121] the Supreme Court addressed the question of "whether out-of-court consistent statements made after the alleged fabrication, or after the alleged improper influence or motive arose, are admissible under" Federal Rule of Evidence 801(d)(1)(B). [FN122] In a 5-4 decision, [FN123] the Court explained that such ***528** statements-- postmotive prior consistent statements--are not admissible as substantive evidence under Rule 801(d)(1)(B). [FN124]

A. The Majority Opinion

The pertinent common-law evidentiary rule that prevailed in the United States for over a century before the enactment of the Federal Rules of Evidence was important to the Court's analysis. The majority defined the common-law premotive rule as holding that "a prior consistent statement introduced to rebut a charge of recent fabrication or improper influence or motive was admissible if the statement had been made before the alleged fabrication, influence, or motive came into being, but it was inadmissible if made afterwards." [FN125]

In seeking to determine the effect of the Federal Rules of Evidence on the common-law rule, the Court looked to the language of Rule 801(d)(1)(B). The Court found two aspects of Rule 801(d)(1)(B)'s language especially informing: (1) the language's focus on one kind of impeachment (i.e., rebutting charges of recent fabrication or improper influence or motive), and not on other forms of impeachment; and (2) Rule 801(b)(1)(B)'s use of wording from common-law cases describing the premotive rule. [FN126]

The Court considered it important that the Advisory Committee did not give all prior consistent statements nonhearsay status. [FN127] It emphasized that the Advisory Committee limited the types of prior consistent statements that receive nonhearsay status to those offered to rebut only one form of impeachment: a charge of "recent fabrication or improper influence or motive." [FN128] This limitation, the Court found, "reinforce s the significance of the requirement that the consistent statements must have been made before the alleged influence, or motive to fabricate arose." [FN129]

The Court reasoned that the rebuttal force of premotive prior consistent statements is very strong when introduced to rebut a ***529** charge of recent fabrication or improper influence or motive. [FN130] The Court, however, explained that little rebuttal force is present when any prior consistent statement is introduced to rebut other forms of impeachment, such as character impeachment by misconduct, convictions, or bad reputation. [FN131] Likewise, the Court explained, little rebuttal force is present when postmotive prior consistent statements are introduced to rebut a charge of recent fabrication or improper influence or motive, [FN132] even though such statements may "suggest in some degree that the testimony did not result from some improper influence." [FN133]

The Court further reasoned that if Rule 801(d)(1)(B)'s drafters intended to permit admission of postmotive prior consistent statements--which have low rebuttal force--then there is "no sound reason" for the drafters to have expressly limited the use of prior consistent statements to rebut impeachment only when such statements have very high rebuttal force, [FN134] while prohibiting the use of such statements to rebut other forms of impeachment when such statements have low rebuttal force similar to the low rebuttal force of postmotive prior consistent statements. [FN135] The Court thus found it "clear ... that the drafters of Rule 801(d)(1)(B) were relying upon the common-law temporal requirement." [FN136]

The Court found support for its analysis by observing that Congress easily could have adopted an evidentiary rule that expressly allows admission of postmotive prior consistent statements. [FN137] In the Court's view, its "analysis is strengthened by the observation that the somewhat peculiar language of the Rule bears close similarity to the language used in many of the common-law cases that describe the premotive requirement." [FN138] It reasoned that this similarity supports ***530** the conclusion that Rule 801(d)(1)(B) "was intended to carry over the common-law pre-motive rule." [FN139]

The Court rejected the government's argument that "the common-law premotive rule ... is inconsistent with the Federal Rules' liberal approach to relevancy." [FN140] It noted that because " r elevance is not the sole criterion of admissibility," relevant out-of-court statements may still be inadmissible. [FN141]

The Court also based its reasoning on the negative aspects of not having such a rule. It feared that the premotive rule's absence could shift a trial's emphasis from the in-court statements to the out-of-court statements. [FN142] In addition, the Court stated its belief that the absence of the premotive rule would increase the burden of the trial court, and would provide no guidance to attorneys preparing for trial or to reviewing appellate courts. [FN143]

Four members of the five-justice majority found their analysis "confirmed by an examination of the Advisory Committee Notes to the Federal Rules of Evidence." [FN144] The plurality explained: "Where, as with Rule 801(d)(1)(B), 'Congress did not amend the Advisory Committee's draft in any way, ... the Committee's commentary is particularly relevant in determining the meaning of the document Congress enacted.'" [FN145] The plurality found that the Advisory Committee's notes stated a "purpose to adhere to the common law" except where expressly provided. [FN146] They reasoned that when the Rules departed from the common law, "in general the Committee said so." [FN147] The plurality found no indication from the notes "that Rule 801(d)(1)(B) abandoned the premotive requirement." [FN148] Moreover, the plurality asserted, the Rules demonstrate the Committee's compromise, one that the Committee stated was "more of experience than of logic," [FN149] ***531** "between the views expressed by the 'bulk of the case law ... against allowing prior statements of witnesses to be used generally as substantive evidence' and the views of the majority of 'writers ... who ha d taken the opposite position.'" [FN150]

Based on this analysis, the Court overruled six of the federal circuits [FN151] and held that Rule 801(d)(1)(B) codified the common-law premotive rule. [FN152] Thus, following Tome, postmotive prior consistent statements are not admissible as substantive evidence under Rule 801(d)(1)(B).

B. The Dissenting Opinion

Four justices, in a dissent authored by Justice Breyer, expressed their disagreement with the majority opinion. The majority and dissenting opinions began from the same point--acknowledgment of the traditional common-law rule-- but quickly parted company.

Although the dissent agreed with the majority's statement of the common-law rule, [FN153] the dissent emphasized that the reason for the premotive requirement was that postmotive prior consistent statements had "no relevance to rebut the charge." [FN154] This point of departure served as the basis for the Court's fracture in this case.

The dissent characterized the majority's holding as finding that a hearsay- related rule--Rule 801(d)(1)(B)--codified a common-law relevancy rule, and asserted that Rule 801(d)(1)(B) "has nothing to do with relevance. Rather, that Rule carves out a subset of prior consistent statements that

were formerly admissible only to rehabilitate a witness." [FN155]

The dissent rejected the majority's premise that the Advisory Committee "singled out one category" of rehabilitative prior consistent statements for nonhearsay treatment because of the category's high probative force. [FN156] It pointed out that other categories also have high probative force in certain situations, including prior consistent statements used to rebut a charge of faulty memory. [FN157] The dissent further argued that, doubts regarding the majority's premise aside, ***532** the majority's holding did not follow from such a premise. [FN158] It asserted that hearsay law basically turns on the reliability of the out-of-court statement, and not its probative force. [FN159] It agreed that postmotive statements may weaken probative force, but asserted that the reliability of such statements is not reduced. [FN160] Thus, the dissent concluded that "from a hearsay perspective, the timing of a prior consistent statement is basically beside the point." [FN161]

The dissent also rejected the majority's "no sound reason" analysis. [FN162] The dissent noted that " j uries have trouble distinguishing between the rehabilitative and substantive use of" prior consistent statements admitted to rebut a charge of recent fabrication or improper influence or motive (i.e., the type of statements covered in Rule 801(d)(1)(B)). [FN163] The dissent observed that the Advisory Committee may have recognized this difficulty and made such statements nonhearsay as an acknowledgment of the realities of a jury trial. [FN164] It contended that the drafters may have excluded other categories of prior consistent statements from nonhearsay status--and thus from dual rehabilitative and substantive use status--because other categories cause less jury confusion. [FN165] Thus, the dissent inferred that Rule 801(d)(1)(B) "singled out one category" because the Advisory Committee felt that juries could more easily separate the rehabilitative and substantive use of other categories of prior consistent statements--generally with an instruction from the trial court--than juries could separate the rehabilitative and substantive use of prior consistent statements admitted to rebut a charge of recent fabrication or improper influence or motive. [FN166] Thus, the dissent found, this is a concession "more of experience than of logic," and is a sound hearsay-related reason for singling out one category. [FN167] Based on this analysis, the dissent concluded that "there is no basis for distinguishing between pre and postmotive statements, for the confusion with respect to each would very likely be the same." [FN168]

***533** The dissent, like the majority, found support in Rule 801(d)(1)(B)'s lack of explicit direction on the issue. The dissent reasoned that "if the drafters had wanted to insulate the common-law rule from the Rules' liberalizing effect, this would have been a remarkably indirect (and therefore odd) way of doing so." [FN169]

Finding that Rule 801(d)(1)(B) did not codify the premotive rule, the dissent went on to determine that the common-law premotive rule did not stand as an absolute bar to the admission of a postmotive prior consistent statement used to rebut a charge of recent fabrication or improper influence or motive. [FN170] The dissent based this conclusion on (1) its observation that postmotive prior consistent statements are sometimes relevant; and (2) the Federal Rules' liberalization of relevancy.

The dissent found circumstances where the premotive rule's "no relevancy" premise is false. The dissent provided an example: "A speaker might be moved to lie to help an acquaintance. But, suppose the circumstances also make clear to the speaker that only the truth will save his child's life." [FN171] The speaker may then be "affected by a far more powerful motive to tell the truth." [FN172] The dissent also noted that the common-law premotive rule was not followed uniformly. [FN173] It found no explanation for why courts enforced an absolute premotive common-law rule. [FN174]

The dissent noted that the Federal Rules made relevancy more flexible than the common-law rules. [FN175] It analogized the premotive rule to the Frye test. The Frye test "excluded scientific evidence that had not gained general acceptance in the relevant field." [FN176] It noted the similarities between the Frye rule and the premotive rule: "'rigid,' and setting forth an 'absolute prerequisite to admissibility.'" [FN177] The dissent reasoned that "Daubert suggests that the liberalized relevancy provisions of the Federal Rules can supersede a pre-existing rule of relevance, at least where no compelling practical or logical support can be found for the pre-existing rule." [FN178]

Based on this analysis, the dissent would have held "that the Federal Rules authorize a district court to allow (where probative in ***534** respect to rehabilitation) the use of postmotive prior consistent statements to rebut a charge of recent fabrication, improper influence or motive (subject of course to, for example, Rule 403)." [FN179] When allowed, the dissent explained, such admission would be as substantive evidence. [FN180]

V. Observations Regarding Rule 801(d)(1)(B) and the Current Premotive Rule

Rule 801(d)(1)(B) of the Federal Rules of Evidence has generated considerable confusion since its enactment. Some commentators have called for the Rule's amendment and have suggested changes. [FN181] These commentators, however, do not provide for the admission of postmotive prior consistent statements under Rule 801(d)(1)(B).

As the Tome Court explained, Rule 801(d)(1)(B) codified a per se time-line premotive rule. [FN182] Rule 801(d)(1)(B) should be amended. Any such amendment should serve at least two purposes. First, the amendment should reject the per se time-line premotive rule and allow the admission of prior consistent statements where the statements are relevant and have value but are inadmissible under the Tome Court's interpretation of Rule 801(d)(1)(B). Second, the amendment should expressly provide for the admission of prior consistent statements as substantive evidence in all cases where such statements are admissible for rehabilitation.

A. The Pitfalls of the Per Se Approach

The overwhelming majority of common-law courts applied a per se time-line premotive rule. [FN183] It is important to understand, however, why a per se time-line rule developed.

Courts reasoned that a consistent statement made during the time in which the witness allegedly had the same motivation that resulted in the impeached in-court statement has no rebuttal force and is thus irrelevant. [FN184] In the vast majority of cases, a strict time-line rule furthers this rationale. Consequently, the rule developed into a per se time- line rule because such a rule is properly determinative in the great majority of cases in which the issue of temporalness and prior consistent statements arise, and theoretically provides predictability and facilitates the decision- making process.

***535** Common-law courts applying the rule shortly before the development and codification of the Federal Rules of Evidence sensed that something was wrong with the per se time-line premotive rule. [FN185] This sense had not fully developed when the Federal Rules of Evidence were enacted. As a result, Rule 801(d)(1)(B) codified, as the Tome Court explained, the common-law rule accepted by the vast majority of courts, including the time-line premotive requirement. [FN186]

Courts' wariness of the time-line premotive rule continued and expanded under the Federal Rules. Several courts applying Rule 801(d)(1)(B) before Tome allowed the admission of postmotive prior consistent statements as substantive evidence under the Rule in some instances. [FN187] Moreover, all but one of the circuits admitted postmotive prior consistent statements for the limited purpose of rehabilitation in some instances. [FN188]

Courts and commentators have become overly focused on a pure time-line analysis when examining prior consistent statements. While it is true that the time-line premotive rule comports to unadorned logic, in practical application the rule's per se approach can be overly restrictive.

There are situations where a postmotive prior consistent statement is relevant, has some rebuttal force or related value, and should be admissible. One such time is when a separate motive to tell the truth or to make a different statement exists at the statement's making. Consider a situation where the declarant has been impeached by a charge of improper influence or motive arising at a particular time. Normally (and logically), a statement that is made after the time the improper influence or motive arose and is consistent with the declarant's in-court testimony offers no rebuttal value and is irrelevant. However, if the postmotive prior consistent statement is made when a separate motive to tell the truth or to make a different statement exists, the postmotive prior consistent statement may offer some rebuttal force. The Tome dissent provided examples of this situation:

A speaker might be moved to lie to help an acquaintance. But, suppose the circumstances also make clear to the speaker that ***536** only the truth will save his child's life. Or, suppose the postmotive statement was made ... when the speaker's motive to lie was much weaker than it was at trial. [FN189]

The dissent explained that "[i]n these and similar situations, special circumstances may indicate that the prior statement was made for some reason other than the alleged improper motivation; it may have been made not because of, but despite, the improper motivation." [FN190]

If a motivation to tell the truth or to make a different statement at the time the prior consistent statement was made appears greater than or equal to the strength of the improper influence or motivation charged at the statement's making, the prior consistent statement may have some rebuttal force or related value, may be relevant, and should be admissible. Any amendment to Rule 801(d)(1)(B) should provide for this situation. A jury is fully capable of making this assessment and should be permitted to do so.

Another situation where a postmotive prior consistent statement is relevant, has some rebuttal force or related value, and should be admissible, is when the charged motive is contextually weak. For example, consider a situation where a criminal defendant alleges that a large number of police officers are conspiring to frame the defendant. The defendant impliedly charges that the officers are lying on the stand about their investigation, and charges that the improper motivation arose as soon as each officer arrived on the crime scene. Should such a charge prevent the officers from being rehabilitated by showing that they made prior consistent statements from the beginning of their investigation? Would not their consistency tend to show the absence of such a conspiracy even though the prior consistent statements were made after the alleged conspiracy began?

Still another example where the charged motive may be contextually weak and the postmotive prior consistent statement would have some rebuttal force or related value was cited by the Tome dissent: postmotive statements made spontaneously. [FN191] Circumstances may reveal that any alleged effect of the charged motive on the declarant was greatly weakened by the reliability evidenced by the statement's spontaneity. The statement could serve to rebut a charge of improper motive and its admissibility should be determined in context.

There are other situations where postmotive prior consistent statements may have some value and should be admissible. A declarant's ability to tell a complicated or unique story more than once ***537** may, in some instances, indicate reliability and be relevant. Child sex-abuse cases are one example of this situation. A young child's postmotive description of the details of sexual abuse can offer some value and indicate that the child is not fabricating the story. A jury is able to weigh these possibilities in context and should be allowed to do so.

In addition, in a situation when a witness testifies as to his or her own prior consistent statement, the jury's ability to view the witness testifying offers more than the statement itself. It gives the jurors another opportunity to observe the witness and judge the witness's credibility.

It is important to note that in most cases, postmotive prior consistent statements will be inadmissible under the relevancy rules for the reasons originally noted by courts developing common-law evidentiary rules. [FN192] The suggestions made in this Article will not change the result in the vast majority of situations, but will refocus the inquiry regarding the admission of prior consistent statements where it belongs--on relevancy.

An argument can be made that anything but a time-line rule

leaves some uncertainty in the parties' pre-trial preparation. However, this potential uncertainty does not outweigh the need to allow the jury to consider relevant matters. Moreover, rejecting the time-line rule would leave no more uncertainty than is present with the current rule. The parties cannot know exactly how the court will rule in regard to relevancy or the premotive or postmotive status of a prior consistent statement. This is particularly evident in the many co-defendant-turned-state's-evidence cases. Whether the trial court will find that the co-defendant's motive arose when he or she was first approached by the government, after a deal was put on paper, or at some other time, seems nearly impossible to predict ahead of the ruling. [FN193] Similarly, witnesses' uncertainty of dates and wavering testimony will often leave pre-trial predictions on the admissibility of a prior consistent statement difficult.

The per se premotive rule also results in administrative problems that hamper the fact-finding process. Sometimes, a trial judge may find that the motive arose and the prior consistent statement was made on particular dates when a different fact-finder could reasonably choose different dates. This results in a trial judge sometimes finding a prior consistent statement to be made postmotive when a jury could reasonably find it to be made premotive, or vice- versa. Prior consistent statements that may rehabilitate should not be excluded in such circumstances. This situation could be rectified ***538** by using the Second Circuit's Grunewald standard: If it is "reasonably possible for the jury to say that the prior consistent statements did in fact antedate the motive disclosed on the cross-examination, the court should not exclude them." [FN194] This standard acknowledges that the determination of a prior consistent statement's admissibility is often too crucial to deprive the jury of weighing the statement and determining its value when reasonable minds could differ on the timing of events. Although the use of this rule would be a step in the right direction, it is not enough to solve the numerous other problems with the per se premotive rule.

Additionally, it is often difficult for the trial court to pin down the date when a charged improper influence or motive arose or the date when a statement was made. Frequently, and particularly in criminal drug trials, witnesses cannot remember even the month in which a particular event occurred. Evidence concerning when an improper influence or motive arose and when a particular prior consistent statement was made may be scant. The trial judge should be free to allow the jury to weigh the evidence under all the circumstances without being bound by a restrictive time-line rule.

These problems with the per se time-line rule have, on occasion, resulted in some legal gymnastics on the issue of when a motive arose. For example, in United States v. Henderson, [FN195] the defendant impeached the government's informant by charging that the informant fabricated his allegations against the defendant in return for leniency. [FN196] On redirect, the trial court admitted the informant's prior consistent statements made after arrest but before the informant and the government reached a plea agreement. [FN197] On appeal, the defendant argued that such admission was error. The Fourth Circuit rejected the defendant's argument. The court reasoned that the defendant's argument "effectively swallows the rule with respect to prior consistent statements made to government officers: by definition such statements would never be prior to the event of apprehension or investigation by the government which gave rise to a motive to falsify." [FN198] The court explained that " s uch a result also would render superfluous our previous distinction ... between statements made to police after arrest but before a bargain and statements made after an agreement is reached. We decline to so eviscerate Rule 801(d)(1)(B)." [FN199] Thus, the arrestee-declarant's prior consistent ***539** statements made after arrest but before the government and the arrestee-declarant reach a plea agreement are admissible under the Henderson rule, while such statements made post-agreement are not.

In many cases, it is doubtful that a motive to fabricate suddenly changes upon the signing of an agreement. It seems much more likely that the motive to fabricate was the same before and after the agreement. In such instances, a pre-agreement (or premotive per Henderson) prior consistent statement offers little that a post-agreement (or postmotive) prior consistent statement does not. The parties, and the jury, would be better served if the court could consider the admissibility of a proffered prior consistent statement in relation to all of the circumstances of the particular case.

When considering the admissibility of prior consistent statements, courts' attention should be directed toward the charged motive, its context, and all of its characteristics, not merely the motive's alleged birthday. When the characteristics and context of a prior consistent statement, including a postmotive prior consistent statement, indicate that the statement is relevant to the juries' consideration of a witness's credibility, or to other relevant issues, the statement should be admissible.

B. Admissibility of Prior Consistent Statements Outside of Rule 801(d)(1)(B)

Any amendment to Rule 801(d)(1)(B) also should clarify the question of the admissibility of prior consistent statements outside of Rule 801(d)(1)(B). This is particularly important because, before Tome, all circuits but the Ninth Circuit held postmotive prior consistent statements admissible for the limited purpose of rehabilitation. Many of these courts explained that Rule 801(d)(1)(B) did not govern such statements.

Some commentators and the Ninth Circuit reason that the drafters of the Federal Rules meant to provide that prior consistent statements are admissible under Rule 801(d)(1)(B) or not at all. [FN200] Of course, statements that are not offered for the truth of the matter asserted are not hearsay by definition. Thus, logically, there would be no reason to seek the admission of a statement offered merely for rehabilitation purposes--and not for the truth of the matter asserted--under Rule 801(d)(1)(B). Absent a desire to use the statement substantively, there would be no reason to seek to classify as nonhearsay under Rule 801(d)(1)(B) a statement that is already outside the definition of hearsay. Therefore, the admission of such a statement ***540** would be governed by the relevancy rules. It would seem that Rule 801(d)(1)(B), part of Article VIII--the hearsay rules--would play no part in

the calculus. The circuits allowing the admission of prior consistent statements offered for the limited purpose of rehabilitation without reference to Rule 801(d)(1)(B) follow the logical path provided by the Federal Rules.

Any indication that Tome provides in relation to the question of whether postmotive prior consistent statements offered for the limited purpose of rehabilitation are admissible is dictum in the classic sense. It was not necessary for the Supreme Court to decide this question to reach its decision in Tome. The prior consistent statements at issue in Tome were admitted by the trial court as nonhearsay under Rule 801(d)(1)(B). The statements were not offered for the limited purpose of rehabilitation. The government's brief explained that "[t]his case does not require the Court to decide whether a premotive rule also applies to prior consistent statements that are not admitted as substantive evidence, but are used merely to rehabilitate a witness." [FN201] Moreover, the Tome opinion clearly states that " o ur holding is confined to the requirements for admission under Rule 801(d)(1)(B)." [FN202]

After Tome, there are two possible scenarios regarding the admission of prior consistent statements. The first is that premotive prior consistent statements are admissible as substantive evidence, while postmotive prior consistent statements are not admissible for any purpose. As explained above, this situation is unsatisfactory. The second scenario is that premotive prior consistent statements are admissible as substantive evidence, while postmotive prior consistent statements are admissible for the "limited purpose of rehabilitation." This, too, is an unsatisfactory situation.

Distinctions between the substantive and nonsubstantive use of prior consistent statements are normally distinctions without practical meaning. Juries have a very difficult time understanding an instruction about the difference between substantive and nonsubstantive use. This is likely a large part of the reason that the drafters of Rule 801(d)(1)(B) provided that evidence that meets the Rule's requirements is admissible substantively.

It makes little sense to differentiate prior consistent statements with a cumbersome time-line rule in regard to the statements' admission as substantive evidence while also allowing the admission of statements rejected by such a rule when juries normally do not make such differentiations. Experience shows that jurors are adept at determining the weight to be given to a witness's testimony and can ***541** easily recognize the interest a witness has in the matter about which he or she testified, including any motive that could affect the witness's credibility. **In recognition of this, the Federal Rules should explicitly provide that all prior consistent statements, when admissible to rehabilitate, are admissible as substantive evidence. The weight given these statements would then be for the jury to determine. Amending Rule 801(d)(1)(B) to account for the issues raised herein would alleviate the concern over substantive versus limited rehabilitative use of prior consistent statements, eliminate the often misunderstood limiting instruction, and make the Rule compatible with the realities of a jury trial.**

Courts have cited other evidence rules in allowing the admission of postmotive prior consistent statements. Several courts cite Rule 106 to account for a "completeness" admission of prior consistent statements. [FN203] Courts have recognized that this is not a precise use of Rule 106. [FN204] Indeed, it appears that this is not a contemplated use of Rule 106 at all. However, the admission of a prior consistent statement to clarify a self-contradiction is often a practical necessity of trial. Such statements should not be forced through the back door of Rule 106, but should be explicitly recognized as admissible when relevant.

As the Tome Court noted, postmotive prior consistent statements, even though not admissible under Rule 801(d)(1)(B), may be admitted substantively under Rule 803(24) [FN205] if the statements meet Rule 803(24)'s requirements. [FN206] Although this avenue is available, Rule 803(24) does not address the issues raised above. Moreover, it is often difficult to meet all of Rule 803(24)'s requirements, [FN207] and such ***542** requirements are usually unnecessary when addressing the admissibility of postmotive prior consistent statements. For example, Rule 803(24)'s notice requirement is normally superfluous in such a situation because an opposing litigant knows that if a charge of recent fabrication or improper influence or motive is made, prior consistent statements may be admissible. In addition, the notice requirement of Rule 803(24) would require the proponent of a postmotive prior consistent statement to anticipate the opponent's impeachment of the declarant with a charge of recent fabrication or improper influence or motive. Because some courts may continue a trial in recognition of Rule 803(24)'s notice requirement when a party seeks to use the rule and has not notified the opposing party before trial, the use of Rule 803(24) in this situation could result in needless delay. [FN208]

A charge of recent fabrication or improper influence or motive is a serious charge reflecting unfavorably on its recipient. The charging party is aware that such a charge can open the door to relevant prior consistent statements that meet the requirements of Rule 801(d)(1)(B). Once that party has opened the door in this manner, there is no convincing reason not to admit, as substantive evidence, prior consistent statements that have some value to the jury from a practical standpoint and that meet the relevancy rules' requirements.

VI. CONCLUSION

Federal Rule of Evidence 801(d)(1)(B) is overly restrictive in regard to the admission of prior consistent statements in many instances. The primary example of this problem is the focus of this Article: postmotive prior consistent statements. Such statements, on occasion, are relevant and offer sufficient value to warrant their admission. Nevertheless, Rule 801(d)(1)(B), as interpreted by the Supreme Court in Tome v. United States, provides a per se prohibition on such statement's admission as substantive evidence. Rule 801(d)(1)(B) should be amended to allow the admission of a prior consistent statement as substantive evidence in instances where the statement is relevant and valuable, but is inadmissible under the current Federal Rules of Evidence after Tome.

The issue of the admissibility of prior consistent statements

has long been recognized as "perplexing." [FN209] Much of the confusion arises from conflict between the theoretical and the practical approaches to the issue. This tension must be recognized and reconciled or the issue ***543** will remain a puzzle. An amendment to the Federal Rules of Evidence addressing the several observations discussed in this Article would serve to clarify the admissibility of prior consistent statements and to further the goals of the Federal Rules of Evidence.

[FNa1]. Chief Judge, United States District Court for the Middle District of North Carolina. B.A., University of North Carolina, 1961; LL.B., University of North Carolina, 1963.

[FNaa1]. Member, North Carolina State Bar. Associate, Kilpatrick Stockton LLP, Winston-Salem, North Carolina. B.S.E.E., University of North Carolina at Charlotte, 1990; M.S.E.E., University of North Carolina at Charlotte, 1992; J.D., cum laude, Wake Forest University, 1994. Former judicial clerk to the Honorable Alvin A. Schall, Circuit Judge, United States Court of Appeals for the Federal Circuit. Former judicial clerk to the Honorable Frank W. Bullock, Jr., Chief Judge, United States District Court for the Middle District of North Carolina.

[FN1]. See, e.g., Hanger v. United States, 398 F.2d 91, 103 (8th Cir.1969) (noting that aspects of the issue have "plagued the courts for centuries"); Michael H. Graham, Prior Consistent Statements: Rule 801(d)(1)(B) of the Federal Rules of Evidence, Critique and Proposal, 30 HASTINGS L.J. 575, 576 (1979) ("In modern litigation the use of prior consistent statements has become exceedingly confused and complex."); Annotation, Admissibility of Previous Statements by a Witness out of Court Consistent with His Testimony, 41 L.R.A. (N.S.) 857, 858 (1913) (stating that the admissibility of prior consistent statements "is as perplexing as any in the law of evidence") [hereinafter 41 L.R.A. (N.S.)].

[FN2]. See, e.g., Tome v. United States, 115 S.Ct. 696, 696-710 (1995), aff'g 3 F.3d 342 (10th Cir.1993); United States v. White, 11 F.3d 1446, 1448-51 (8th Cir.1993).

[FN3]. See, e.g., United States v. Forrester, 60 F.3d 52, 64-65 (2d Cir.1995); United States v. Montague, 958 F.2d 1094, 1096-98 (D.C. Cir.1992).

[FN4]. See, e.g., United States v. Farmer, 923 F.2d 1557, 1567-68 (11th Cir.1991); Washington v. Vogel, 880 F.Supp. 1534, 1540 (M.D. Fla. 1995).

[FN5]. See Federal Rules of Evidence for United States Courts and Magistrates, Pub. L. No. 93-595, 88 Stat. 1296 (1975).

[FN6]. See Fed. R. Evid. 801(d)(1)(B).

[FN7]. Id.

[FN8]. 115 S.Ct. 696 (1995).

[FN9]. See infra Part II.B.1.

[FN10]. See Tome, 115 S.Ct. at 700.

[FN11]. The terms "premotive" and "postmotive" are employed throughout this Article as short-hand for, respectively, before and after "recent fabrication or improper influence or motive" (the language of Rule 801(d)(1)(B) and many common-law courts).

[FN12]. See, e.g., Robert P. Burns, Foreword: Bright Lines and Hard Edges: Anatomy of a Criminal Evidence Decision, 85 J. CRIM. L. & CRIMINOLOGY 843 (1995); Eileen A. Scallen, Interpreting the Federal Rules of Evidence: The Use and Abuse of the Advisory Committee Notes, 28 LOY. L.A. L. REV. 1283 (1995); Eileen A. Scallen, Classical Rhetoric, Practical Reasoning, and the Law of Evidence, 44 AM. U. L. REV. 1717 (1995); Andrew E. Taslitz, Interpretive Method and the Federal Rules of Evidence: A Call for a Politically Realistic Hermeneutics, 32 HARV. J. ON LEGIS. 329 (1995); Christopher A. Jones, Note, Clinging to History: The Supreme Court (Mis)Interprets Federal Rule of Evidence 801(d)(1)(B) as Containing a Temporal Requirement, 29 U. RICH. L. REV. 459 (1995).

[FN13]. See 4 JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 1123, at 254 (Chadbourn Rev. 1972); John H. Wigmore, The History of the Hearsay Rule, 17 HARV. L. REV. 437, 446-47 (1904).

[FN14]. See 4 WIGMORE, supra note 13, § 1123, at 254.

[FN15]. See 5 id. § 1364, at 18.

[FN16]. See 5 id.

[FN17]. See 4 id. § 1123, at 254.

[FN18]. See 4 id. § 1123, at 254-55.

[FN19]. See 4 id. § 1123, at 254; 5 id. § 1364, at 20.

[FN20]. GEOFFREY GILBERT, THE LAW OF EVIDENCE 108 (photo. reprint, Garland Publishing, Inc. 1979) (1754). For an interesting look at Gilbert's evidentiary work, see Judy M. Cornett, The Treachery of Perception: Evidence and Experience in Clarissa, 63 U. CIN. L. REV. 165 (1994).

[FN21]. See 4 WIGMORE, supra note 13, § 1123, at 254.

[FN22]. See Graham, supra note 1, at 577-78; see also United States v. Holmes, 26 F. Cas. 349, 352 (C.C.D. Me. 1858) ("No principle in the law of evidence is better settled than" the rule that direct testimony supporting a witness's credibility "is not to be heard except in reply" to an opposing party's impeachment attempt).

[FN23]. See 4 WIGMORE, supra note 13, § 1124, at 255.

[FN24]. See 4 id.

[FN25]. E.g., State v. Parish, 79 N.C. 610, 613 (1878).

[FN26]. "Impeachment" includes "attempted impeachment" as applicable throughout this discussion. What constitutes sufficient "impeachment" to satisfy the requirements of Rule 801(d)(1)(B) and the common law is beyond the scope of this Article.

[FN27]. See, e.g., Conrad v. Griffey, 52 U.S. (11 How.) 480, 491-92 (1850); Ellicott v. Pearl, 35 U.S. (10 Pet.) 412, 439 (1836); Stewart v. People, 23 Mich. 63 (1871).

[FN28]. See 4 WIGMORE, supra note 13, § 1124.

[FN29]. See 3A id. § 1018, at 996 (discussing self-contradiction and observing that "the whole purpose of the hearsay rule has been already satisfied"); see also California v. Green, 399 U.S. 149, 154-55 (1970).

[FN30]. See Edmund M. Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 HARV. L. REV. 177, 192 (1948). Professor Morgan reasoned that "[w]hen the Declarant is also a witness, it is difficult to justify classifying as hearsay evidence of his own prior statements. This is especially true where Declarant as a witness is giving as part of his testimony his own prior statement." Id.; see also Edmund M. Morgan, The Hearsay Rule, 12 WASH. L. REV. 1, 4 (1937).

[FN31]. See CHARLES T. MCCORMICK, LAW OF EVIDENCE § 224, at 458 (1954); 2 CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 251, at 117 (John W. Strong ed., 4th ed. 1992) [hereinafter MCCORMICK ON EVIDENCE]; Charles T. McCormick, The Turncoat Witness: Previous Statements as Substantive Evidence, 25 TEX.L.REV. 573, 575-88 (1947).

[FN32]. See Jack B. Weinstein, Probative Force of Hearsay, 46 IOWA L. REV. 331, 333 (1961) (describing the "practical absurdity in many instances [of] treating the out of court statement of the witness himself as hearsay").

[FN33]. The National Conference of Commissioners on Uniform State Laws promulgated the Uniform Rules of Evidence. See generally Symposium on the Uniform Rules of Evidence, 10 RUTGERS L. REV. 479, 479-646 (1956).

The American Law Institute promulgated the Model Code of Evidence. See MODEL CODE OF EVIDENCE (1942). Professor Morgan served as reporter for the Model Code, while Dean Wigmore served as chief consultant. See id. at iii-iv.

[FN34]. The Uniform Rules of Evidence defined as nonhearsay "[a] statement previously made by a person who is present at the hearing and available for cross-examination with respect to the statement and its subject matter, provided the statement would be admissible if made by declarant while testifying as a witness." UNIF. R. EVID. 63(1)(1953). In 1974, the Uniform Rules of Evidence abandoned this position and generally conformed to the Federal Rules of Evidence. See UNIF. R. EVID. 801(d)(1) (1974).

[FN35]. See MODEL CODE OF EVIDENCE Rule 503 (1942). "Evidence of a hearsay declaration is admissible if the judge finds that the declarant (a) is unavailable to testify, or (b) is present and subject to cross-examination." Id.

[FN36]. See 21 Charles A. Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5005, at 91-92 (1977).

[FN37]. See 21 id. § 5005, at 88-89. As a result of the Nebraska Supreme Court's adoption of the Model Code of Evidence, the Nebraska Legislature repealed the court's rulemaking power and rejected the Model Code. See 21 id. § 5005, at 89 & n.80 (citing Edmund M. Morgan, The Future of the Law of Evidence, 29 TEX.L.REV. 587, 599 (1951)).

[FN38]. See, e.g., Conrad v. Griffey, 52 U.S. (11 How.) 480, 491-92 (1850); Ellicott v. Pearl, 35 U.S. (10 Pet.) 412, 439 (1836); Dowdy v. United States, 46 F.2d 417, 424 (4th Cir.1931); Dwyer v. State, 145 A.2d 100, 109-10 (Me. 1958); Commonwealth v. Retkovitz, 110 N.E. 293, 297-99 (Mass. 1915); State v. Flint, 14 A. 178, 184-86 (Vt. 1888); see also Annotation, Admissibility, for Purposes of Supporting Impeached Witnesses, of Prior Statements by Him Consistent with His Testimony, 75 A.L.R.2D 909, 935- 50 (1961) (citing cases) [hereinafter 75 A.L.R.2D]; Annotation, Admissibility, for Purpose of Supporting Impeached Witness, of Prior Statements by Him Consistent with His Testimony, 140 A.L.R. 21, 78-129 (1942) (citing cases) [hereinafter 140 A.L.R.].

Judge Weinstein and Professor Berger note that "[p]rior to the federal rules, the courts were virtually unanimous in allowing" prior consistent statements to be used following impeachment by this method. 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 801(d)(1)(B)[01], at 801-149 to -150 (1996).

[FN39]. See, e.g., Ellicott, 35 U.S. (10 Pet.) at 439; Ryan v. UPS, 205 F.2d 362, 364 (2d Cir.1953); People v. Walsh, 301 P.2d 247, 250-51 (Cal. 1956); People v. Singer, 89 N.E.2d 710, 711-12 (N.Y. 1949); see also 75 A.L.R.2D, supra note 38, at 944-46 (citing cases); 140 A.L.R., supra note 38, at 117-21 (citing cases).

[FN40]. See sources cited supra note 39.

[FN41]. See sources cited supra note 39.

[FN42]. See sources cited supra note 39.

[FN43]. United States v. Grunewald, 233 F.2d 556, 566 (2d Cir.1956), rev'd on other grounds, 353 U.S. 391 (1957); see also United States v. Sampol, 636 F.2d 621, 673 (D.C. Cir.1980); United States v. DiLorenzo, 429 F.2d 216, 220 (2d Cir.1970); Greenway v. State, 626 P.2d 1060, 1062 (Alaska 1980) (Matthews, J., concurring).

[FN44]. See, e.g., United States v. Gandy, 469 F.2d 1134, 1134-35 (5th Cir.1972); Hanger v. United States, 398 F.2d 91, 104-05 (8th Cir.1968); Copes v. United States, 345 F.2d 723, 725-26 (D.C. Cir.1964); State v. George, 30 N.C. 324, 328 (1848).

[FN45]. See, e.g., Gandy, 469 F.2d at 1134-35; Copes, 345 F.2d at 725.

[FN46]. It is important to note that an attack on a witness's memory often, but not always, includes a charge of recent fabrication.

[FN47]. See, e.g., Applebaum v. American Export Isbrandtsen Lines, 472 F.2d 56, 61 (2d Cir.1972); Felice v. Long Island R.R., 426 F.2d 192, 198 n.6 (2d Cir.1970); United States v. Keller, 145 F.Supp. 692, 695-97 (D.N.J. 1956); People v. Basnett, 8 Cal. Rptr. 804, 810-11 (Ct. App. 1960); Thomas v. Ganezer, 78 A.2d 539, 542 (Conn. 1951); Openshaw v. Adams, 445 P.2d 663, 668-69 (Idaho 1968); Cross v. State, 86 A. 223, 227 (Md. 1912); People v. Mann, 212 N.W.2d 282, 287 (Mich. Ct. App. 1973); State v. Slocinski, 197 A. 560, 562 (N.H. 1938); Jones v. Jones, 80

N.C. 246, 250 (1878); see also Graham, supra note 1, at 605-06 (noting that prior consistent statements properly support such an attack "if the statement was made shortly after the event in question"); 1 MCCORMICK ON EVIDENCE, supra note 31, § 47, at 178 n.18 ("If the witness's accuracy of memory is challenged, it seems clear common sense that a consistent statement made shortly after the event and before he had time to forget, should be received in support."); 75 A.L.R.2D, supra note 38, at 929-30 (citing cases); 140 A.L.R., supra note 38, at 48- 49 (citing cases). Courts hold similarly today. See Debra T. Landis, Annotation, Admissibility of Impeached Witness' Prior Consistent Statement-- Modern State Civil Cases, 59 A.L.R.4TH 1000, 1023 (1988 & Supp.1994) (citing cases) [hereinafter 59 A.L.R.4TH]; Debra T. Landis, Annotation, Admissibility of Impeached Witness' Prior Consistent Statement--Modern State Criminal Cases, 58 A.L.R.4TH 1014, 1051-53 (1987 & Supp.1994) (citing cases) [hereinafter 58 A.L.R.4TH].

[FN48]. Openshaw, 445 P.2d at 669.

[FN49]. Thomas, 78 A.2d at 542 (quoting Jones, 80 N.C. at 250) (internal quotation marks omitted).

[FN50]. Applebaum, 472 F.2d at 62.

[FN51]. See, e.g., id. at 61-62; Jones, 80 N.C. at 250; see also 1 MCCORMICK ON EVIDENCE, supra note 31, § 47, at 178 n. 18.

[FN52]. See, e.g., People v. Doyell, 48 Cal. 85, 90-91 (1874); People v. Kinney, 95 N.E. 756, 757 (N.Y. 1911); Cincinnati Traction Co. v. Stephens, 79 N.E. 235, 236-37 (Ohio 1906); Green v. State, 110 S.W. 929, 929-30 (Tex. Crim. App. 1908); see also Graham, supra note 1, at 605-06; 140 A.L.R., supra note 38, at 47-48. The common-law trend throughout the twentieth century, however, was to admit prior consistent statements following an attack on a witness's memory.

[FN53]. See, e.g., Kinney, 95 N.E. at 757 ("It is sufficient to state somewhat dogmatically that this evidence [a prior consistent statement regarding identification] was utterly incompetent, for this is so baldly the law that there is no chance for debate or discussion.").

[FN54]. See sources cited supra note 47.

[FN55]. E.g., People v. Singer, 89 N.E.2d 710, 711 (N.Y. 1949).

[FN56]. See Graham, supra note 1, at 582-83.

[FN57]. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 443 (1989).

[FN58]. See, e.g., sources cited supra notes 38-39.

[FN59]. E.g., Thomas v. Ganezer, 78 A.2d 539, 542 (Conn. 1951).

[FN60]. Professor Michael Graham refers to this type of impeachment as "naked impeachment." Graham, supra note 1, at 594.

[FN61]. Mere contradiction evidence usually takes the form of a witness whose testimony portrays a different version of the matter about which a previous witness testified. Many courts decline to admit prior consistent statements to rebut such impeachment. See, e.g., Inman Bros. v. Dudley & Daniels Lumber Co., 146 F. 449, 456 (6th Cir.1906); Evans v. State, 22 S.E. 298, 298-99 (Ga. 1894); People v. Katz, 103 N.E. 305, 312-13 (N.Y. 1913); see also 4 WIGMORE, supra note 13, § 1127, at 267; 140 A.L.R., supra note 38, at 38-42 (citing cases).

A very small minority of courts, however, ruled such statements admissible following contradiction evidence. See, e.g., Mallonee v. Duff, 19 A. 708, 708-09 (Md. 1890); State v. Rhyne, 13 S.E. 943, 943-44 (N.C. 1891); see also 140 A.L.R., supra note 38, at 42-47 (citing cases). Dean Wigmore described these courts as "misled." 4 WIGMORE, supra note 13, § 1127, at 267.

[FN62]. 4 WIGMORE, supra note 13, § 1127, at 267.

[FN63]. See, e.g., Edwards v. Commonwealth, 140 S.W. 1046, 1047 (Ky. 1911); Lyles v. State, 239 S.W. 446, 449-50 (Tenn. 1922); Thurmond v. State, 11 S.W. 451, 452 (Tex. Ct. App. 1889); see also 4 WIGMORE, supra note 13, § 1125, at 258; 140 A.L.R., supra note 38, at 34-35 (citing cases). A few courts, however, admitted prior consistent statements to rebut the impeachment of the declarant's moral character. See, e.g., State v. Rowe, 4 S.E. 506, 509-10 (N.C. 1887); Zell v. Commonwealth, 94 Pa. 258, 267 (1880); see also 140 A.L.R., supra note 38, at 35-36 (citing cases).

[FN64]. See, e.g., Yoder v. United States, 71 F.2d 85, 89 (10th Cir.1934); McKelton v. State, 6 So. 301, 301 (Ala. 1889); Mason v. Vestal, 26 P. 213, 213-14 (Cal. 1891); see also 4 WIGMORE, supra note 13, § 1125, at 258; 75 A.L.R.2D, supra note 38, at 927-28 (citing cases); 140 A.L. R., supra note 38, at 36-37 (citing cases). A few courts, however, admitted prior consistent statements to rebut such impeachment. See, e.g., State v. Parrish, 468 P.2d 143, 149 (Kan. 1970); State v. Dove, 32 N.C. 469, 474-75 (1849); 4 WIGMORE, supra note 13, § 1125, at 258; 140 A.L.R., supra note 38, at 37 (citing cases).

[FN65]. "The admission of prior consistent statements to support a witness impeached by prior inconsistent statements has plagued the courts for centuries ...." Hanger v. United States, 398 F.2d 91, 103 (8th Cir.1968). Impeachment by prior inconsistent statement is also called self-contradiction. See id.

[FN66]. See, e.g., Ellicott v. Pearl, 35 U.S. (10 Pet.) 412, 439 (1836); Affronti v. United States, 145 F.2d 3, 7 (8th Cir.1944); Gelbin v. New York, N.H. & H.R. Co., 62 F.2d 500, 502 (2d Cir.1933); American Agric. Chem. Co. v. Hogan, 213 F. 416, 420-21 (1st Cir.1914); Baker v. People, 209 P. 791, 793 (Colo. 1922); Chicago City Ry. v. Matthieson, 72 N.E. 443, 444-45 (Ill. 1904); see also 4 WIGMORE, supra note 13, § 1126; 140 A.L.R., supra note 38, at 49-59 (citing cases). Much of the case law recognized this as the "general rule."

[FN67]. 4 WIGMORE, supra note 13, § 1126, at 259.

[FN68]. See, e.g., Schoppel v. United States, 270 F.2d 413, 417 (4th Cir.1959); United States v. Corry, 183 F.2d 155, 157

(2d Cir.1950); Childs v. State, 55 Ala. 25, 28 (1876); Thompson v. State, 58 N.E.2d 112, 112-13 (Ind. 1944), overruled by Dean v. State, 433 N.E.2d 1172 (Ind. 1982); American Stores Co. v. Herman, 171 A. 54, 55-56 (Md. 1934); Cross v. State, 86 A. 223, 226-27 (Md. 1912); People v. Purman, 185 N.W. 725, 727 (Mich. 1921); Stewart v. People, 23 Mich. 63, 74-76 (1871); Stafford v. Lyon, 413 S.W.2d 495, 498 (Mo. 1967); Piehler v. Kansas City Pub. Serv. Co., 226 S.W.2d 681, 683-84 (Mo. 1950); Reeves v. Hill, 158 S.E.2d 529, 537 (N.C. 1968); Hale v. Smith, 460 P.2d 351, 353 (Or. 1969); State v. Turner, 15 S.E. 602, 602-03 (S.C. 1892); Kepley v. State, 320 S.W.2d 143, 145 (Tex. Crim. App. 1959); State v. Sibert, 310 P.2d 388, 391 (Utah 1957); Russell v. Cavelero, 246 P. 25, 26 (Wash. 1926); see also Kaneshiro v. United States, 445 F.2d 1266, 1271 (9th Cir.1971); Sweazey v. Valley Transp., Inc., 107 P.2d 567, 572 (Wash. 1940) (describing admitting prior consistent statements to rebut prior inconsistent statements as the minority rule); 140 A.L.R., supra note 38, at 59-65 (citing cases); see generally 4 WIGMORE, supra note 13, § 1126, at 258-67.

[FN69]. 4 WIGMORE, supra note 13, § 1126, at 259.

[FN70]. See, e.g., United States v. Fayette, 388 F.2d 728, 733-35 (2d Cir.1968); Newman v. United States, 331 F.2d 968, 970-71 (8th Cir.1964); United States v. Agueci, 310 F.2d 817, 834 (2d Cir.1962); United States v. Lev, 276 F.2d 605, 608 (2d Cir.1960); Cafasso v. Pennsylvania R.R., 169 F.2d 451, 453 (3d Cir.1948); Affronti, 145 F.2d at 7 ("[I]f some portions of a statement made by a witness are used on cross-examination to impeach him, other portions of the statement which are relevant to the subject matter about which he was cross-examined may be introduced in evidence to meet the force of the impeachment."); United States v. Weinbren, 121 F.2d 826, 828-29 (2d Cir.1941); United States v. Katz, 78 F.Supp. 435, 440 (M.D. Pa. 1948), aff'd, 173 F.2d 116 (3d Cir.1949); see generally Michael H. Graham, Federal Practice & Procedure § 6712, at 461 (interim ed. 1992).

[FN71]. See, e.g., Felice v. Long Island R.R., 426 F.2d 192, 198 (2d Cir.1970); Twardosky v. New England Tel. & Tel. Co., 62 A.2d 723, 727 (N.H. 1948); Sweazey, 107 P.2d at 572; see also 4 WIGMORE, supra note 13, § 1126, at 260-65; GRAHAM, supra note 70, § 6712, at 461; Graham, supra note 1, at 594-602.

[FN72]. See, e.g., Hanger v. United States, 398 F.2d 91, 103-04 (8th Cir.1968); National Postal Transp. Assoc. v. Hudson, 216 F.2d 193, 200 (8th Cir.1954); Cafasso, 169 F.2d at 453; Affronti, 145 F.2d at 7; State v. Ouimette, 298 A.2d 124, 133-34 (R.I. 1972).

[FN73]. Fed. R. Civ. P. 43(a) (1938) (amended 1972).

[FN74]. See id. Rule 43(a) provided, in pertinent part:

> All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs ....

Id.; see also generally Thomas F. Green, Jr., Federal Civil Procedure Rule 43(a), 5 VAND. L. REV. 560 (1952).

[FN75]. See Fed. R. Crim. P. 26 (1946). Rule 26 provided, in pertinent part: "The admissibility of evidence ... shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Id.

[FN76]. Fed. R. Evid. 102.

[FN77]. See William L. Hungate, An Introduction to the Proposed Rules of Evidence, 32 FED. B.J. 225, 228-29 (1973).

[FN78]. See 21 WRIGHT & GRAHAM, supra note 36, § 5005, at 90.

[FN79]. See Fed. R. Evid. 801(d) advisory committee's note (comparing Rule 63(1) of the Uniform Rules of Evidence with Rule 801(d)).

[FN80]. See id.

[FN81]. Fed. R. Evid. 801(c). Rule 801(a) defines a "statement" as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." Fed. R. Evid. 801(a). Rule 801(b) defines a "declarant" as "a person who makes a statement." Fed. R. Evid. 801(b).

[FN82]. See Fed. R. Evid. 802. Rule 802 provides that "[h]earsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress." Id.

[FN83]. Fed. R. Evid. 801(d)(1)(B). Of course, prior consistent statements admissible under Rule 801(d)(1)(B) must still qualify for admission under the relevancy rules. See Fed. R. Evid. 401-03.

[FN84]. This is true for all prior statements admitted under Rule 801(d). See Fed. R. Evid. 801(d) advisory committee's note.

[FN85]. Id.

[FN86]. See, e.g., Engebretsen v. Fairchild Aircraft Corp., 21 F.3d 721, 729-30 (6th Cir.1994); United States v. Castillo, 14 F.3d 802, 805-06 (2d Cir.1994); United States v. White, 11 F.3d 1446, 1449 (8th Cir.1993); United States v. Casoni, 950 F.2d 893, 905-06 (3d Cir.1991); United States v. Bolick, 917 F.2d 135, 138 (4th Cir.1990); United States v. Roy, 843 F.2d 305, 307 (8th Cir.1988); United States v. Colon, 835 F.2d 27, 31 (2d Cir.1987); United States v. Khan, 821 F.2d 90, 94 (2d Cir.1987); United States v. Bowman, 798 F.2d 333, 338 (8th Cir.1986); United States v. Brennan, 798 F.2d 581, 587-88 (2d Cir.1986), aff'd, 867 F.2d 111 (2d Cir.1989); United States v. Andrade, 788 F.2d 521, 532-33 (8th Cir.1986); United States v. Pierre, 781 F.2d 329, 333 (2d Cir.1986); United States v. Harris, 761 F.2d 394, 399-400 (7th Cir.1985); United States v. Juarez, 549 F.2d 1113, 1114 (7th Cir.1977); see also United States v. Jones, 766 F.2d 994,

1004 (6th Cir.1985) (holding, without discussion, that trial court's admission of prior consistent statements to rehabilitate witnesses was not an abuse of discretion); see also United States v. Rubin, 609 F.2d 51, 66-70 (2d Cir.1979) (Friendly, J., concurring) (arguing that the limitations on the use of prior consistent statements apply only to affirmative evidence), aff'd, 449 U.S. 424 (1981); United States v. James, 609 F.2d 36, 50 n.20 (2d Cir.1979) (noting but not deciding the issue).

[FN87]. See 2 MCCORMICK ON EVIDENCE, supra note 31, § 251, at 117; WRIGHT & GRAHAM, supra note 36, § 6712, at 461-63; Graham, supra note 1, at 594-604.

[FN88]. See, e.g., Engebretsen, 21 F.3d at 730; Pierre, 781 F.2d at 333; Harris, 761 F.2d at 399; Rubin, 609 F.2d at 66-70 (Friendly, J., concurring); United States v. Quinto, 582 F.2d 224, 233-34 (2d Cir.1978); see also White, 11 F.3d at 1449; Bolick, 917 F.2d at 138; Bowman, 798 F.2d at 338.

[FN89]. See cases cited supra note 88.

[FN90]. See, e.g., Quinto, 582 F.2d at 233.

[FN91]. See, e.g., Andrade, 788 F.2d at 533; Pierre, 781 F.2d at 333; Harris, 761 F.2d at 400; see also John D. Bennett, Note, Prior Consistent Statements and Motives to Lie, 62 N.Y.U. L. REV. 787 (1987). Rule 106 provides: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." Fed. R. Evid. 106. Courts have recognized that this is "not a precise use of Rule 106." E.g., Pierre, 781 F.2d at 333.

[FN92]. See, e.g., Engebretsen, 21 F.3d at 729; Pierre, 781 F.2d at 333.

[FN93]. United States v. Miller, 874 F.2d 1255, 1273 (9th Cir.1989); see also United States v. Payne, 944 F.2d 1458, 1470-71 (9th Cir.1991); Judith A. Archer, Note, Prior Consistent Statements: Temporal Admissibility Standard Under Federal Rule of Evidence 801(d)(1)(B), 55 FORDHAM L. REV. 759 (1987).

[FN94]. Miller, 874 F.2d at 1273 (emphasis added).

[FN95]. Id. (emphasis omitted).

[FN96]. Id. In reaching this conclusion, the Ninth Circuit quoted a treatise on the Federal Rules of Evidence:

> [T]he drafters believed (i) that the principles governing rehabilitation would remain unchanged by the Rules, (ii) that the rather specific description of circumstances of admissibility contained in Rule 801(d)(1)(B) reaches all cases in which prior consistent statements may be received to repair credibility, and consequently (iii) that this Rule permits the substantive use of every prior statement which may be received to rehabilitate a witness.

Id. at 1273 n.11 (quoting 4 David W. Louisell & Christopher B. Mueller, Federal Evidence § 420, at 195 (1980)).

[FN97]. See, e.g., Edward D. Ohlbaum, The Hobgoblin of the Federal Rules of Evidence: An Analysis of Rule 801(d)(1)(B), Prior Consistent Statements and a New Proposal, 1987 B.Y.U. L. REV. 231, 246. Professor Ohlbaum reasons that:

> [T]he term "recent" ... purposefully introduces the crucial element of the time frame during which the alleged motive to lie emerged. If improper influence or motive is the basis for the intentionally fabricated testimony, "recent" fabrication requires that the motive occur after the consistent statement was made. Thus, the phrase "recent fabrication" introduces two elements: first, with regard to "fabrication," an intentional or purposeful falsification; second, with respect to "recent," a falsification which results from a motive that developed after the statement was made.

Id. at 246-47.

[FN98]. See, e.g., Graham, supra note 1, at 583.

[FN99]. Fed. R. Evid. 801(d) advisory committee's note.

[FN100]. **First Circuit:** First Circuit case law discussing this issue is sparse. Only one First Circuit case, United States v. Vest, 842 F.2d 1319 (1st Cir.1988), examines the issue. The Vest court determined that the prior consistent statements at issue "were made before [the declarant] acquired a motive to fabricate," and thus were admissible. Id. at 1330. Other prior consistent statements were made after the declarant acquired a motive to fabricate. See id. The court reasoned that these statements were "not hearsay at all" because they "were not 'offered ... to prove the truth of the matter asserted.'" Id. (quoting Fed. R. Evid. 801(c)). Thus, these postmotive statements were "not 'prior consistent statements' under Fed. R. Evid. 801(d)(1)(B)." Id. The First Circuit noted the split in the circuits on this issue without further elaboration in United States v. Piva, 870 F.2d 753, 759 n.4 (1st Cir.1989).

Second Circuit: See United States v. Brennan, 798 F.2d 581, 587-88 (2d Cir.1986) (holding prior consistent statement admissible for rehabilitation purposes even if inadmissible under Rule 801(d)(1)(B)); United States v. Pierre, 781 F.2d 329, 333 (2d Cir.1986) (same); United States v. Rubin, 609 F.2d 51, 66-70 (2d Cir.1979) (Friendly, J., concurring) (arguing that standards of admissibility announced in United States v. Quinto, 582 F.2d 224 (2d Cir.1978), should not apply when prior consistent statements are introduced for purely rehabilitative purposes), aff'd, 449 U.S. 424 (1981); Quinto, 582 F.2d at 234 (litigant seeking to introduce prior consistent statement "must demonstrate that the ... statement was made prior to the time that the supposed motive to falsify arose"); see also United States v. Castillo, 14 F.3d 802, 806 (2d Cir.1994) (examining the "Pierre exception" for rehabilitative purposes); United States v. Shulman, 624 F.2d 384, 393 (2d Cir.1980) ("[T]he Quinto requirements were satisfied in this case."); see also generally Yvette Olstein, Comment, Pierre and Brennan: The Rehabilitation of Prior Consistent Statements, 53 BROOK. L. REV. 515 (1987) (discussing Pierre, Brennan, Quinto, Rubin, and the law of prior consistent statements in the Second Circuit).

Third Circuit: See United States v. Casoni, 950 F.2d 893, 904-06 (3d Cir.1991) (whether to admit postmotive prior consistent statement is a relevancy matter; when statement is made postmotive, the statement is not relevant to rebut an

implication of recent fabrication, and is therefore inadmissible for substantive purposes; however, postmotive statements offered only for rehabilitative purposes may be admissible); see also United States v. De Peri, 778 F.2d 963, 977 (3d Cir.1985) (noting, but not reaching, the issue).

Fourth Circuit: See United States v. Henderson, 717 F.2d 135, 138-39 (4th Cir.1983) ("[A] prior consistent statement is admissible under the rule only if the statement was made prior to the time the supposed motive to falsify arose."); see also United States v. Bolick, 917 F.2d 135, 138 (4th Cir.1990). The Bolick court "assume[d], without deciding, that the prior consistent statements were admitted as rehabilitation and that they are not subject to the requirements of Rule 801(d)(1)(B)." Id. The court further noted that the Fourth Circuit "may have endorsed" the proposition that postmotive prior consistent statements are admissible for nonsubstantive purposes in United States v. Parodi, 703 F.2d 768 (4th Cir.1983). Bolick, 917 F.2d at 138 (citing Parodi, 703 F.2d at 785-86 (citing in turn Rubin, 609 F.2d at 66-70 (Friendly, J., concurring))); see also United States v. Mehra, 824 F.2d 297, 300 (4th Cir.1987) (holding without elaboration in face of defendant's postmotive rule argument that "[a]dmission of the statement, even if erroneous, presents no grounds for reversal") (citing Fed. R. Crim. P. 52(a)); United States v. Dominguez, 604 F.2d 304, 310-11 (4th Cir.1979) (allowing prior consistent statement for rehabilitation of impeached witness); United States v. Weil, 561 F.2d 1109, 1111 & n.2 (4th Cir.1977) (assuming that the prior consistent statement was not made before the motive to fabricate existed).

Seventh Circuit: See United States v. Patterson, 23 F.3d 1239, 1247 (7th Cir.1994) (explaining that in order to admit prior consistent statements under Rule 801(d)(1)(B), "the witness must ... have made the statements before he had a motive to fabricate") (citing United States v. Fulford, 980 F.2d 1110, 1114 (7th Cir.1992)); United States v. Davis, 890 F.2d 1373, 1379 (7th Cir.1989) (to admit prior consistent statements as non-hearsay under Rule 801(d)(1)(B), "the statement must have been made before the declarant a motive to fabricate") (quoting United States v. Monzon, 869 F.2d 338, 342-43 (7th Cir.1989)); United States v. Harris, 761 F.2d 394, 398-400 (7th Cir.1985) ("[The postmotive] condition need not be met to admit into evidence prior consistent statements which are offered solely to rehabilitate a witness rather than as evidence of the matters asserted in those statements."); see also Thomas v. United States, 41 F.3d 1109, 1119 n.2 (7th Cir.1994) ("[The defendant did] not argue that he offered his prior consistent statement merely to rehabilitate his testimony on the stand, that is, not as substantive evidence. Therefore, [the court did] not address whether Fed. R. Evid. 801(d)(1)(B) would encompass the admissibility of his prior statement offered for that purpose."); United States v. Lewis, 954 F.2d 1386, 1391 (7th Cir.1992) (setting forth four criteria, including the premotive rule, that must be met in order to admit a prior consistent statement under Rule 801(d)(1)(B)).

Eighth Circuit: See United States v. White, 11 F.3d 1446, 1450-51 (8th Cir.1993) ("[T]o be admitted as substantive evidence under Rule 801(d)(1)(B), a prior consistent statement must have been made before the motive to fabricate came into existence.") (citing United States v. Bowman, 798 F.2d 333, 338 (8th Cir.1986)). The Bowman court had stated that "the better rule imposes a requirement that the consistent statements must come before the motive to fabricate existed"; however, the court noted, no prejudicial error was shown. Bowman, 798 F.2d at 338; see also United States v. Roy, 843 F.2d 305, 307 (8th Cir.1988) ("Bowman specifically held that prior consistent statements made after the existence of a motive to fabricate are admissible for rehabilitation ....") (citing Bowman, 798 F.2d at 338); United States v. Andrade, 788 F.2d 521, 532-33 (8th Cir.1986) (allowing F.B.I. agent's statements to "rehabilitate and support" agent following implied charge of fabrication). The Andrade court also noted that the Quinto holding was being questioned by the Second Circuit and cited Judge Friendly's concurrence in Rubin. See id.; see also United States v. Scholle, 553 F.2d 1109, 1121-22 (8th Cir.1977) (finding that the facts did not support defendant's argument that prior consistent statements were inadmissible because they were postmotive).

[FN101]. See, e.g., Patterson, 23 F.3d at 1247; Casoni, 950 F.2d at 904; Harris, 761 F.2d at 399; Quinto, 582 F.2d at 233-34.

[FN102]. See, e.g., Harris, 761 F.2d at 399; Quinto, 582 F.2d at 234- 35.

[FN103]. United States v. McPartlin, 595 F.2d 1321, 1351 (7th Cir.1979) (quoting 4 WEINSTEIN & BERGER, supra note 38, ¶ 801(d)(1)(B)[01], at 801-100 (1977)); see also White, 11 F.3d at 1450 (quoting same).

[FN104]. See, e.g., Casoni, 950 F.2d at 904-05; Harris, 761 F.2d at 399 (citing Fed. R. Evid. 402).

[FN105]. See, e.g., Harris, 761 F.2d at 400; United States v. Juarez, 549 F.2d 1113, 1114 (7th Cir.1977).

[FN106]. See, e.g., United States v. Parodi, 703 F.2d 768, 785 (4th Cir.1983).

[FN107]. See, e.g., United States v. Pierre, 781 F.2d 329, 333 (2d Cir.1986); Harris, 761 F.2d at 400.

[FN108]. See, e.g., Pierre, 781 F.2d at 333; Harris, 761 F.2d at 400; see also GRAHAM, supra note 70, § 6712, at 461-63.

[FN109]. See, e.g., Pierre, 781 F.2d at 333; Harris, 761 F.2d at 400; United States v. Rubin, 609 F.2d 51, 70 (2d Cir.1979); United States v. Baron, 602 F.2d 1215, 1252 (7th Cir.1979); see also United States v. Andrade, 788 F.2d 521, 533 (8th Cir.1986) ("[T]his rehabilitative use of prior consistent statements is in accord with the principle of completeness prompted by Rule 106."); supra note 86 and accompanying text. But see Ohlbaum, supra note 97, at 282 & n.140 ("[T]hese courts have relied on a tortured reading of the 'rule of completeness' ...."). Courts, too, have noted that this is "not a precise use of Rule 106." E.g., Pierre, 781 F.2d at 333.

[FN110]. **Fifth Circuit:** See United States v. Parry, 649 F.2d 292, 295-96 (5th Cir. Unit B June 1981) (postmotive prior consistent statement admissible for substantive purposes); United States v. Williams, 573 F.2d 284, 289 & n.3 (5th Cir.1978) (postmotive prior consistent statement admissible

for substantive purposes) (citing United States v. Gandy, 469 F.2d 1134 (5th Cir.1972)); see also United States v. Cifarelli, 589 F.2d 180, 185 (5th Cir.1979) (noting, but not examining, the issue).

Sixth Circuit: See United States v. Lawson, 872 F.2d 179, 182-83 (6th Cir.1989) ("[W]here there are other indicia of reliability surrounding a prior consistent statement that make it relevant to rebut a charge of recent fabrication or improper motive, then the fact that the statement was made after the alleged motive to falsify should not preclude its admissibility."); United States v. Hamilton, 689 F.2d 1262, 1273-74 (6th Cir.1982) (noting the Sixth Circuit's "desire for a more relaxed standard of admissibility under Rule 801(d)(1)(B) and [the court's] uneasiness with the Quinto decision") (citing United States v. LeBlanc, 612 F.2d 1012 (6th Cir.1980)).

Ninth Circuit: The Ninth Circuit has a somewhat convoluted history on this issue. Recent case law indicates, however, that the Ninth Circuit fits into this category. Cf. 4 WEINSTEIN & BERGER, supra note 38, ¶ 801(d)(1)(B)[01], at 801-196 to -198 (putting Ninth Circuit in premotive requirement category). In United States v. Miller, 874 F.2d 1255 (9th Cir.1989), the Ninth Circuit stated that the premotive "requirement should not be applied as a rigid per se rule barring all such prior consistent statements under Rule 801(d)(1)(B), without regard to other surrounding circumstances that may give them significant probative value." Id. at 1274. The Miller court reasoned that "a prior consistent statement offered for rehabilitation is either admissible under Rule 801(d)(1)(B) or it is not admissible at all." Id. at 1273. The Miller court also found this conclusion "consistent with the case law of this circuit." Id. at 1273 n.13; see also United States v. Payne, 944 F.2d 1458, 1470-72 (9th Cir.1991) (following Miller); cf. Breneman v. Kennecott Corp., 799 F.2d 470, 473 (9th Cir.1986) ("A prior consistent statement is admissible only if it was made before the witness had a motive to fabricate.") (citing United States v. De Coito, 764 F.2d 690, 694 (9th Cir.1985)); United States v. Rohrer, 708 F.2d 429, 433 (9th Cir.1983) ("A prior consistent statement is admissible to rehabilitate a witness only if made before the witness has a motive to fabricate.").

Tenth Circuit: United States v. Tome, 3 F.3d 342, 350 (10th Cir.1993) ("[T]he premotive rule is clearly too broad."), rev'd, 115 S.Ct. 696 (1995). For a discussion of the Tome case, see infra Part IV.

Eleventh Circuit: See United States v. Farmer, 923 F.2d 1557, 1567-68 (11th Cir.1991) ("[The] argument that ... prior consistent statements [are] inadmissible because they were not made before the motive to fabricate arose has repeatedly been rejected by this circuit."); United States v. Pendas-Martinez, 845 F.2d 938, 942 n.6 (11th Cir.1988) (same); United States v. Anderson, 782 F.2d 908, 915-16 (11th Cir.1986) (same); United States v. Parry, 649 F.2d 292, 296 (5th Cir. Unit B June 1981) (following Williams, 573 F.2d at 289 n.3, and Gandy, 469 F.2d at 1135).

D.C. Circuit: See United States v. Montague, 958 F.2d 1094, 1096-98 (D.C. Cir.1992) ("[The] prior consistent statement need not have preceded the appearance of the motive in order to render the statement non-hearsay under Rule 801(d)(1)(B).").

[FN111]. See, e.g., Montague, 958 F.2d at 1098; Miller, 874 F.2d at 1274; Hamilton, 689 F.2d at 1273.

[FN112]. See, e.g., Miller, 874 F.2d at 1274; Lawson, 872 F.2d at 182; Williams, 574 F.2d at 289 n.3 (following Gandy, 469 F.2d at 1135).

[FN113]. See, e.g., Montague, 958 F.2d at 1098.

[FN114]. See, e.g., Tome, 3 F.3d at 350; Montague, 958 F.2d at 1098; Miller, 874 F.2d at 1274; Lawson, 872 F.2d at 182-83.

[FN115]. See, e.g., Miller, 874 F.2d at 1274; Lawson, 872 F.2d at 182- 83.

[FN116]. 874 F.2d 1255 (9th Cir.1989).

[FN117]. See id. at 1272-74.

[FN118]. Id. at 1272 (citation omitted). The court based this conclusion on its reasoning that "[because] the requirement of no prior motive to fabricate is rooted in Rules 402 and 403, and not in the terms of Rule 801(d)(1)(B), there is no basis for limiting the requirement to cases involving prior statements under Rule 801(d)(1)(B)." Id.

[FN119]. Id. at 1273 (footnote omitted). For a further discussion of Miller, see supra notes 93-96 and accompanying text.

[FN120]. See Miller, 874 F.2d at 1274.

[FN121]. 115 S.Ct. 696 (1995).

[FN122]. Id. at 699.

[FN123]. Justice Kennedy wrote the majority opinion and was joined by Justices Stevens, Scalia, Souter, and Ginsburg in all but Part II.B, which Justice Scalia did not join. See id. at 699. Justice Breyer wrote the dissenting opinion and was joined by Chief Justice Rehnquist and Justices O'Connor and Thomas. See id. at 706 (Breyer, J., dissenting). Justice Scalia filed an opinion concurring in part and concurring in the judgment. See id. at 706 (Scalia, J., concurring in part and concurring in the judgment).

[FN124]. See id. at 705.

[FN125]. Id. at 700 (emphasis added) (citing Ellicott v. Pearl, 35 U.S. (10 Pet.) 412, 439 (1836) ("[W]here the testimony is assailed as a fabrication of a recent date ... in order to repel such imputation, proof of the antecedent declaration of the party may be admitted.")); see also People v. Singer, 89 N.E.2d 710, 712 (N.Y. 1949). The majority also cited the treatises of Professor McCormick and Dean Wigmore. See Tome, 115 S.Ct. at 700 (citing MCCORMICK ON EVIDENCE, supra note 31, § 49, at 105 (2d ed. 1972); 4 WIGMORE, supra note 13, § 1128, at 268).

[FN126]. See Tome, 115 S.Ct. at 701-02.

[FN127]. See id. at 701.

[FN128]. Id. The majority noted that the Advisory Committee used "the same phrase ... in its description of the 'traditiona[l]' common law of evidence." Id. (citing Fed. R. Evid. 801(d) advisory committee's note).

[FN129]. Id. The majority rephrased this reasoning: "the forms of impeachment within the Rule's coverage are the ones in which the temporal requirement makes the most sense." Id.

[FN130]. See id. ("A consistent statement that predates the motive is a square rebuttal of the charge that the testimony was contrived as a consequence of that motive.").

[FN131]. See id. ("[P]rior consistent statements carry little rebuttal force when most other types of impeachment are involved.") (citing MCCORMICK ON EVIDENCE, supra note 31, § 49, at 105 (2d ed. 1972); 4 WIGMORE, supra note 13, § 1131, at 293).

[FN132]. See id. ("[O]ut-of-court statements that postdate the alleged fabrication ... refute the charged fabrication in a less direct and forceful way.").

[FN133]. Id. at 702.

[FN134]. Recall that prior consistent statements have very high rebuttal force when used to rebut impeachment by charges of recent fabrication or improper influence or motive. See supra note 130 and accompanying text.

[FN135]. See Tome, 115 S.Ct. at 702 (explaining that if there is no temporal requirement "imbedded in" Rule 801(d)(1)(B), then there is "no sound reason not to admit consistent statements to rebut other forms of impeachment as well").

[FN136]. Id.

[FN137]. See id. The majority suggested that a rule that provides that "a witness' prior consistent statements are admissible whenever relevant to assess the witness's truthfulness or accuracy" would embody the Government's theory. Id.

[FN138]. Id. at 702 (citing Ohlbaum, supra note 97, at 245 ("Rule 801(d)(1)(B) employs the precise language--'rebut[ting] ... charge[s] ... of recent fabrication or improper influence or motive'--consistently used in the panoply of pre-1975 decisions.")); see also Ellicott v. Pearl, 35 U.S. (10 Pet.) 412, 439 (1836); Hanger v. United States, 398 F.2d 91, 104 (8th Cir.1968); People v. Singer, 89 N.E.2d 710, 711 (N.Y. 1949).

[FN139]. Tome, 115 S.Ct. at 702.

[FN140]. Id. at 704 ("This argument misconceives the design of the Rules' hearsay provisions.").

[FN141]. Id.

[FN142]. See id. at 705.

[FN143]. Id. The majority noted that postmotive prior consistent statements could gain admission under Federal Rule of Evidence 803(24) if the statements met Rule 803(24)'s requirements. See id. Rule 803(24) is known as the "catch-all exception." See generally GRAHAM, supra note 70, § 6775; see also infra note 205.

[FN144]. Tome, 115 S.Ct. at 702. Justice Scalia did not join in Part II.B of the Court's opinion because the majority's discussion "gives effect to those Notes" as displaying "the 'purpose' or 'inten[t]' of the draftsmen." Id. at 706 (Scalia, J., concurring in part and concurring in the judgment) (citations omitted).

[FN145]. Id. at 702 (quoting Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 165-66 n.9 (1988)).

[FN146]. Id.

[FN147]. Id. at 702-03.

[FN148]. Id. at 703.

[FN149]. Id. at 704.

[FN150]. Id. at 703-04 (quoting Fed. R. Evid. 801(d) advisory committee's note).

[FN151]. See supra note 110 and accompanying text.

[FN152]. See Tome, 115 S.Ct. at 700.

[FN153]. See id. at 706 (Breyer, J., dissenting).

[FN154]. Id. The dissent noted that the treatises discuss the issue "under the general heading of 'impeachment and support' (McCormick) or 'relevancy' (Wigmore), and not 'hearsay.'" Id. at 706-07.

[FN155]. Id. at 707.

[FN156]. Id.

[FN157]. See id. "'[I]f the witness's accuracy of memory is challenged, it seems clear common sense that a consistent statement made shortly after the event and before he had time to forget, should be received in support.'" Id. (quoting MCCORMICK ON EVIDENCE, supra note 31, § 49, at 105 n.88 (2d ed. 1972)) (alteration in original).

[FN158]. See id.

[FN159]. See id.

[FN160]. See id.

[FN161]. Id.

[FN162]. See id. The majority's "no sound reason" analysis is described supra notes 134-36 and accompanying text.

[FN163]. Tome, 115 S.Ct. at 707 (Breyer, J., dissenting) (citing 4 WEINSTEIN & BERGER, supra note 38, ¶ 801(d)(1)(B)[01], at 801-188 ("[A]s a practical matter, the jury in all probability would misunderstand or ignore a limiting instruction [with respect to the class of prior consistent statements covered by the Rule] anyway, so there is no good reason for giving one.")).

[FN164]. See id. at 707-08.

[FN165]. See id.

[FN166]. See id. at 707-08.

[FN167]. Id. at 708 (quoting Fed. R. Evid. 801(d) advisory committee's note).

[FN168]. Id. at 708.

[FN169]. Id. at 709.

[FN170]. See id. at 709-10.

[FN171]. Id. at 708.

[FN172]. Id.

[FN173]. See id. (citing United States v. Gandy, 469 F.2d 1134, 1135 (5th Cir.1972); Copes v. United States, 345 F.2d 723, 726 (D.C. Cir.1964); State v. George, 30 N.C. 324, 328 (1848)).

[FN174]. See id.

[FN175]. See id. at 709.

[FN176]. Id. (citing Frye v. United States, 293 F. 1013 (D.C. Cir.1923)).

[FN177]. Id. (quoting Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 588 (1993) (finding the Frye test "at odds with the 'liberal thrust' of the Federal Rules")).

[FN178]. Id.

[FN179]. Id. at 709-10.

[FN180]. See id. at 710.

[FN181]. See, e.g., Graham, supra note 1; Ohlbaum, supra note 97.

[FN182]. See 115 S.Ct. at 702.

[FN183]. See supra note 39 and accompanying text.

[FN184]. See supra note 41 and accompanying text.

[FN185]. See, e.g., United States v. Gandy, 469 F.2d 1134, 1134-35 (5th Cir.1972); Hanger v. United States, 398 F.2d 91, 104-05 (8th Cir.1968); Copes v. United States, 345 F.2d 723, 725-26 (D.C. Cir.1964); see also United States v. Grunewald, 233 F.2d 556, 566 (2d Cir.1956), rev'd on other grounds, 353 U.S. 391 (1957).

[FN186]. See 115 S.Ct. at 702.

[FN187]. See supra notes 110-20 and accompanying text.

[FN188]. See supra notes 100-09 and accompanying text. The Ninth Circuit reasoned that prior consistent statements are admissible as substantive evidence or not at all. See supra notes 93-95, 110, 116-20 and accompanying text. However, the Ninth Circuit allowed postmotive prior consistent statements for substantive use in certain situations. See United States v. Miller, 874 F.2d 1255, 1274 (9th Cir.1989).

[FN189]. 115 S.Ct. at 708 (Breyer, J., dissenting).

[FN190]. Id.

[FN191]. See id.

[FN192]. See supra Part II.

[FN193]. See infra notes 195-99 and accompanying text.

[FN194]. United States v. Grunewald, 233 F.2d 556, 566 (2d Cir.1956), rev'd on other grounds, 353 U.S. 391 (1957); see supra note 43 and accompanying text.

[FN195]. 717 F.2d 135 (4th Cir.1983).

[FN196]. See id. at 138.

[FN197]. See id.

[FN198]. Id. at 139.

[FN199]. Id. (citations omitted).

[FN200]. See supra notes 93-96 and accompanying text.

[FN201]. Respondent's Brief at 45 n.24, Tome (No. 93-6892).

[FN202]. 115 S.Ct. at 705.

[FN203]. See supra note 109 and accompanying text.

[FN204]. See supra note 109 and accompanying text.

[FN205]. Rule 803(24) provides that:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Fed. R. Evid. 803(24).

[FN206]. See 115 S.Ct. at 705; see also United States v. Obayagbona, 627 F.Supp. 329, 340-41 (E.D.N.Y. 1985); United States v. Iaconetti, 406 F.Supp. 554 (E.D.N.Y.), aff'd, 540 F.2d 574 (2d Cir.1976); Arizona v. Huerta, 826 P.2d 1210, 1212-14 (Ariz. Ct. App. 1991); Arizona v. Thompson, 805 P.2d 1051, 1053-55 (Ariz. Ct. App. 1990); see generally Arthur H. Travers, Jr., Prior Consistent Statements, 57 NEB. L. REV. 974, 998-1002 (1978).

[FN207]. See generally GRAHAM, supra note 70, § 6775.

[FN208]. See id. § 6775, at 744-47. Rule 803(24)'s other requirements are similarly unnecessary and overburdensome in this situation.

[FN209]. 41 L.R.A. (N.S.), supra note 1, at 858.

END OF DOCUMENT

FORDHAM
University School of Law

Lincoln Center, 140 West 62nd Street, New York, NY 10023-7485

Daniel J. Capra
Philip Reed Professor of Law

Phone: 212-636-6855
e-mail:dcapra@law.fordham.edu
Fax: 212-636-6899

Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Possible Amendment to Evidence Rule 806
Date: November 1, 2003

At its Fall 2002 meeting the Committee directed the Reporter to prepare a memorandum on the advisability of amending Evidence Rule 806, the Rule permitting impeachment of hearsay declarants under certain conditions.

Rule 806 provides that if a hearsay statement is admitted under a hearsay exception or exemption, the opponent as a general rule may impeach the hearsay declarant to the same extent as if the declarant were testifying in court. The courts are in dispute, however, about whether a hearsay declarant's character for truthfulness may be impeached with prior bad acts under Rule 806. If the declarant were to testify at trial, he could be asked about pertinent bad acts, but no evidence of those acts could be proffered—Rule 608(b) prohibits extrinsic evidence of bad acts offered to impeach the witness's character for truthfulness. For hearsay declarants, however, ordinarily the only way to impeach with bad acts is to proffer extrinsic evidence, because the declarant is not on the stand to be asked about the acts. Rule 806 does not explicitly say that extrinsic evidence of bad acts is allowed. As a result, some courts prohibit bad acts impeachment of hearsay declarants, and some permit it.

Two further problems have arisen under the Rule, though they have not presented the same degree of conflict in the courts. Thus, these problems are less serious, but might be addressed if the Rule is to be amended on other grounds. First, the Rule literally read will mean that under certain conditions a criminal defendant can be impeached with prior convictions even though he never takes the stand. This problem can arise in a multi-defendant case where one defendant's hearsay statement is offered to implicate a co-defendant, and the co-defendant responds with evidence of the defendant's prior convictions or bad acts. A second, different problem could arise because the Rule refers to agency-admissions as equivalent to hearsay in the first sentence of the Rule, but not thereafter.

This memorandum is divided into six parts. Part One sets forth the Rule, the Committee Note, and general commentary about the Rule. Part Two discusses the conflict in the case law over whether a hearsay declarant may be impeached with extrinsic evidence of bad acts. Part Three discusses the lesser problems of impeaching non-testifying criminal defendants and treatment of agency-admissions. Part Four sets forth the very limited state law variation. Part Five discusses the benefits and disadvantages of an amendment. Part Six sets forth a model for amending the Rule to provide specifically that extrinsic evidence of prior bad acts are admissible to impeach a hearsay declarant's character for truthfulness, subject to Rule 403; variations on that model address the further problems of impeachment of non-testifying criminal defendants and the treatment of agency admissions in the Rule.

It is important to note that this memorandum does not necessarily advocate an amendment to Rule 806. It is provided to apprise the Committee of existing problems under the Rule. It is for the Committee to determine whether those problems are sufficiently grave to justify the steep costs of an amendment.

Attached to this memorandum is a law review article by Professor Cordray. The article "concludes that there are serious deficiencies in Rule 806 as currently written and applied and offers a proposed revision of Rule 806 that will better enable the rule to serve both its own purposes and those of the impeachment rules with which it is jointly applied."

I. Rule, Note, and General Commentary

Rule 806 currently reads as follows:

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in rule 801(d)(2) (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

The original Committee Note to the Rule reads as follows:

The declarant of a hearsay statement which is admitted in evidence is in effect a witness. His credibility should in fairness be subject to impeachment and support as though he had in fact testified. See Rules 608 and 609. There are however, some special aspects of the impeaching of a hearsay declarant which require consideration. These special aspects center upon impeachment by inconsistent statement, arise from factual differences which exist between the use of hearsay and an actual witness and also between various kinds of hearsay, and involve the question of applying to declarants the general rule disallowing evidence of an inconsistent statement to impeach a witness unless he is afforded an opportunity to deny or explain. See Rule 613(b).

The principal difference between using hearsay and an actual witness is that the inconsistent statement will in the case of the witness almost inevitably of necessity in the nature of things be a *prior* statement, which it is entirely possible and feasible to call to his attention, while in the case of hearsay the inconsistent statement may well be a *subsequent* one, which practically precludes calling it to the attention of the declarant. The result of insisting upon observation of this impossible requirement in the hearsay situation is to deny the opponent, already barred from cross-examination, any benefit of this important technique of impeachment. The writers favor allowing the subsequent statement. McCormick § 37, p. 69; 3 Wigmore § 1033. The cases, however, are divided. Cases allowing the impeachment include People v. Collup, 27 Cal. 2d 829, 167 P.2d 714 (1946); People v. Rosoto, 58 Cal. 2d 304, 23 Cal. Rptr. 779, 373 P.2d 867 (1962); Carver v. United States, 164 U.S. 694, 17 S. Ct. 228, 41 L. Ed. 602 (1897). Contra, Mattox v. United States, 156 U.S. 237, 15 S. Ct. 337, 39 L. Ed. 409 (1895); People v. Hines, 284 N.Y. 93, 29 N.E.2d 483 (1940). The force of *Mattox*, where the hearsay was the former testimony of a deceased witness and the denial of

use of a subsequent inconsistent statement was upheld, is much diminished by *Carver*, where the hearsay was a dying declaration and denial of use of a subsequent inconsistent statement resulted in reversal. The difference in the particular brand of hearsay seems unimportant when the inconsistent statement is a *subsequent* one. True, the opponent is not totally deprived of crossexamination when the hearsay is former testimony or a deposition but he is deprived of crossexamining on the statement or along lines suggested by it. Mr. Justice Shiras, with two justices joining him, dissented vigorously in *Mattox*.

When the impeaching statement was made *prior* to the hearsay statement, differences in the kinds of hearsay appear which arguably may justify differences in treatment. If the hearsay consisted of a simple statement by the witness, e.g., a dying declaration or a declaration against interest, the feasibility of affording him an opportunity to deny or explain encounters the same practical impossibility as where the statement is a subsequent one, just discussed, although here the impossibility arises from the total absence of anything resembling a hearing at which the matter could be put to him. The courts by a large majority have ruled in favor of allowing the statement to be used under these circumstances. McCormick § 37, p. 69; 3 Wigmore § 1033. If, however, the hearsay consists of former testimony or a deposition, the possibility of calling the prior statement to the attention of the witness or deponent is not ruled out, since the opportunity to cross-examine was available. It might thus be concluded that with former testimony or depositions the conventional foundation should be insisted upon. Most of the cases involve depositions, and Wigmore describes them as divided. 3 Wigmore § 1031. Deposition procedures at best are cumbersome and expensive, and to require the laying of the foundation may impose an undue burden. Under the federal practice, there is no way of knowing with certainty at the time of taking a deposition whether it is merely for discovery or will ultimately end up in evidence. With respect to both former testimony and depositions the possibility exists that knowledge of the statement might not be acquired until after the time of the cross-examination. Moreover, the expanded admissibility of former testimony and depositions under Rule 804(b)(1) calls for a correspondingly expanded approach to impeachment. The rule dispenses with the requirement in all hearsay situations, which is readily administered and best calculated to lead to fair results.

Notice should be taken that Rule 26(f) of the Federal Rules of Civil Procedure, as originally submitted by the Advisory Committee, ended with the following: "... and, without having first called them to the deponent's attention, may show statements contradictory thereto made at any time by the deponent." This language did not appear in the rule as promulgated in December, 1937. See 4 Moore's Federal Practice §§ 26.01[9], 26.35 (2d ed. 1967). In 1951, Nebraska adopted a provision strongly resembling the one stricken from the federal rule: "Any party may impeach any adverse deponent by self-contradiction without having laid foundation for such impeachment at the time such deposition was taken." R.S. Neb. § 251267.07.

For similar provisions, see Uniform Rule 65; California Evidence Code § 1202;

Kansas Code of Civil Procedure § 60462; New Jersey Evidence Rule 65.

The provision for cross-examination of a declarant upon his hearsay statement is a corollary of general principles of cross-examination. A similar provision is found in California Evidence Code § 1203.

General Commentary

If a hearsay statement is introduced into evidence because it qualifies as an exception to the hearsay rule, it is being introduced for its truth. This makes the credibility of the hearsay declarant important. The hearsay declarant's statements are the equivalent of trial testimony. For this reason, Rule 806 provides that the credibility of the hearsay declarant generally can be attacked and supported just as if the declarant is on the stand testifying. In other words, the ways in which a witness can be impeached and rehabilitated should also be the ways in which a hearsay declarant can be impeached and rehabilitated.

If a declarant's statement is not being offered for its truth, then it is not hearsay, and impeachment of the declarant is not permitted under Rule 806. This makes sense, because if the statement is not offered for its truth, there is no concern about the credibility of the declarant, and so there is no need for evidence on that subject.

The Rule makes a special provision for impeachment of a hearsay declarant with inconsistent statements. Two hypothetical situations can help to illustrate the different posture in which impeachment of a witness testifying at trial and impeachment of a hearsay declarant often take place. If a witness *W* is available to testify at trial, he takes the stand and tells his story. Under Rule 613, no foundation need be laid prior to the introduction of *W*'s inconsistent statement, but at some point *W* must be given a chance to explain. Since *W* is present at trial, any statement that is introduced to impeach will have been made prior to trial.

If, however, *W* is unavailable at trial or is not called to testify, and in place of live testimony a statement by *W* is introduced because it satisfies a hearsay exception or exemption, e.g., it is a declaration against interest or admission by an agent, Rule 806 provides that *W* may still be impeached. Impeachment occurs when a statement inconsistent with the hearsay declaration is introduced. This statement may well have been made *after* the hearsay statement that qualifies as an exception or exemption. Circumstances make it impossible to require that a foundation be laid when the statement qualifying as an exception or exemption is made, because the party wishing to impeach is often not present, and even if present, may have no idea that a trial will result and that a future inconsistent statement will be made.

It would have been possible for the drafters of the Rule to distinguish situations outside of

a formal judicial proceeding or deposition from proceedings where a witness is sworn and a formal statement is made and recorded, and to distinguish statements made prior to a judicial proceeding (including deposition) from those made afterwards. When a deposition is taken, for instance, it would be possible to require that any party having knowledge of a statement made prior to deposing the witness and inconsistent with the witness' statement must give the witness a chance to explain the inconsistency at the deposition upon penalty of being unable to demonstrate the inconsistency at trial if the person who was deposed is unable to appear.

The Advisory Committee rejected drawing this line between informal and formal statements on the ground that deposition procedures are cumbersome and expensive enough and to require the laying of the foundation might impose undue burdens. Moreover, the Committee appears to have concluded that a distinction based on the timing of inconsistent statements was more complex than beneficial. The Committee was not inclined to adopt a general Rule requiring a foundation with an exception for special circumstances. Accordingly, Rule 806 makes a special provision for impeachment with inconsistent statements or conduct–it dispenses with the foundation requirement that applies to such impeachment with trial witnesses. No opportunity to explain or deny the statement need be provided to a hearsay declarant.

The goal of Rule 806 is straightforward: to allow an adversary to impeach a hearsay declarant as if the declarant were testifying at trial. The problem with the Rule is one of execution. Many of the rules and methods governing impeachment of trial witnesses are dependent on the presence of the witness who is being impeached. Where that witness is a hearsay declarant, some adjustments must be made. It seems fair to state that Rule 806, as drafted, has not done a very good job of making all of the necessary adjustments. The Committee is directed to the attached article by Professor Cordray for a full treatment of the problems encountered by the Rule's spotty adjustment of the impeachment rules to impeachment of hearsay declarants. This memo focuses on the three major problems that can arise under the Rule.

II. Impeachment With Prior Bad Acts and the Extrinsic Evidence Limitation

Rule 608(b) restricts impeachment to questions addressed to a witness on the stand and limits the examiner to the witness' answers; that Rule precludes extrinsic evidence of specific acts offered to impeach the witness' character for truthfulness. It can therefore be argued that extrinsic evidence of specific act of a hearsay declarant who is not present to testify is equally impermissible. In one sense, this would mean that impeachment of hearsay declarants would be subject to the same rule as impeachment of trial witnesses. On closer inspection, however, there is no equality of impeachment if the Rule 608(b) limitation applies to impeachment of hearsay declarants. If the attacking party cannot impeach the declarant with specific instances of conduct, she is clearly worse off than she would have been if her opponent had called the declarant to testify. This is because if the witness were testifying, the attacking party would at least be allowed to *ask* the witness about the prior bad act; she would have to take the witness's answer, but at least she could ask. In contrast, with a hearsay declaration, there is ordinarily nobody who can be asked about the witness's prior act of misconduct. The attacking party may luck out if there is a witness who testifies to the hearsay statement and that witness also happens to know something about the alleged bad act. But this would be only by chance. See *United States v. Washington,* 263 F.Supp.2d 413, 423 n.5 (D.Conn. 2003) ("Although . . . the tension between Rules 806 and 608(b) is somewhat alleviated where defense counsel can cross-examine the witness to the hearsay statement about the declarant's misconduct as it bears on the declarant's character for truthfulness or untruthfulness, no such consolation prize exists for defendants such as Washington, against whom hearsay statements are admitted into evidence through a witness who has never had any contact with or any knowledge of the declarant--here, an administrator who oversaw the 911 system in the city of New Haven.").

Professor Cordray points out another problem with imposing an extrinsic evidence limitation on impeachment of hearsay declarants: it could give rise to abusive practice:

> In addition, if Rule 806 is applied to enforce the prohibition on extrinsic evidence, parties might be encouraged to offer hearsay evidence rather than live testimony. For example, if a party felt that a witness was vulnerable to attack under Rule 608(b), that party might attempt to insulate the witness from this form of impeachment by offering his out-of-court statements, rather than calling him to testify. If, however, the attacking party were allowed to impeach a nontestifying declarant with extrinsic evidence of untruthful conduct, the incentive to use hearsay evidence would be removed.

Cordray, *Evidence Rule 806 and the Problem of the Nontestifying Declarant*, 56 OHIO STATE L.J. 495, 526 (1995).

Conflict in the Courts

Rule 806 does not explicitly state whether the extrinsic evidence rule is applicable to impeachment of a hearsay declarant's character for truthfulness. The courts are in apparent conflict

on the question.

The Second Circuit has taken the view that a hearsay declarant may be impeached with extrinsic evidence of bad acts, so long as the declarant could have been asked about the bad acts on cross-examination had he testified. In *United States v. Friedman,* 854 F.2d 535 (2d Cir. 1988), the defendant was on trial for racketeering, resulting from kickbacks in the New York City Parking Bureau. The government admitted numerous declarations of Donald Manes, a co-conspirator. The defendant in response wanted to admit evidence that Manes had lied to hospital personnel and pretended that he had been assaulted when he had actually attempted suicide. The extrinsic evidence was a videotape of Manes's own account of his attempted suicide and fabrication of an assault. The trial judge excluded the evidence. The Court on appeal observed that the extrinsic evidence offered by the defendant would not have been barred by Rule 608(b), because Manes was unavailable and could not be cross-examined. In such cases, "resort to extrinsic evidence may be the only means of presenting such evidence to the jury." In this case, however, the Court found no error because the excluded evidence was not very probative of Manes's truthfulness, and it would have injected evidence of Manes' subsequent suicide into the case. As such, the extrinsic evidence was properly excluded under Rule 403. Thus, the *Friedman* Court took the position that the absolute exclusion of extrinsic evidence found in Rule 608(b) is not applicable when an adversary proffers bad act evidence to impeach a hearsay declarant's character for truthfulness. Rather, admissibility is controlled by Rule 403. *See also United States v. Washington,* 263 F.Supp.2d 413 (D.Conn. 2003) (treating *Friedman* as a holding, and ruling that extrinsic evidence of a hearsay declarant's prior bad act should have been admitted).

The D.C. Circuit in *United States v. White*, 116 F.3d 903 (D.C. Cir. 1997), came to a different result. In *White*, an undercover officer testified about a deceased declarant's hearsay statements. The defendant sought to ask the officer whether the declarant had ever made false statements on an employment application or had ever violated court orders. The trial court precluded the cross-examination, and the Court of Appeals affirmed. The Court declared that the extrinsic evidence limitation of Rule 608(b) applied to impeachment of hearsay declarants with prior bad acts under Rule 806. Because the witness did not know anything about the declarant's bad acts, the defendants would have had to present extrinsic evidence for the impeachment to be probative. The Court found no abuse of discretion in the ruling that cross-examination under these circumstances would be of little utility.

The *White* Court's ruling – that the Rule 608(b) preclusion of extrinsic evidence applied to bad acts offered to impeach a hearsay declarant – was not heavy on analysis. But the Third Circuit, in *United States v. Saada*, 212 F.3d 210, 221-22 (3d Cir. 2000), engaged in an extensive analysis of the Rule to conclude that extrinsic evidence may never be admitted to prove a bad act offered to impeach a hearsay declarant's character for truthfulness. *Saada* was a case in which the government impeached a hearsay declarant whose statement was offered by the defense. The hearsay was admitted on the defendant's behalf under the excited utterance exception, and it appeared to indicate that a flooded warehouse was caused by accident rather than as an attempt to defraud an insurance company. The declarant was a judge. To attack the declarant's credibility, the government asked the

court to take judicial notice of two New Jersey Supreme Court decisions ordering the declarant's removal from the bench and disbarment for unethical conduct, as well as the factual details supporting those decisions, which reflected his unethical conduct. The defendant objected, arguing that a hearsay declarant could not be impeached with extrinsic evidence of bad acts. The trial judge took judicial notice of the bad acts. The *Saada* Court found this to be error, reasoning that the language and structure of Rule 806 do not grant an exception to the preclusion of extrinsic evidence established in Rule 608(b). The Court's analysis is as follows:

> Appellants argue that if Yaccarino had testified, Rule 608(b) would have prevented the government from introducing extrinsic evidence of his unethical conduct, and would have limited the government to questioning him about that conduct on cross-examination. Thus, appellants argue, judicial notice of the evidence constituted improper impeachment of a hearsay declarant. The government correctly avers that it would have been allowed to inquire into Yaccarino's misconduct on cross-examination if he had testified at trial because Rule 806 allows a party against whom a hearsay statement is admitted to call the declarant as a witness and "to examine the declarant on the statement as if under cross-examination." Because Yaccarino's death foreclosed eliciting the facts of his misconduct in this manner, the government argues that it was entitled to introduce extrinsic evidence of his misconduct. In effect, the government argues that, read in concert, Rules 806 and 608(b) permit the introduction of extrinsic evidence of misconduct when a hearsay declarant is unavailable to testify.
>
> At the outset, we note that the issue of whether Rule 806 modifies Rule 608(b)'s ban on extrinsic evidence is a matter of first impression in this circuit, and a matter which the majority of our sister courts likewise has not yet addressed. Indeed, there are only two circuit court opinions construing the effect of Rule 806's intersection with Rule 608(b). Those cases are themselves in conflict. In *United States v. Friedman*, 854 F.2d 535 (2d Cir. 1988), the Second Circuit held that the trial court properly excluded impeachment evidence that a hearsay declarant had lied to the police because that evidence was not probative of the truthfulness of the hearsay statement there at issue. In doing so, however, the court suggested that extrinsic evidence of such misconduct would have been admissible had the misconduct been probative of truthfulness: "[Rule 608(b)] limits such evidence of 'specific instances' to cross-examination. Rule 806 applies, of course, when the declarant has not testified and there has by definition been no cross-examination, and resort to extrinsic evidence may be the only means of presenting such evidence to the jury." The Second Circuit's position in *Friedman* conflicts with the District of Columbia Circuit's more recent statement in *United States v. White*, 116 F.3d 903 (D.C. Cir. 1997). In that case, the district court had allowed defense counsel to cross-examine a police officer about a hearsay declarant's drug use, drug dealing, and prior convictions, but had not allowed defense counsel to impeach the declarant's credibility by asking the officer whether the declarant had ever made false statements on an employment form or disobeyed a court order. The declarant was unavailable because he had been murdered. The court of appeals concluded that defense counsel should have been allowed to cross-examine the officer about the declarant's making false statements and

disobeying a court order. In doing so, the court observed that defense counsel "could not have made reference to any extrinsic proof of those acts" during cross-examination. Thus, in contrast to the Second Circuit in *Friedman*, the D.C. Circuit in *White* took the position that the ban on extrinsic evidence of misconduct applies in the context of hearsay declarants, even when those declarants are unavailable to testify.

We agree with the approach taken by the court in *White*, and conclude that Rule 806 does not modify Rule 608(b)'s ban on extrinsic evidence of prior bad acts in the context of hearsay declarants, even when those declarants are unavailable to testify. We perceive our holding to be dictated by the plain -- albeit imperfectly meshed -- language of Rules 806 and 608(b). As discussed, Rule 806 allows impeachment of a hearsay declarant only to the extent that impeachment would be permissible had the declarant testified as a witness, which, in the case of specific instances of misconduct, is limited to cross-examination under Rule 608(b). The asserted basis for declining to adhere to the clear thrust of these rules is that the only avenue for using information of prior bad acts to impeach the credibility of a witness -- cross-examination -- is closed if the hearsay declarant cannot be called to testify. We are unpersuaded by this rationale. First, the unavailability of the declarant will not always foreclose using prior misconduct as an impeachment tool because the witness testifying to the hearsay statement may be questioned about the declarant's misconduct -- without reference to extrinsic evidence thereof -- on cross-examination concerning knowledge of the declarant's character for truthfulness or untruthfulness. And, even if a hearsay declarant's credibility may not be impeached with evidence of prior misconduct, other avenues for impeaching the hearsay statement remain open. For example, the credibility of the hearsay declarant -- and indeed that of the witness testifying to the hearsay statement -- may be impeached with opinion and reputation evidence of character under Rule 608(a), evidence of criminal convictions under Rule 609, and evidence of prior inconsistent statements under Rule 613. The unavailability of one form of impeachment, under a specific set of circumstances, does not justify overriding the plain language of the Rules of Evidence.

The *Saada* Court relied on the special treatment given in Rule 806 to inconsistent statements, as creating an inference of congressional refusal to give similar dispensation to bad act impeachment:

We also read the language of Rule 806 implicitly to reject the asserted rationale for lifting the ban on extrinsic evidence. Rule 806 makes no allowance for the unavailability of a hearsay declarant in the context of impeachment by specific instances of misconduct, but makes such an allowance in the context of impeachment by prior inconsistent statements. Rule 613 requires that a witness be given the opportunity to admit or deny a prior inconsistent statement before extrinsic evidence of that statement may be introduced. If a hearsay declarant does not testify, however, this requirement will not usually be met. Rule 806 cures any problem over the admissibility of a non-testifying declarant's prior inconsistent statement by providing that evidence of the statement "is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain." See generally Fed. R. Evid. 806 advisory committee's notes. The fact that Rule 806 does not provide a

comparable allowance for the unavailability of a hearsay declarant in the context of Rule 608(b)'s ban on extrinsic evidence indicates that the latter's ban on extrinsic evidence applies with equal force in the context of hearsay declarants.

The *Saada* Court noted the negative consequences of its construction of Rule 806:

> In reaching this conclusion, we are mindful of its consequences. Upholding the ban on extrinsic evidence in the case of a hearsay declarant may require the party against whom the hearsay statement was admitted to call the declarant to testify, even though it was the party's adversary who adduced the statement requiring impeachment in the first place. And, as here, where the declarant is unavailable to testify, the ban prevents using evidence of prior misconduct as a form of impeachment, unless the witness testifying to the hearsay has knowledge of the declarant's misconduct. See generally 4 Mueller & Kirkpatrick, Federal Evidence § 511 at 894 n.7 (2d ed. 1994); Margaret Meriwether Cordray, Evidence Rule 806 and the Problem of Impeaching the Nontestifying Declarant, 56 Ohio St. L.J. 495, 525-530 (1995). Nevertheless, these possible drawbacks may not override the language of Rules 806 and 608(b), and do not outweigh the reason for Rule 608(b)'s ban on extrinsic evidence in the first place, which is "to avoid minitrials on wholly collateral matters which tend to distract and confuse the jury . . . and to prevent unfair surprise arising from false allegations of improper conduct." Carter v. Hewitt, 617 F.2d 961, 971 (3d Cir. 1980).

The arguable problem with the reasoning in *Saada* is that it is inconsistent with the *intent* of Rule 806, which is to give the opponent of the hearsay the same leeway for impeachment as it would have if the declarant testified at trial. Under *Saada*, the opponent of the hearsay is put in a worse position with respect to bad acts of the hearsay declarant. The opponent could at least raise the bad acts on cross-examination if the declarant were to testify, whereas if the statement is introduced as hearsay it is unlikely that the jury will hear about the hearsay declarant's bad acts.

In sum, there is a clear conflict in the courts as to the relationship between Rules 806 and 608(b). Two circuits hold that Rule 608(b) governs impeachment of hearsay declarants as well as trial witnesses, while one circuit finds an implicit exception in Rule 806 to the extrinsic evidence requirement of Rule 608(b).

III. Other Problems In Applying Rule 806

The admissibility of extrinsic evidence of bad acts is the major problem that the Committee considered in its decision to direct the Reporter to write a memo on the advisability of amending Rule 806. However, two lesser problems have been raised in the application of the Rule. The first, raised in Professor Cordray's article, is the possibility that a non-testifying criminal defendant in a multi-defendant case could have his credibility impeached even though he never testifies. The second is a technical problem in the Rule with respect to impeaching declarants whose statements are admissible as agency admissions under Rule 801(d)(2). These problems will be analyzed in sequence in this section.

A. Impeachment of Non-Testifying Criminal Defendants

It is standard trial practice for a defense lawyer and defendant, in deciding whether to testify, to consider the consequences of impeachment. Criminal defendants who exercise their constitutional right not to testify often do so in order to keep prejudicial information about their background away from the jury, where that information would be admissible to impeach the defendant's character for truthfulness. As Professor Cordray notes, however, Rule 806 by its terms creates a situation in which a criminal defendant might be impeached even though he never takes the stand.

The problem is illustrated by what happened to the defendant Finch in *United States v. Bovain,* 708 F.2d 606, 613-4 (11th Cir. 1983). Seven defendants were tried jointly for conspiracy. The government called Nichols, a coconspirator cooperating with the government. Nichols testified about hearsay statements that Finch, a codefendant, had made about Rickett, another codefendant. These statements were admissible under the coconspirator exemption from the hearsay rule, Rule 801(d)(2)(E). Rickett then impeached Finch's credibility as a hearsay declarant by introducing Finch's prior convictions for theft and narcotics. Finch was thus impeached even though he never testified at trial. The Court of Appeals found this permissible. It noted as follows:

> [T]he result reached by the district court is straightforward and logical. Because Finch is a hearsay declarant, his testimony may be treated like that of a witness (Rule 806), and as a witness, he can be impeached (Rules 608, 609). Therefore, the certified records of Finch's prior convictions were admissible for impeachment purposes (Rule 609).
>
> The district court was careful to instruct the jury that evidence of Finch's convictions could be used to discredit the accuracy of his out-of-court statements, but that the prior crimes could not be considered as evidence of Finch's guilt on the charges contained in the indictment. In a conspiracy case, the trial judge has the difficult task of balancing the countervailing interests of all the codefendants. Decisions on the admissibility of evidence are committed to the sound discretion of the district court, and will not be overturned on appeal absent a clear abuse of that discretion. This situation was unusual in that both Rickett and Finch were defendants, but neither testified, and one sought to impeach the other during

> cross-examination of a third party. The trial judge evaluated the rights and interests at stake from many perspectives and ruled that the probative value of the evidence outweighed the risk of prejudice to Finch. Based on the applicable policy considerations and rules, the admission of the prior crimes evidence did not constitute an abuse of the court's discretion.

Professor Cordray considers the result in *Bovain* to be problematic because "the defendant who has done nothing to place his credibility in issue – indeed, has actively sought to keep it from becoming an issue – loses the protection that silence normally affords him." She argues that this result is contrary to the policy of Rule 609, which is based on the principle that a criminal defendant should receive protection from prior convictions unless he "opens the door" by testifying and possibly trying to mislead the jury that he has led a "blameless life." She concludes as follows:

> For these reasons, Rule 806 should be amended to prevent introduction of a criminal defendant's prior convictions in these circumstances. More specifically, Rule 806 should be amended to provide that, if the declarant is the accused, then the declarant may be impeached with prior convictions only if he has affirmatively placed his credibility in issue.

With reference to placing credibility "in issue", Professor Cordray contrasts *Bovain* (where that did not occur), with *United States v. Lawson,* 608 F.2d 1129 (6th Cir. 1979). Lawson was charged with counterfeiting. Defense counsel cross-examined a government witness, who was a secret service agent, to bring out the fact that Lawson had consistently denied any involvement; counsel also introduced a written statement in which Lawson denied all complicity in the counterfeit activities. In response, the government introduced Lawson's conviction that would have been admissible under Rule 609 had he testified. The Court found no error: "By putting these hearsay statements before the jury his counsel made Lawson's credibility an issue in the case the same as if Lawson had made the statements from the witness stand." Therefore Rule 806 was applicable, and Lawson could be impeached as if he testified. Thus, by using the limitation– "only if he has affirmatively placed his credibility in issue"– Professor Cordray would distinguish cases like *Bovain*, where impeachment of the defendant/hearsay declarant would not be permitted, from cases like *Lawson* where under Rule 806 the defendant could be impeached as if he testified.

It is for the Committee to determine whether the problem raised by Professor Cordray is serious enough to be addressed in an amendment. *Bovain* appears to be the only reported case in which a defendant was impeached under Rule 806 even though he never testified and never tried to bring in any of his own exculpatory statements. In other cases, such as *Lawson* and *United States v. Noble,* 754 F.2d 1324 (7th Cir. 1985), the defendant's hearsay statements were admitted in the course of defense counsel's cross-examination of a government witness, and so the defendant was properly impeached as if he had testified at trial.

In *United States v. Robinson,* 783 F.2d 64, 67-8 (7th Cir. 1986), a situation arose similar to *Bovain*, but the trial court chose to solve it by refusing to allow the defendant to impeach the credibility of the codefendant whose hearsay statement was admitted against him. The Court found

no error, holding that the trial court has discretion to use "the *Bovain* solution" or to refuse impeachment entirely. The amendment proposed by Professor Cordray would in effect preclude the *Bovain* solution and would mandate the result in *Robinson*, i.e., impeachment of the codefendant hearsay declarant would not be permitted where the declarant did nothing to introduce the statement.

It should be noted that the rights of *two* defendants are involved when the hearsay statement of one codefendant is admitted against another. The hearsay declarant has a complaint that he should not be impeached because he never chose to testify and did nothing to interject his credibility into the trial. But the defendant against whom the hearsay is admitted also has a complaint that if he is not permitted to impeach the declarant's credibility, then he is deprived of evidence that is important to his defense. There is a constitutional underpinning to the rights of both defendants. The impeachment of the hearsay declarant/defendant is in some tension with the defendant's constitutional right to refuse to testify. On the other hand, the preclusion of impeachment is in tension with the other defendant's constitutional right to confront the witnesses against him. See *United States v. Burton*, 937 F.2d 324, 329 (7th Cir. 1991) (declaring that the Confrontation Clause can be violated if the defendant is prohibited from impeaching a hearsay declarant, but finding no plain error in prohibiting impeachment in this case). Given the fact that important rights are at stake on both sides, the Committee might conclude that it is better to leave the issue to the discretion of district judges (as the courts did in both *Bovain* and *Robinson*) rather than to codify a result that would always favor one defendant over the other.

B. Rule 806 and Agency-Admissions

The Senate proposed adding the language "or a statement defined in Rule 801(d)(2(C), (D), or (E)" to the Supreme Court draft of Rule 806 as a recognition that if a hearsay statement is admitted as an agency-based admission (including coconspiracy), it has the same effect as if it is admitted under a hearsay exception: the hearsay statement is admitted for its truth, as if the declarant were testifying at trial. Accordingly, if a hearsay statement is admitted as an agency-admission, the credibility of the declarant should be treated the same as any other hearsay declarant whose statement is admitted; under Rule 806, the credibility of such a declarant should be subject to attack, and if attacked then supported, as if the declarant were testifying at trial.

The Senate Report on this addition reads as follows:

> Rule 906 [*sic*], as passed by the House and as proposed by the Supreme Court provides that whenever a hearsay statement is admitted, the credibility of the declarant of the statement may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if the declarant had testified as a witness. Rule 801 defines what is a hearsay statement. While statements by a person authorized by a party-opponent to make a statement concerning the subject, by the party-opponent's agent or by a

coconspirator of a party — see Rule 801(d)(2)(C), (D), and (E) — are traditionally defined as exceptions to the hearsay rule, Rule 801 defines such admission by a party-opponent as statements which are not hearsay. Consequently, Rule 806 by referring exclusively to the admission of hearsay statements, does not appear to allow the credibility of the declarant to be attacked when the declarant is a coconspirator, agent or authorized spokesman. The committee is of the view that such statements should open the declarant to attacks on his credibility. Indeed, the reason such statements are excluded from the operation of Rule 806 is likely attributable to the drafting technique used to codify the hearsay rule, viz some statements, instead of being referred to as exceptions to the hearsay rule, are defined as statements which are not hearsay. The phrase "or a statement defined in Rule 801(d)(2)(C), (D), and (E)" is added to the rule in order to subject the declarant of such statements, like the declarant of hearsay statements, to attacks on his credibility.

The Senate's position was accepted in Conference, and the Rule was amended accordingly.

Why is it, one might ask, that the Senate addition covered only agency-admissions, when Rule 801(d) also treats certain statements of testifying witnesses, as well as party admissions under subdivisions (d)(2)(A) and (B), as exempt from the hearsay rule? The answer is that the declarants of statements covered by Rule 801(d)(1) and (d)(2)(A) and (B) are in a different position than hearsay declarants who make agency-admissions. Rule 801(d) declarants are by definition testifying at trial and subject to cross-examination, and are therefore subject to impeachment like every other trial witness. There is no need for Rule 806 to cover testifying witnesses whose hearsay statements are admitted at trial. As to (d)(2)(A) and (B), these are admissions that are either made or adopted by the party-opponent. The party-opponent is therefore the hearsay-declarant. The Senate rightfully assumed that the party would have no interest in impeaching himself– and if he were trying to do so, he was probably up to something no good, such as trying to admit exculpatory hearsay under the guise of impeaching himself. As Professor Cordray notes, there is no good reason to permit a party-opponent to impeach himself when a statement he either made or adopted is admitted against him.

The problem created by the Senate's addition is its failure to follow the treatment of agency-admissions through to the end of the Rule. To refresh recollection, Rule 806 currently reads as follows:

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, *or a statement defined in rule 801(d)(2) (C), (D), or (E),* has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a

witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

(Emphasis added).

The Senate failed to recognize that the problem it addressed–the need to treat statements offered as agency-admissions as equivalent to hearsay offered under the hearsay exceptions–also arises in the second and third sentence of the Rule. The second sentence, covering prior inconsistent statements, also refers to the declarant's "hearsay" statement. Accordingly, an argument could be made that when an agency-admission is admitted, the adversary cannot impeach the declarant with an inconsistent statement unless he affords the declarant an opportunity to deny or explain. That is, the Rule construed literally means that the special treatment afforded to inconsistent statements does not apply unless the declarant has made a "hearsay" statement, which would not be the case for an agency admission. Similarly, the third sentence of the Rule, allowing the adversary to call the declarant and treat him as a hostile witness, would not appear to apply to agency-admissions, because it covers only "hearsay" statements.

In sum, the Senate's salutary intent – to treat agency-admissions in the same manner as hearsay admitted under an exception – should have been extended to the second and third sentence of the Rule. Professor Cordray evaluates the problem as one of "sloppy drafting."

Professor Cordray argues, however, that the omission of agency-admissions language from the second sentence of Rule 806 is "unproblematic". She notes that the purpose of the second sentence is to excuse the foundation requirement of Rule 613(b) when a hearsay declarant is impeached with an inconsistent statement. She argues that Rule 613(b) already covers the matter with respect to agency-admissions because the last sentence of that Rule provides that its foundation requirement "does not apply to admissions of a party-opponent as defined in Rule 801(d)(2)." But Professor Cordray's assessment does not appear to be accurate. It is true that under the last sentence of Rule 613(b), agency-admissions can be admitted when they are inconsistent with a witness's testimony, without satisfying the "explain or deny" foundation requirement. But that dispensation is given to the agency-admission itself, and the reason for the dispensation is that agency-admissions are substantively admissible regardless of whether they are inconsistent with the witness's testimony–therefore the explain or deny requirement is not applicable. This provision does not cover, however, the *impeachment* of a declarant of an agency-admission with that declarant's *inconsistent statement.* An inconsistent statement of a declarant who made an agency-admission may or may not itself be an agency-admission. Therefore, if agency-admissions are to be treated the same as hearsay under Rule 806, they should be included specifically in the second sentence of the Rule.

This omission of agency-admission language from the second and third sentences of the Rule does not appear to have created a substantial problem in practice. The little case law that there is on the question indicates that the courts have not required a foundation for an inconsistent statement offered to impeach a declarant of an agency-admission. See, e.g., *United States v. Wali*, 860 F.2d 588

(3d Cir. 1988) (a coconspirator's exculpatory statements regarding the defendant should have been admitted to impeach, as the statements inconsistent with other statements made by the conspirator that were admitted under Rule 801(d)(2)(E); no foundation was required). So while it may be clarifying to include agency-admissions within the second sentence of Rule 806, it is definitely not necessary.

No reported cases have been found concerning the treatment of declarants of agency-admissions when called by the adversary to testify, i.e., the subject of the third sentence of the Rule.

Thus, there is no reason to amend Rule 806 solely to extend the treatment of agency-admissions to the second and third sentences of the Rule. However, if the Rule is to be amended on other grounds, such as to allow extrinsic evidence to impeach a hearsay declarant with bad acts, then the Committee may wish to consider whether it would be useful to rectify the drafting problem left by the treatment of agency-admissions in only one sentence of the Rule. Section VI of this memo includes a model that would extend the treatment of agency-admissions to all of the sentences of the Rule.

IV. State Law Variation

Most of the states following the federal model have a version of Rule 806 that is substantively identical to the Federal Rule. The only variation that is pertinent to the matters discussed in this memo is Alaska Rule 806. That Rule provides as follows (with the difference from the Federal model underlined):

> When a hearsay statement, or a statement defined in Rule 801 (d)(2) (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement <u>or a statement defined in Rule 801(d)(2)(C), (D), or (E)</u> has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

Thus, Alaska corrects in the third sentence the drafting problem caused by the Senate's addition of agency-admission to the first sentence only. The Alaska drafters apparently found it unnecessary to add agency-admissions to the second sentence of the Rule. As discussed above, it has been argued that Rule 613(b) already exempts agency-admissions from the foundation requirement for inconsistent statements. But that is only true if the inconsistent statement is in fact an agency-admission. Thus, Rule 613(b) does not cover an inconsistent statement of a declarant of an agency-admission, when that inconsistent statement is offered solely to impeach the hearsay declarant. So if Alaska wanted to extend agency-admissions treatment to the rest of the Rule, it should have included a reference to agency-admissions in the second as well as the third sentence of the Rule.

V. Benefits and Disadvantages of an Amendment to Rule 806

Benefits

One major benefit of an amendment to Rule 806 would be to resolve a conflict in the circuits over whether extrinsic evidence of prior bad acts are admissible to impeach a hearsay declarant who is not testifying at trial. This conflict has arisen because a literal interpretation of the Rule is in conflict with the intent of the Rule. The intent of the Rule is to allow an adversary to use any form of impeachment of a hearsay declarant as could be used if the declarant were to testify at trial. But a literal interpretation of the Rule would prohibit the use of extrinsic evidence of bad acts (because no special dispensation is made for such evidence in Rule 806), thus making it impossible in most cases to impeach a hearsay declarant with bad acts. Given the importance and value attached to impeachment of hearsay declarants (see, e.g., *United States v. Inadi,* 475 U.S. 387 (1986) (noting the importance of impeachment of hearsay declarants whose statements are offered against a criminal defendant, citing Rule 806)) this deficiency in the literal text of the Rule seems unjustified. Thus, an amendment to Rule 806 dispensing with the extrinsic evidence limitation would not only resolve a conflict, it would also promote the spirit and intent of the Rule.

With respect to the two lesser problems cited in this memorandum–impeachment of non-testifying defendants and lack of treatment of agency-admissions in the second and third sentences of the Rule–the benefits of an amendment are not as obvious. At most these would be tag-along changes that would not justify an amendment on their own or even together. But there are arguably some advantages to these tag-along amendments. As to impeachment of non-testifying criminal defendants, specific preclusion of this practice would arguably lead to a fair result. It would protect the criminal defendant's right to remain silent and refuse to testify. It is arguably unfair to introduce prejudicial impeachment evidence against a defendant who has done nothing at trial to warrant such impeachment.

As to extension of agency-admissions treatment to the second and third sentences of the Rule, this would rectify the problematic drafting of the Rule, and it would be uncontroversial as it is essentially a technical amendment.

Disadvantages

In addition to the costs that are attendant to every rules amendment, there are a few special considerations that might be taken into account in deciding whether to propose an amendment to Rule 806.

1. 1997 Amendment.

involves competing interests and countervailing constitutional considerations.

Of course the problem of impeaching non-testifying co-defendants could be resolved by severing the trials of A and B. Rules on severance are not evidentiary rules, however. One way to look at an amendment concerning non-testifying co-defendants is that it would be an evidentiary rule that operates as a rule on severance; that is, if the Rule permits impeachment, that will impact on the decision to sever the trial, as would a Rule prohibiting it. Query whether the Committee should propose an amendment having an effect on severance questions, at least without consulting the Criminal Rules committee.

As discussed, there are two court opinions addressing this problem. The *Bovain* court reads the Rule literally and allows A to impeach B. The *Robinson* court does not disagree with the *Bovain* result, but reads *Bovain* as only one solution to this complex problem; both courts seem to agree that treatment of impeachment of non-testifying co-defendants should be left to the discretion of district court judges. In *Robinson*, the Court prohibited A from impeaching B, and the Court of Appeals found no abuse of discretion.

Given the complex balance of interests involved, it would appear that there is much to be said for leaving the treatment of impeachment of non-testifying defendants to the discretion of the district court. It would not appear that any amendment is necessary to implement any judicial discretion in the matter, as the courts in *Bovain* and *Robinson* found ample discretion without any language to that effect in the Rule.

4. Infrequency of Impeachment of Agency-Admission Declarants.

As discussed above, a technical amendment could be proposed that would extend the treatment of agency-admission declarants to the second and third sentences of Rule 806. The only potential downside of such an amendment is that it is addressing a problem that arises quite infrequently and seems to have been handled in the only reported case on the subject.

VI. Models for a Proposed Amendment to Rule 806

Models for a proposed amendment to Rule 806 are set forth below. The models address, in various combinations, the three problems in the Rule that arguably give rise to a need for an amendment. Those problems are:

1. Impeachment of hearsay declarants with extrinsic evidence of bad acts.

2. Impeachment of non-testifying criminal defendants.

3. Treatment of agency-admissions in the second and third sentences of the Rule.

Model One: Permitting Extrinsic Evidence of Bad Acts to Impeach a Hearsay Declarant, Subject to Rule 403:

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in ~~rule~~ Rule 801(d)(2) (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence ~~which~~ that would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. Specific instances of the conduct of a declarant, for the purposes of attacking or supporting the declarant's character for truthfulness, may be proved through extrinsic evidence, subject to Rule 403. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

Committee Note to Model One

The amendment permits a party to impeach a declarant with extrinsic evidence of specific acts offered to prove the declarant's character for truthfulness, subject to the balancing test of Rule 403. This change is consistent with the intent of Rule 806, which is to provide an attacking party with all the methods of impeachment that the party would have if the declarant were to testify. If the attacking party cannot impeach the declarant with specific instances of conduct, she is clearly worse off than she would have been if declarant testified at trial. If the declarant testifies, the attacking party would at least be allowed to ask the witness about bad acts probative of the witness's character for truthfulness, subject to Rule 403. In contrast, an out-of-court declarant cannot even be asked about an act of misconduct. Therefore, extrinsic evidence is often the only way that the act can be presented to the jury, and should be permitted unless its probative value is substantially outweighed by the factors set forth in Rule 403. Moreover, a rule prohibiting impeachment of declarants with extrinsic evidence could give rise to abusive practice:

> [I]f Rule 806 is applied to enforce the prohibition on extrinsic evidence, parties might be encouraged to offer hearsay evidence rather than live testimony. For example, if a party felt that a witness was vulnerable to attack under Rule 608(b), that party might attempt to insulate the witness from this form of impeachment by offering his out-of-court statements, rather than calling him to testify. If, however, the attacking party were allowed to impeach a nontestifying declarant with extrinsic evidence of untruthful conduct, the incentive to use hearsay evidence would be removed.

Margaret Cordray, *Evidence Rule 806 and the Problem of the Nontestifying Declarant*, 56 OHIO STATE L.J. 495, 526 (1995).

The amendment therefore adopts the position of the court in *United States v. Friedman,* 854 F.2d 535 (2d Cir. 1988) (noting that extrinsic evidence will sometimes be necessary to impeach a declarant who does not testify at trial, and holding that admission of such evidence is regulated by Rule 403). The contrary result reached by the court in *United States v. Saada,* 212 F.3d 210 (3d Cir. 2000), was based on the fact that Rule 806 did not by its terms give special consideration to impeachment of declarants with bad acts, while it had specifically given such consideration to impeachment of declarants with inconsistent statements. That discrepancy in the text of the Rule has been rectified by this amendment.

Model Two: Permitting Extrinsic Evidence of Bad Acts to Impeach a Hearsay Declarant, Subject to Rule 403, and Prohibiting Impeachment of a Non-testifying Criminal Defendant Who Does Not Affirmatively Introduce His Own Hearsay Statement.

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in ~~rule~~ Rule 801(d)(2) (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence ~~which~~ that would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. Specific instances of the conduct of a declarant, for the purposes of attacking or supporting the declarant's character for truthfulness, may be proved through extrinsic evidence, subject to Rule 403. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination. If the declarant is an accused, the declarant's character for truthfulness may be attacked only if the declarant has affirmatively placed the declarant's credibility in issue.

Committee Note to Model Two

The amendment makes two changes to the Rule. First, it permits a party to impeach a declarant with extrinsic evidence of specific acts offered to prove the declarant's character for truthfulness, subject to the balancing test of Rule 403. This change is consistent with the intent of Rule 806, which is to provide an attacking party with all the methods of impeachment that the party would have if the declarant were to testify. If the attacking party cannot impeach the declarant with specific instances of conduct, she is clearly worse off than she would have been if declarant testified at trial. If the declarant testifies, the attacking party would at least be allowed to ask the witness about bad acts probative of the witness's character for truthfulness, subject to Rule 403. In contrast, an out-of-court declarant cannot even be asked about an act of misconduct. Therefore, extrinsic evidence is often the only way that the act can be presented to the jury, and should be permitted unless its probative value is substantially outweighed by the factors set forth in Rule 403. Moreover, a rule prohibiting impeachment of declarants with extrinsic evidence could give rise to abusive practice:

> [I]f Rule 806 is applied to enforce the prohibition on extrinsic evidence, parties might be encouraged to offer hearsay evidence rather than live testimony. For example, if a party felt that a witness was vulnerable to attack under Rule 608(b), that party might attempt to insulate the witness from this form of impeachment by offering his

> out-of-court statements, rather than calling him to testify. If, however, the attacking party were allowed to impeach a nontestifying declarant with extrinsic evidence of untruthful conduct, the incentive to use hearsay evidence would be removed.

Margaret Cordray, *Evidence Rule 806 and the Problem of the Nontestifying Declarant*, 56 OHIO STATE L.J. 495, 526 (1995).

The amendment therefore adopts the position of the court in *United States v. Friedman,* 854 F.2d 535 (2d Cir. 1988) (noting that extrinsic evidence will sometimes be necessary to impeach a declarant who does not testify at trial, and holding that admission of such evidence is regulated by Rule 403). The contrary result reached by the court in *United States v. Saada,* 212 F.3d 210 (3d Cir. 2000), was based on the fact that Rule 806 did not by its terms give special consideration to impeachment of declarants with bad acts, while it had specifically given such consideration to impeachment of declarants with inconsistent statements. That discrepancy in the text of the Rule has been rectified by this amendment.

The second change to the Rule prohibits a party from impeaching a criminal defendant's character for truthfulness when the defendant's hearsay statements (or statements defined as not hearsay under Rule 801(d)(2)(C)(D), or (E)) are offered against that party. For example, in a conspiracy prosecution of multiple defendants, one defendant's out-of-court statement is potentially admissible against other defendants under Rule 801(d)(2)(E). If the defendants against whom the statements are offered are allowed to impeach the defendant/hearsay declarant with convictions or bad acts, the jury may well be prejudiced against that defendant, even though that defendant has decided not to testify for fear of impeachment. A rule prohibiting impeachment of the defendant/declarant's character for truthfulness will protect that defendant's right to refuse to testify.

Model Three: Permitting Impeachment With Extrinsic Evidence; Extending Agency-Admissions Treatment Throughout the Rule.

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in ~~rule~~ Rule 801(d)(2) (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence ~~which~~ that would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement or statement defined in Rule 801(d)(2)(C),(D), or (E), is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. Specific instances of the conduct of a declarant, for the purposes of attacking or supporting the declarant's character for truthfulness, may be proved through extrinsic evidence, subject to Rule 403. If the party against whom a hearsay statement or statement defined in Rule 801(d)(2)(C),(D), or (E) has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

Committee Note to Model Three

The amendment permits a party to impeach a declarant with extrinsic evidence of specific acts offered to prove the declarant's character for truthfulness, subject to the balancing test of Rule 403. This change is consistent with the intent of Rule 806, which is to provide an attacking party with all the methods of impeachment that the party would have if the declarant were to testify. If the attacking party cannot impeach the declarant with specific instances of conduct, she is clearly worse off than she would have been if declarant testified at trial. If the declarant testifies, the attacking party would at least be allowed to ask the witness about bad acts probative of the witness's character for truthfulness, subject to Rule 403. In contrast, an out-of-court declarant cannot even be asked about an act of misconduct. Therefore, extrinsic evidence is often the only way that the act can be presented to the jury, and should be permitted unless its probative value is substantially outweighed by the factors set forth in Rule 403. Moreover, a rule prohibiting impeachment of declarants with extrinsic evidence could give rise to abusive practice:

> [I]f Rule 806 is applied to enforce the prohibition on extrinsic evidence, parties might be encouraged to offer hearsay evidence rather than live testimony. For example, if a party felt that a witness was vulnerable to attack under Rule 608(b), that party might attempt to insulate the witness from this form of impeachment by offering his out-of-court statements, rather than calling him to testify. If, however, the attacking party were allowed to impeach a nontestifying declarant with extrinsic evidence of untruthful conduct, the incentive to use hearsay evidence would be removed.

Margaret Cordray, *Evidence Rule 806 and the Problem of the Nontestifying Declarant*, 56 OHIO STATE L.J. 495, 526 (1995).

The amendment therefore adopts the position of the court in *United States v. Friedman,* 854 F.2d 535 (2d Cir. 1988) (noting that extrinsic evidence will sometimes be necessary to impeach a declarant who does not testify at trial, and holding that admission of such evidence is regulated by Rule 403). The contrary result reached by the court in *United States v. Saada,* 212 F.3d 210 (3d Cir. 2000), was based on the fact that Rule 806 did not by its terms give special consideration to impeachment of declarants with bad acts, while it had specifically given such consideration to impeachment of declarants with inconsistent statements. That discrepancy in the text of the Rule has been rectified by this amendment.

The amendment also makes a technical change to the Rule, by extending the Rule's equation of statements that are "not hearsay" offered under Rule 801(d)(2)(C), (D), or (E) with hearsay offered and admitted under an exception. This semantic equation is now applied to the other sentences of the Rule in which the term "hearsay" is used.

Reporter's Note on Model Three

Note that there is no reference to agency-admissions language in the new sentence governing impeachment with extrinsic evidence. This is because no such language is necessary. That sentence does not refer to "hearsay" and therefore no comparable reference to agency-admissions is required. Rather, the sentence refers to a "declarant", a term that covers a person who makes any out of court utterance, whether hearsay or an agency-admission.

Model Four

Permitting Extrinsic Evidence of Bad Acts to Impeach a Hearsay Declarant, Subject to Rule 403; Prohibiting Impeachment of a Non-testifying Criminal Defendant Who Does Not Affirmatively Introduce His Own Hearsay Statement; and Extending Agency-Admission Treatment.

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in ~~rule~~ Rule 801(d)(2) (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence ~~which~~ that would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement or statement defined in Rule 801(d)(2)(C),(D), or (E), is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. Specific instances of the conduct of a declarant, for the purposes of attacking or supporting the declarant's character for truthfulness, may be proved through extrinsic evidence, subject to Rule 403. If the party against whom a hearsay statement or statement defined in Rule 801(d)(2)(C),(D), or (E) has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.If the declarant is an accused, the declarant's character for truthfulness may be attacked only if the declarant has affirmatively placed the declarant's credibility in issue.

Committee Note to Model Four

The amendment makes two substantive changes and one set of technical changes to the Rule. First, the amendment permits a party to impeach a declarant with extrinsic evidence of specific acts offered to prove the declarant's character for truthfulness, subject to the balancing test of Rule 403. This change is consistent with the intent of Rule 806, which is to provide an attacking party with all the methods of impeachment that the party would have if the declarant were to testify. If the attacking party cannot impeach the declarant with specific instances of conduct, she is clearly worse off than she would have been if declarant testified at trial. If the declarant testifies, the attacking party would at least be allowed to ask the witness about bad acts probative of the witness's character for truthfulness, subject to Rule 403. In contrast, an out-of-court declarant cannot even be asked about an act of misconduct. Therefore, extrinsic evidence is often the only way that the act can be presented to the jury, and should be permitted unless its probative value is substantially outweighed by the factors set forth in Rule 403. Moreover, a rule prohibiting impeachment of declarants with extrinsic evidence could give rise to abusive practice:

[I]f Rule 806 is applied to enforce the prohibition on extrinsic evidence, parties might

> be encouraged to offer hearsay evidence rather than live testimony. For example, if a party felt that a witness was vulnerable to attack under Rule 608(b), that party might attempt to insulate the witness from this form of impeachment by offering his out-of-court statements, rather than calling him to testify. If, however, the attacking party were allowed to impeach a nontestifying declarant with extrinsic evidence of untruthful conduct, the incentive to use hearsay evidence would be removed.

Margaret Cordray, *Evidence Rule 806 and the Problem of the Nontestifying Declarant*, 56 OHIO STATE L.J. 495, 526 (1995).

The amendment therefore adopts the position of the court in *United States v. Friedman,* 854 F.2d 535 (2d Cir. 1988) (noting that extrinsic evidence will sometimes be necessary to impeach a declarant who does not testify at trial, and holding that admission of such evidence is regulated by Rule 403). The contrary result reached by the court in *United States v. Saada,* 212 F.3d 210 (3d Cir. 2000), was based on the fact that Rule 806 did not by its terms give special consideration to impeachment of declarants with bad acts, while it had specifically given such consideration to impeachment of declarants with inconsistent statements. That discrepancy in the text of the Rule has been rectified by this amendment.

The second change to the Rule prohibits a party from impeaching a criminal defendant's character for truthfulness when the defendant's hearsay statements (or statements defined as not hearsay under Rule 801(d)(2)(C)(D), or (E)) are offered against that party. For example, in a conspiracy prosecution of multiple defendants, one defendant's out-of-court statement is potentially admissible against other defendants under Rule 801(d)(2)(E). If the defendants against whom the statements are offered are allowed to impeach the defendant/hearsay declarant with convictions or bad acts, the jury may well be prejudiced against that defendant, even though that defendant has decided not to testify for fear of impeachment. A rule prohibiting impeachment of the defendant/declarant's character for truthfulness will protect that defendant's right to refuse to testify.

The amendment also makes a technical change to the Rule, by extending the Rule's equation of statements that are "not hearsay" offered under Rule 801(d)(2)(C), (D), or (E) with hearsay offered and admitted under an exception. This semantic equation is now applied to the other sentences of the Rule in which the term "hearsay" is used.

*495 EVIDENCE RULE 806 AND THE PROBLEM OF IMPEACHING THE NONTESTIFYING DECLARANT

Margaret Meriwether Cordray [FNa1]

I. INTRODUCTION

Rule 806 of the Federal Rules of Evidence, which governs impeachment of a hearsay declarant, is a powerful weapon in both civil and criminal litigation. [FN1] For the most part, however, it has been overlooked by lawyers and by commentators. [FN2] Rule 806 deserves considerably more careful consideration than it has received, because the rule as written creates the potential for great prejudice and because it contains ambiguities that are causing confusion among and within the circuit courts of appeals.

Rule 806 performs an apparently simple function: it permits a nontestifying declarant whose out-of-court statement is introduced into evidence--either because it is admissible hearsay or because it is defined as nonhearsay in Rule 801(d)(2)(C), (D), or (E)--to be impeached as if the declarant actually had testified as a witness. [FN3]

***496** The rule rests on a straightforward premise. When an out-of-court statement is admitted for its truth, the trier of fact must evaluate the importance and trustworthiness of the statement, just as if the statement had been made from the witness stand. In performing that evaluation, the credibility of the person who made the statement is often a central concern for the fact-finder. When an out-of-court statement is admitted for its truth, therefore, the declarant's credibility is in issue, in the same manner as it would be if the declarant were a testifying witness. In drafting Rule 806, the Advisory Committee recognized this point, stating: "The declarant of a hearsay statement which is admitted in evidence is in effect a witness. His credibility should in fairness be subject to impeachment and support as though he had in fact testified." [FN4]

Rule 806 thus seeks to allow litigants to treat declarants, for impeachment purposes, as if they were testifying witnesses. Accordingly, the rule is designed to permit a party to impeach a declarant using any method of impeachment that is permissible against a live witness. [FN5] In addition, however, the rule also operates as a restriction, by limiting impeachment to those situations when it is independently authorized under some other rule of evidence. [FN6]

***497** Since Rule 806 merely permits a declarant to be impeached as if he were a testifying witness, it is a "piggyback" rule that operates only in conjunction with the other impeachment rules. This aspect of the rule, however, greatly complicates the achievement of the rule's apparently simple rationale.

When the other impeachment rules--which govern, for instance, impeachment with prior convictions, past bad acts, and prior inconsistent statements [FN7]--were formulated, they were designed to operate with respect to witnesses who testified in court. This expectation that the impeachment rules would be used against testifying witnesses significantly influenced the policy considerations and balancing of interests that shaped those rules. Thus, for instance, when Congress debated and eventually enacted Rule 609, which governs impeachment with prior convictions, Congress assumed that the rule would only permit impeachment of testifying witnesses, and the careful compromise embodied in Rule 609 is premised on that assumption. [FN8]

Rule 806, by contrast, is premised squarely on the opposite assumption: it assumes that the declarant will not be a testifying witness. When the other impeachment rules are used in conjunction with Rule 806, therefore, they are being used in a context very different from that envisioned when they were drafted. As a result, the balance of competing considerations that underlies the other impeachment rules is disrupted, leaving open the possibility of great and unintended mischief.

As written, Rule 806 does little to guard against this possibility. With one exception, [FN9] the rule does not specifically address how it is to be used in ***498** conjunction with the various restrictions and rationales of the other impeachment rules. Rather, Rule 806 offers only the general principle that a declarant's credibility may be impeached with evidence that would be admissible if the declarant had testified as a witness. As a consequence, Rule 806 fails to deal effectively with some of the difficult problems associated with permitting impeachment of a nontestifying declarant. Indeed, in some circumstances, the rule leads to startlingly prejudicial results.

This Article explores in depth the tensions and unintended defects in Rule 806. In doing so, the Article focuses on three areas in which the combination of Rule 806 with other evidentiary rules raises important and difficult questions.

First, the Article discusses the relationship between Rule 806 and Rule 609, looking particularly at the disturbing but very real possibility that the combination of the two rules will permit a prosecutor (or a codefendant) to impeach a criminal defendant with his prior convictions, even though he neither testified nor did anything to place his credibility in issue. Second, the Article considers the intersection between Rule 806 and Rule 608(b), focusing on whether it is sensible to enforce Rule 608(b)'s ban on extrinsic evidence when that rule is applied through Rule 806. Third, the Article analyzes the proper extent of Rule 806's application to declarants of statements admitted as party admissions under Rule 801(d)(2) and, in particular, to declarants of individual and adoptive admissions. The Article concludes that there are serious deficiencies in Rule 806 as currently

written and applied and offers a proposed revision of Rule 806 that will better enable the rule to serve both its own purposes and those of the impeachment rules with which it is jointly applied. [FN10]

II. USE OF RULE 609 THROUGH RULE 806

Rule 609 of the Federal Rules of Evidence provides one of the most potent, and potentially prejudicial, methods of impeachment. Under Rule 609, counsel may impeach the credibility of a witness with the witness's prior convictions, subject to specified requirements and limitations. [FN11] In a criminal case, when the ***499** defendant is impeached with his prior convictions, it is widely recognized that the defendant faces a unique, and often devastating, form of prejudice. This prejudice arises from the significant risk that the jury will not use the evidence of convictions solely to evaluate the defendant's credibility, but also will use it as evidence of guilt or moral desert. [FN12] Because of this risk, Rule 609 was carefully crafted to achieve what its framers believed to be an acceptable balance between accommodating the prosecution's need for probative impeaching evidence and the defendant's right to be protected against undue prejudice.

That balance, which was achieved only after months of congressional debate and painstaking revision, [FN13] is embodied in Rule 609, which permits a criminal defendant to be impeached, without restriction, with prior convictions for offenses involving dishonesty or false statement. [FN14] With respect to other convictions, however, Rule 609 permits a criminal defendant to be impeached only if the crime was a felony and the prosecution demonstrates that the prior conviction's probative value on the issue of credibility outweighs the risk of prejudice to the defendant. [FN15] As such, Rule 609 represents a "'deliberate, yet ***500** uneasy compromise between opposing positions in a sharply-divided Congress.'" [FN16]

In reaching this compromise, it is clear that advocates on both sides of the congressional debate assumed that Rule 609 would permit impeachment of the criminal defendant only if he actually chose to testify in his own defense. [FN17] This assumption played a critical role in the drafting of Rule 609, because Congress reached its careful compromise against the backdrop of its understanding that, if the criminal defendant feared that introduction of his prior convictions would unduly prejudice his case, he could protect himself by declining to testify.

When Rule 609 is employed in conjunction with Rule 806, however, it becomes possible to impeach even a nontestifying criminal defendant with his prior convictions. And this is true, regardless of whether the defendant has done anything to put his credibility in issue, as long as the defendant's out- of-court statement has been admitted for its truth. [FN18] This use of Rule 806 ***501** completely undermines Congress's assumption that the criminal defendant would be able to shield himself from introduction of his prior convictions by choosing not to testify. In doing so, Rule 806 offers an unforeseen and unsettling end run around the careful balance drawn in Rule 609. Moreover, by permitting Rule 609 to be used in this manner, Rule 806 imposes substantial, and in some circumstances unjustifiable, risks on the criminal defendant.

A. The Intersection Between Rules 609 and 806: Impeachment of a Nontestifying Criminal Defendant

Rule 806 clearly contemplates that a party may use Rule 609 to impeach the declarant of a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E), with his prior convictions. [FN19] All of the courts that have examined the issue have so held. [FN20] Because Rule 806 places no restrictions on which declarants may be impeached, a criminal defendant whose out-of-court statements have been admitted for their truth is subject to impeachment under Rule 806. [FN21] Thus, even a criminal defendant who chooses not to testify may nevertheless be subject to impeachment with his prior convictions if he becomes a declarant at his trial.

Most obviously, a criminal defendant can become a declarant if the defendant introduces his own out-of-court statement for its truth. [FN22] In this situation, Rule 806 by its terms permits the credibility of the defendant-- as declarant--to be attacked with evidence of his prior convictions under Rule 609, even if the defendant does not take the witness stand. [FN23]

In addition, a criminal defendant can become a declarant if another party introduces the defendant's out-of-court statement for its truth. In this situation, ***502** Rule 806 apparently permits the criminal defendant to be impeached with his prior convictions, even though the defendant did nothing to place his credibility in issue. [FN24]

The drafters of Rules 609 and 806 appear not to have contemplated that the rules would combine to permit impeachment in these situations. Indeed, the possibility that a criminal defendant who chose not to testify could be impeached with his prior convictions is utterly at odds with the assumptions that underlie Rule 609. The question, therefore, is whether application of Rule 609 through Rule 806 against the nontestifying criminal defendant is consistent with the purposes of those rules and, in particular, with the delicate balance of competing policies embodied in Rule 609.

B. The Propriety of Using Rule 609 Through Rule 806 Against a Nontestifying Criminal Defendant

1. Use of Rule 609 Against a Criminal Defendant Who Offers His Own Hearsay Statements in Order to Advance His Case

As noted above, the criminal defendant can become a declarant by offering into evidence his own hearsay statements. The facts of United States v. Noble [FN25] provide a good example of this situation.

Noble was charged with conspiracy to distribute and

The first package of amendments proposed by the reconstituted Advisory Committee in 1995 contained a proposed amendment to Rule 806, which was enacted in 1997. The amendment deleted a comma from the Rule and was described, understandably, as a technical amendment with no intended change in the meaning of the Rule. It could be argued that the Advisory Committee, by proposing such an insignificant change to the Rule in 1995, had implicitly passed on any other changes to the Rule. [The reporter to the Committee at that time was Professor Margaret Berger].

Yet if the Committee does wish to propose an amendment to Rule 806, it probably should not be deterred by the previous Committee's action. Committees often take action on rules they have previously passed on due to subsequent developments in the law. In the case of Rule 806, the conflict in the courts as to admissibility of extrinsic evidence of bad acts did not really crystallize until the Third Circuit's decision in *Saada* in 2000. The prior Committee also did not have the benefit of Professor Cordray's suggestions concerning Rule 806, as that article was published in 1996, after the proposed technical amendment had already been sent through the approval process. Moreover, to the extent there is "legislative" history concerning the 1997 amendment, my conversations with several members indicates that there was never any consideration of a substantive amendment to Rule 806. In sum, there should be nothing like *stare decisis* in the prior Committee's previous limited action.

2. Limited Number of Circuits in Conflict.

At this point, only three circuits have weighed in on whether bad acts of a hearsay declarant can be proved with extrinsic evidence. It could be argued that the Committee could wait for more circuits to opine on the matter before an amendment is proposed. But on the other hand, no matter how many circuits weigh in, there will still be a conflict in the circuits about the meaning of Rule 806, as the Second Circuit permits extrinsic evidence and the D.C. and Third Circuits do not. Moreover, given the drawn-out nature of the rulemaking process, it could well be that other circuits will weigh in on the matter before any proposed amendment would be sent to the Judicial Conference. It is up to the Committee, of course, to determine whether it is appropriate to wait for other circuits before proposing an amendment that would rectify an existing conflict.

3. Sensitive Questions on Impeachment of Non-Testifying Criminal Defendants.

As discussed above, Rule806 if applied literally permits criminal defendant "A" to impeach co-defendant "B" when "B's" hearsay statement has been offered by the prosecution and admitted against "A" (usually under the co-conspirator exclusion from the hearsay rule)– even when B has decided not to testify. Arguably this is unfair to B, because B has decided not to place his credibility at issue by testifying–and he has probably made that decision in part for fear of impeachment. So his constitutionally-based decision not to testify can be impaired by the literal application of Rule 806. But it is also arguably unfair to A to *prohibit* such impeachment, because A has a constitutional right to confront the witnesses against him, and this right extends to hearsay declarants. Thus, the resolution of the question of impeachment of non-testifying defendants is not self-evident, as it

distribution of counterfeit money. At trial, Noble did not testify. His lawyer, however, introduced a taped conversation between Noble and a Secret Service agent, who had been posing as an interested buyer. During that conversation, Noble repeatedly denied any knowledge of the counterfeiting operations. After introduction of the taped conversation, the prosecution impeached Noble with a prior counterfeiting conviction. [FN26]

Rule 806, by its terms, permits such impeachment in this situation. By introducing his own exculpatory hearsay statements, Noble became a declarant. As such, his credibility was subject to attack under Rule 806, and the ***503** prosecution was entitled to use any authorized method of impeachment, including impeachment with prior convictions under Rule 609. [FN27]

Moreover, use of Rule 609 through Rule 806 against a nontestifying defendant in these circumstances comports with the rationales of both rules. Rule 806 is founded on the notion that the declarant of an out-of-court statement which is admitted for its truth is in effect a witness, and thus in fairness his credibility should be subject to impeachment to the same extent as if he had in fact testified. When Noble introduced his own exculpatory out-of- court statements he, in effect, became a witness for himself, even though he did not actually take the witness stand. It is therefore entirely consistent with the rationale of Rule 806 to allow the prosecutor to impeach Noble "as though he had in fact testified." [FN28]

Use of Rule 609 through Rule 806 in these circumstances also is consistent with the purpose of Rule 609. A motivating force behind Rule 609's enactment was the concern that, if the defendant were immune from impeachment with prior convictions, the defendant would be able to "appear as a witness of blameless life." [FN29] In permitting the criminal defendant to be impeached with his prior convictions, Congress expressed its judgment that the prosecution's need to protect against such misrepresentation can justify the substantial risk of prejudice to the accused. [FN30]

Where, in an effort to advance his case, the defendant offers his own hearsay statements, it seems well within the intended scope of Rule 609 to allow the prosecutor to impeach the defendant's credibility. The facts of Noble are instructive. There, the defendant offered his own exculpatory hearsay statements, even though he did not formally testify. In doing so, Noble affirmatively made his credibility an issue, because he was telling his story ***504** himself. [FN31] Rule 609 reflects Congress's determination that it is fair to allow the prosecutor to impeach a testifying defendant with prior convictions in order to prevent him from appearing as one who has led an exemplary life. It seems equally fair to allow the prosecutor to impeach a nontestifying defendant with his prior convictions, where the defendant has chosen to tell his story through his own hearsay statements rather than by taking the witness stand. [FN32] Indeed, it is arguably more important to allow impeachment in this context, because the defendant has avoided the rigors of cross-examination by introducing his hearsay statements rather than testifying. [FN33]

To put the matter somewhat differently, when Congress decided to allow the criminal defendant to be impeached with his prior convictions under Rule 609, it struck a bargain of sorts. If the defendant asks the jury to listen to, and believe, his own statement offered in aid of his defense, then the prosecutor may tell the jury about the defendant's prior convictions, as long as they will help the jury evaluate the defendant's credibility. When the defendant makes his statement out of court, and then offers it in court in lieu of testifying, he is still asking the jury to believe his statement offered in aid of his defense. A principled application of Rule 609, therefore, requires that the defendant who offers his out-of-court statement be held to the same bargain as the defendant who makes his statement in court. In both instances, the defendant is asking the jury to take his word and conclude that his statement is true.

2. Use of Rule 609 Against a Criminal Defendant Who Has Not Affirmatively Placed His Credibility in Issue

The reach of Rule 806, however, is not expressly limited to situations in which the defendant asks the jury to take his word. Rather, the clear import of Rule 806 is that, once a person's hearsay statement (or statement defined in Rule 801(d)(2)(C), (D), or (E)) has been admitted into evidence, the credibility of the declarant may be attacked regardless of who may be the sponsor or ***505** source of the statement. [FN34] As a result, the text of Rule 806 permits a criminal defendant to be impeached with his prior convictions in situations where another party, rather than the defendant, has put the defendant's credibility in issue by introducing his out-of-court statement. The policies underlying Rules 806 and 609, however, do not support impeachment in such a situation.

This situation can easily arise in the context of a joint trial. The facts of United States v. Bovain [FN35] are illustrative. In that case, seven defendants were tried jointly for unlawful distribution of, and conspiracy to distribute, heroin. At trial, the prosecution called Nichols, a coconspirator who was cooperating with the government. Nichols testified about hearsay statements that Finch, a defendant, had made about the drug activities of Rickett, a codefendant. Rickett then impeached Finch's credibility, as a hearsay declarant, with evidence of Finch's prior convictions for stolen money orders and a narcotics offense. [FN36] Finch never testified during the trial.

By its terms, Rule 806 permits impeachment in this situation: If Finch, the defendant, had testified that Rickett, the codefendant, was involved in drug-related activities, Rickett could have impeached Finch with his prior convictions under Rule 609. Although Finch did not testify, the prosecutor introduced Finch's out-of-court statement that Rickett was involved in drug- related activities. That introduction made Finch a declarant; in essence, he was a witness against Rickett, even though he did not testify. Under Rule 806, a declarant may be impeached with prior convictions under Rule 609 as if

the declarant were a live witness. Therefore, under the text of the rules, it was proper to allow Rickett to impeach Finch--a declarant and witness against him--with Finch's prior convictions. [FN37]

Whether this result is consistent with the policies underlying Rule 609, however, is a much more troubling question, and it requires greater attention to the problems of unfairness and prejudice thus created than it has yet received. In analyzing the issue on appeal in Bovain, for instance, the Eleventh Circuit gave these problems no more than passing recognition. Rather, the court focused on the application of the text of Rule 806, which it found "straightforward and logical," [FN38] only pausing to note that the situation was ***506** "unusual," and that the trial court had acted within its discretion based on "the applicable policy considerations and rules . . . ." [FN39]

The disrupting effect of this unforeseen application of the rules on the delicate balancing of policies that Congress sought to achieve through Rule 609, however, demands serious consideration. To that end, it is necessary to look more closely at the competing policies and concerns that led Congress to the careful compromise embodied in Rule 609.

In the congressional debate over Rule 609, there were basically two camps. One camp favored giving counsel unrestricted rights to impeach any witness, including the criminal defendant, with almost all prior convictions. [FN40] The other camp advocated placing significant limitations on the right to impeach, limiting impeachment to prior convictions involving dishonesty or false statement. [FN41]

Advocates of limited impeachment rights focused on the risk of prejudice that introduction of prior convictions creates for a criminal defendant. [FN42] This risk of prejudice stems from the likelihood that the jury will misuse the evidence. Rule 609 permits evidence of prior convictions to be used only for impeachment purposes. Thus, the jury may only properly use such evidence to help evaluate whether the witness is credible. [FN43] The jury may not use the prior convictions as evidence that the defendant is the sort of person who would ***507** commit the crime charged or who should be in prison regardless of whether he is actually guilty of the particular crime charged. [FN44]

The danger, and therefore the risk of prejudice, lies in the difficulty of making this distinction. It is widely agreed that a jury is unlikely to maintain the distinction, even with the help of a limiting instruction. [FN45] The problem arises because, as Dean Nichol has explained, " k nowing the 'kind of person' a defendant is for purposes of credibility cannot be separated from the knowledge of character as applied to the determination of guilt or innocence." [FN46] As a result, despite any limiting instruction the judge might give, there is a significant risk that the jury will use the evidence of prior crimes in its determination of guilt. [FN47]

***508** The danger that the jury will misuse evidence of a defendant's prior record is a real one, and the prejudice arising from misuse is substantial. Research conducted in this area indicates that criminal defendants who are impeached with their prior convictions are significantly more likely to be convicted, especially if the prior crimes are similar to the one currently charged. [FN48]

Because the risks are so high and the prejudice so overwhelming, congressional advocates of narrow impeachment rights argued forcefully that the evidence rules should restrict this form of impeachment to convictions for crimes, such as perjury, that bear directly on veracity. [FN49] This view was ***509** reflected in the version of Rule 609 that originally passed the House of Representatives. [FN50]

On the other side of the debate, congressional proponents of broad leeway to impeach the criminal defendant with his prior convictions stressed two closely related points. First, they emphasized that it would be unfair to allow the criminal defendant to present himself to the jury as a witness whose life has been exemplary. [FN51] Representative Hogan, a principal advocate of this view in the House of Representatives, argued repeatedly that "it would be misleading to permit the accused to appear as a witness of blameless life on those occasions when the accused chooses to take the stand." [FN52]

Second, congressional proponents of broad impeachment rights expressed concern that, when a witness testifies, the jury should have the information it needs to evaluate the witness's credibility. Senator McClellan, for instance, asked:

> [W]hy should one who has already been convicted of rape or murder and is later being tried for armed robbery, not be able to be questioned about his previous crimes, so that a jury might properly evaluate the credibility of the testimony he is giving . . . [?]
>
> . . . .
>
> If the jury is to be permitted to correctly determine what the true facts are in a particular case, it must be permitted to have all the evidence before it ***510** that will enable it to judge the credibility of the witnesses who have given testimony. . . . [FN53]

These views prevailed in the Senate, which passed a version of Rule 609 that would have made all felony convictions and all convictions for crimes involving dishonesty or false statement automatically admissible for impeachment purposes. [FN54]

In the end, of course, Congress reached a compromise between the opposing views, so that convictions for crimes involving dishonesty or false statement were made admissible without qualification, and convictions for other crimes were made admissible only if the crime was a felony and the prosecution could demonstrate that the conviction's probative value outweighed the risk of prejudice to the defendant. [FN55] But again, this compromise was founded on the assumption that Rule 609 would apply only against testifying witnesses. [FN56] The question, therefore, is whether it is consistent with congressional intent and the notions of fairness that informed it to apply Rule 609 through Rule

806 against a defendant who has done nothing to place his credibility in issue. In order to analyze that question, it is important to understand the options that the criminal defendant normally enjoys under Rule 609.

In a criminal trial, if the defendant does not testify, he cannot be impeached with his prior convictions. [FN57] And that is so, even though, by pleading not guilty, the defendant is in a sense asking the jury to believe him. This principle ***511** reflects the strong tradition in our justice system that a person should be tried based on the facts of the case, not on the basis of his character. [FN58]

Thus, the criminal defendant who has a prior record is understood to have a clear choice between testifying (with the attendant risk that he will be impeached with his prior convictions) and not testifying (thereby avoiding introduction of his prior convictions, but forgoing the opportunity to explain his defense himself). The choice is never an easy one, for:

> If [the] defendant takes the stand, he faces impeachment by proof of his prior convictions and the consequent danger that the jurors instead of considering the convictions as relevant to credibility, will regard them as evidence of guilt, despite instructions to the contrary. If the defendant remains silent, statistics indicate that the jury is likely to conclude that he is guilty. [FN59]

Nevertheless, the defendant is afforded this choice, which means that, if he believes that jury knowledge of his prior convictions would fatally prejudice his case, he can protect himself from admission of his record by opting not to testify. [FN60]

***512** Application of Rule 609 through Rule 806 against a nontestifying defendant who did not affirmatively place his credibility in issue, however, completely upsets this balance and strips the defendant of the opportunity even to make the difficult choice not to testify. In Bovain, for instance, the defendant had chosen not to testify. [FN61] Although the opinion does not specify why he chose as he did, it is at least a fair assumption that, as in the broad run of cases, the defendant feared the jury's reaction to his substantial criminal record, which included a conviction similar to the crime charged. [FN62] When a defendant chooses not to testify for that reason, he chooses not to place his credibility in issue, and he pays a considerable price for the privilege (i.e., the risk that the jury will assume that he is afraid to testify because he is guilty).

Under the Bovain application of Rules 806 and 609, however, the defendant who has done nothing to place his credibility in issue--indeed, has actively sought to keep it from becoming an issue--loses the protection that silence normally affords him. Put more starkly, because the prosecution has sought to enhance its case against a codefendant by using the defendant's hearsay statements, the defendant faces the substantial--and now unavoidable-- prejudice of impeachment with prior convictions. [FN63]

In enacting Rule 609, Congress expressed its judgment that imposing these risks on the criminal defendant is fair when the defendant testifies in his own behalf. But there is a critical difference between a case in which the defendant testifies in his own behalf, and one in which the defendant does nothing to put his own credibility in issue. In the first case--the standard Rule 609 context--the defendant has, in a sense, "opened the door." By asking the jury to believe his own testimonial account, the defendant has affirmatively placed his credibility in issue; that act justifies subjecting the defendant to rigorous impeachment under the policy resolution embodied in Rule 609. In the second case, however, the defendant has not "opened the door." He has not affirmatively placed his credibility in issue; on the contrary, he has consciously sought to shield himself by declining to testify at trial. In this context, there are ***513** no grounds for Congress's concern that the defendant could try to mislead the jury by presenting himself as "a witness of blameless life." [FN64] This important policy consideration underlying Rule 609 thus would not justify impeachment in this situation.

There are, however, some grounds for Congress's related concern that the jury should have sufficient information to evaluate a witness's credibility. [FN65] Rule 609 reflects Congress's judgment that a witness's prior convictions are probative evidence on the issue of credibility. Rule 609, however, is premised on the assumption that the rule would come into play only if the defendant chose to testify. This premise seems to have been critical to Congress's shaping of the rule; during the debates, members of Congress repeatedly returned to the fact that a criminal defendant could protect himself from introduction of his prior convictions by not testifying at his trial. [FN66] When this premise is no longer sound--because the defendant has not testified and has not otherwise placed his testimonial credibility in issue--the risk that the jury will misuse the evidence of prior convictions has much less to counterbalance it.

Once again, it is useful here to consider this problem from the standpoint of the bargain struck by Congress in Rule 609. Under the terms of that bargain, if the defendant chose to place his testimonial credibility in issue, then the prosecution would be permitted to impeach the defendant with prior convictions that were sufficiently probative of credibility. But if the defendant feared that the impact of his prior convictions would be too great, then he could prevent their introduction by not placing his credibility in issue. This exchange, however, is greatly undermined when one of the critical elements--the defendant's decision to place his testimonial credibility in issue--is no longer present.

In that situation, the concern that the jury should receive relevant information to evaluate the witness's credibility must give way to the greater concern that the criminal defendant will be unduly prejudiced by introduction of his prior convictions. It is true that the litigant adversely affected by the defendant's out-of-court statement may want and need to impeach his credibility. [FN67] That need alone, however, should not justify subjecting the ***514** defendant to potentially insurmountable prejudice, a form of prejudice which

threatens the very presumption of innocence that is afforded to the criminal defendant. [FN68]

For these reasons, Rule 806 should be amended to prevent introduction of a criminal defendant's prior convictions in these circumstances. More specifically, Rule 806 should be amended to provide that, if the declarant is the accused, then the declarant may be impeached with prior convictions only if he has affirmatively placed his credibility in issue.

*515 3. Determination of When a Criminal Defendant Has Affirmatively Placed His Credibility in Issue

The remaining issue is when a criminal defendant should be understood to have affirmatively placed his credibility in issue, such that he should be subject to impeachment under the conjunction of Rules 806 and 609. At either end of the spectrum of possible cases, the answers are clear. If, on the one hand, the defendant introduces his own hearsay statements in his case-in-chief, as the defendant did in Noble, then the defendant should be subject to impeachment with prior convictions under Rule 806. [FN69] If, on the other hand, another party (the prosecutor or a codefendant) introduces the defendant's out- of-court statements, as was the case in Bovain, then the defendant should not be subject to impeachment with prior convictions under Rule 806. [FN70]

The difficult cases, of course, fall in the middle of the spectrum. These are cases in which the defendant's out-of-court statements are introduced as a result of questioning by the defense counsel, but are not affirmatively introduced as part of the defendant's case-in-chief. This type of situation would likely arise in one of two ways.

First, the defense counsel might raise or elicit the defendant's out-of-court statements in cross-examination of a prosecution witness. Suppose, for instance, that the prosecution witness had testified on direct examination that the defendant had made certain incriminating statements, or had engaged in *516 certain incriminating conduct. If the prosecution witness were then to testify on cross-examination about exculpatory statements that the defendant had also made, the question would arise as to whether the defendant had placed his credibility in issue. [FN71] In such situations, the answer will necessarily turn on the facts and circumstances of the particular case. Nonetheless, it does seem possible in most instances to draw a principled distinction between cases in which the defendant can fairly be considered to have placed his credibility in issue, and those in which he should not be considered to have placed his credibility in issue.

This distinction lies in the defense counsel's need to raise or elicit the defendant's own hearsay statement on cross-examination. In some instances, the defense counsel will need to do so in order to correct a misleading impression that may have been created by the prosecution witness's testimony on direct examination. If, for example, the witness testified on direct examination that the defendant made certain incriminating statements, then the defense counsel might well need to ask the witness whether the defendant had contemporaneously made any other statements. In doing so, the defense counsel's purpose would be to dispel the misleading impression created by the partial account that the prosecution had elicited. In such instances, the defense should not be considered to have placed the defendant's credibility in issue. [FN72]

By contrast, in some situations the defense counsel may choose to raise or elicit the defendant's own hearsay statements during cross-examination of a prosecution witness (rather than during the defendant's case-in-chief) for her own strategic reasons, and not in an effort to correct a distorted impression created by the prosecution. This situation is functionally equivalent to the situation in which the defense counsel introduces the defendant's statements *517 during her case-in-chief; the only difference is the timing. When the impetus for introducing the statement is something other than the need to dispel a misleading impression by providing greater context, the defense can fairly be considered to have placed the defendant's credibility in issue. [FN73]

The second situation in which the defendant's hearsay statements might be introduced as a result of questioning by the defense counsel, but not affirmatively introduced as part of the defendant's case-in-chief, would occur if the witness were to surprise the defense with testimony about the defendant's hearsay statements. If, for example, a defense witness on direct examination (or a prosecution witness on cross-examination) were unexpectedly to recount a hearsay statement that the defendant had made, the question would arise as to whether the defendant had placed his credibility in issue.

A possible approach in this situation would be to consider the defense to have affirmatively introduced the statement, unless the defense moves to strike it from the record. Such an approach has the advantage of ease of administration, for it would eliminate any need for the trial court to undertake the difficult task of determining whether the witness's testimony was indeed unexpected and spontaneous. Yet it has the significant disadvantage of forcing the defense to discredit (by asking to have stricken) a favorable statement that the defendant himself made, an apparently significant action to which the jury would naturally tend to ascribe undue importance. [FN74]

*518 In these more difficult cases, therefore, the better approach would seem to be to require the prosecution to attempt to block the introduction of the hearsay statement as a prerequisite to impeaching the defendant with prior convictions. The prosecution could do so either by objecting to the admissibility of the statement or by indicating to the court, out of the jury's hearing, that if the statement were not withdrawn, the prosecution would seek to impeach the defendant with his prior convictions. Such a requirement would put the defense to a clear choice: withdraw the statement or affirmatively sponsor it. If the defense chose to withdraw the

statement, then the prosecution could, of course, request a limiting instruction admonishing the jury to disregard the statement. [FN75] If, on the other hand, the defense chose to press for admission of the statement, then it could fairly be considered to have placed the defendant's credibility in issue. [FN76]

In both the easy and more difficult cases, therefore, the core principle for applying Rule 609 through Rule 806 is that the criminal defendant should not be subject to impeachment with his prior convictions unless he can fairly be judged to have affirmatively placed his credibility in issue through the introduction of his own hearsay statements. [FN77] Rule 806 should be amended to rely explicitly on this principle. The explanatory notes to the rule also should provide more detailed guidance about how courts would be expected to exercise their discretion in applying this principle in the more difficult cases, as described above.

C. Proposed Amendment of Rule 806

Rule 806 thus should be amended to provide that, where the declarant is a ***519** criminal defendant, the declarant may be impeached with prior convictions only if he has affirmatively placed his credibility in issue. The following proposed amendment is designed to serve this purpose:

When a hearsay statement, or a statement defined in Rule 801(d)(2), (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. If the declarant is an accused, the credibility of the declarant may be attacked with prior convictions only if the declarant has affirmatively placed the declarant's credibility in issue. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination. [FN78]

III. RULE 806 AND THE BAN ON EXTRINSIC EVIDENCE

The combination of Rule 806 with the other impeachment rules also creates difficult problems in the context of impeachment with specific instances of conduct showing untruthfulness under Rule 608(b). [FN79] As was the case with Rule 609, these problems stem from the grafting of Rule 806--which is designed to permit impeachment of a declarant who is not a testifying witness--onto a rule designed to permit impeachment of a witness who testifies in court.

Rule 608 authorizes and regulates one of the methods of impeachment provided in the Federal Rules. [FN80] In general, this impeachment method entails ***520** introducing evidence that the witness has a poor character for veracity. [FN81] More specifically, Rule 608 permits the attacking party to use reputation and opinion evidence and to inquire into specific instances of conduct, subject to the general requirement that the evidence must be probative of truthfulness or untruthfulness. [FN82]

Rule 608(b) also states an important limitation on the use of such evidence. Although Rule 608(b) permits inquiry on cross-examination, the rule expressly prohibits the use of extrinsic evidence to prove specific instances of conduct showing untruthfulness. [FN83] As a result, the impeaching party may ask the witness about specific instances of conduct on cross-examination, but if the ***521** witness denies the misconduct, she must take the witness's answer; the impeaching party may not use extrinsic evidence to prove that the witness did engage in such conduct. [FN84]

To some extent, of course, the prohibition on the use of extrinsic evidence limits the effectiveness of this method of impeachment. In the normal setting, however, where the attacking party is impeaching a testifying witness, the ability to question the witness about specific instances of conduct is nonetheless a powerful impeachment tool. By asking, specifically and repeatedly, about alleged misconduct, the attacking party is able to convey the information to the jury, thus creating suspicion and doubt. [FN85]

It is clear that Rule 608(b) was crafted with the understanding that the attacking party would be impeaching a testifying witness, who could be asked about relevant specific instances of conduct. This is underscored by the text of the rule itself, which provides that specific instances of conduct "may not be ***522** proved by extrinsic evidence. They may, however, . . . be inquired into on cross-examination of the witness." [FN86]

When Rule 608(b) is applied through Rule 806, however, this understanding is no longer valid, because Rule 806 authorizes impeachment of declarants who are not testifying witnesses. If the declarant does not testify, as will often be the case, the impeaching party will not be able to inquire about specific instances of conduct on cross-examination because there will be no witness to cross-examine. In that situation, Rule 608(b)'s ban on extrinsic evidence may preclude any use at all of this impeachment weapon. By its terms, Rule 806 authorizes impeachment only with "evidence which would be admissible for those purposes if the declarant had testified as a witness." [FN87] Currently, therefore, Rule 806 would appear to forbid the use of extrinsic evidence of specific instances to impeach a nontestifying declarant, because if the declarant were a testifying witness, Rule 608(b) would forbid the use of extrinsic evidence.

On the other hand, it is possible that Rule 806 could be interpreted to modify the ban on extrinsic evidence contained in Rule 608(b). Rule 806 is designed to permit a party to impeach a declarant as if she were a testifying witness, and Rule 608(b) permits a testifying witness to be impeached with specific instances of conduct showing

untruthfulness. Rule 806 thus could be understood to allow the general type of impeachment authorized in Rule 608(b), making allowances for necessary alterations in form. Although this construction stretches the language of Rule 806, the Second Circuit apparently adopted this approach in United States v. Friedman, [FN88] reasoning that Rule 806(b) "limits such evidence of 'specific instances' to cross-examination. Rule 806 applies, of course, when the declarant has not testified and there has by definition been no cross- examination, and resort to extrinsic evidence may be the only means of presenting such evidence to the jury." [FN89]

***523** In order to determine how Rule 806 should be applied, the critical issue is whether, as a matter of principle, the prohibition on extrinsic evidence should extend to impeachment of a nontestifying declarant when Rule 608(b) is used through Rule 806. Resolution of that issue turns on whether the restriction that Rule 608(b) imposes on impeachment of testifying witnesses is sufficiently important that it should also be imposed on impeachment of nontestifying declarants. It is thus necessary to understand the reasons that underlie Rule 608(b)'s ban on extrinsic evidence.

A. The Dangers of Extrinsic Evidence

Rule 608 is widely understood to codify the common law rules that governed impeachment with character evidence. [FN90] The common law, like Rule 608(b), permitted the impeaching party to ask a witness about conduct showing untruthfulness, but forbade the impeaching party from proving such conduct with extrinsic evidence. [FN91]

It has long been recognized that the primary reason for the prohibition on extrinsic evidence is to avoid confusion of issues. This reason is based on the concern that allowing the impeaching party to introduce extrinsic evidence (that is, to call additional witnesses) to prove the specific instances of conduct might result in a "mini-trial" on that point. As Dean Wigmore explained: "There are two chief considerations; first, each additional witness introduces the entire group of questions as to his qualifications and his impeachment . . .; secondly, this additional mass of testimony on minor points tends to overwhelm the material issues of the case and to confuse the tribunal in its efforts to ***524** disentangle the truth upon those material points." [FN92] Courts have emphasized that extrinsic evidence is excluded for this reason. In United States v. Martz, [FN93] for instance, the court stated: "The purpose of barring extrinsic evidence is to avoid holding mini-trials on peripherally related or irrelevant matters." [FN94]

Dean Wigmore also offered a second reason for the ban on extrinsic evidence: the prevention of unfair surprise. [FN95] The concern is that if the attacking party were to introduce false evidence of misconduct, the witness would have little ability to rebut it. Although the possibility of surprise is generally insufficient to support a rule excluding evidence, the danger here is that the impeaching party might falsely allege misconduct of any nature, over any part of the witness's life. False allegations of misconduct might put the witness at too great a disadvantage, for he could not be "expected to be prepared to disprove every alleged act of his life." [FN96]

Commentators have suggested that a third concern further serves to justify the ban as well. This concern is based on the risk of prejudice that a party suffers when the jury learns of his, or even his witness's, misdeeds. [FN97] When a witness is impeached with a specific instance of conduct showing untruthfulness, the jury may properly use the evidence only to evaluate the ***525** witness's credibility. It may not use the evidence substantively, as evidence that the party is the sort of person who would commit the charged offense (or, in a civil case, the act complained of), or who deserves to be punished regardless of whether he committed the wrong at issue. [FN98] The risk of prejudice lies in the substantial likelihood that the jury will be unable to confine its use of the evidence to evaluation of credibility, but will use it substantively as well. [FN99]

For these various reasons, Rule 6O8(b) expressly prohibits the attacking party from using extrinsic evidence to prove specific instances of conduct when impeaching a testifying witness. The issue with respect to Rule 806 is whether these reasons are sufficient to support enforcement of the ban when doing so will effectively preclude any use of this impeachment tool. In order to make that determination, it is important to weigh the countervailing considerations that arise in the special situation of the nontestifying declarant.

B. Impeaching the Nontestifying Declarant

The drafters of Rule 806 recognized that the declarant of an out-of-court statement admitted for its truth is in effect a witness and that the jury needs to evaluate the declarant's credibility, just as it needs to evaluate the credibility of a witness who testifies in court. [FN100] Rule 806 thus seeks to allow a party to impeach the credibility of a declarant as if the declarant were a testifying witness.

If the specific restrictions contained in Rule 6O8(b) are enforced when that rule is applied in conjunction with Rule 806, however, the impeaching party will not be able to impeach the nontestifying declarant to the same extent that the impeaching party would be able to impeach a testifying witness. This is so because Rule 608(b) limits impeachment with specific instances of conduct showing untruthfulness to the single method of cross-examination. If the declarant does not testify, the attacking party will not have an opportunity to cross-examine the declarant about relevant misconduct. As a result, the impeaching party effectively will be precluded from impeaching the declarant with such misconduct.

If the attacking party cannot impeach the declarant with specific instances of conduct, she is clearly worse off than she would have been if her opponent had called the declarant to testify. Unless she is able (and willing) to call the declarant as her own witness, she now has no way of bringing to the jury's ***526** attention damaging

evidence of the declarant's untruthful conduct. Instead, the attacking party will be limited to using opinion or reputation evidence about the declarant's character for untruthfulness, which is often significantly less effective than evidence of specific instances of conduct. [FN101]

It is true that, if the declarant is available to testify, the attacking party has the right to call and cross-examine him. [FN102] But this burden seems both significant and unfair. As Professors Louisell and Mueller argue: "The impeaching party ought not to be put to the burden of calling the declarant to the stand even if he is available, since his adversary has adduced the statement which gave rise to the need for impeachment." [FN103]

In addition, if Rule 806 is applied to enforce the prohibition on extrinsic evidence, parties might be encouraged to offer hearsay evidence rather than live testimony. For example, if a party felt that a witness was vulnerable to attack under Rule 608(b), that party might attempt to insulate the witness from this form of impeachment by offering his out-of-court statements, rather than calling him to testify. If, however, the attacking party were allowed to impeach a nontestifying declarant with extrinsic evidence of untruthful conduct, the incentive to use hearsay evidence would be removed. Further, it might encourage parties to call available declarants to testify, because doing so would limit the attacking party to inquiring about specific instances of conduct on cross-examination.

These considerations militate strongly in favor of modifying Rule 608(b)'s ban on extrinsic evidence when the attacking party seeks to impeach a nontestifying declarant with specific instances of conduct showing untruthfulness. On the other side, of course, are the original reasons for the ban: the concerns about confusion, surprise, and prejudice. These reasons, however, do not support enforcement of the ban outside the setting of the testifying witness who is subject to cross-examination. Indeed, even with respect to a testifying witness, these reasons do not serve to justify a blanket exclusion of evidence of specific instances of conduct, but rather serve only to ***527** justify exclusion of extrinsic evidence of such conduct. In other words, these reasons have been considered sufficient only to limit the amount and type of impeachment with specific instances of conduct, not to ban it altogether. [FN104]

When the declarant does not testify, the use of extrinsic evidence is not simply a secondary, additional means of conveying the impeaching information to the jury: it is the only means of doing so. [FN105] In this situation, in light of the considerations favoring such impeachment, the traditional ban on the use of extrinsic evidence must yield. [FN106]

This is not to say that the dangers of confusion, surprise, and prejudice no longer exist when extrinsic evidence is offered to impeach a nontestifying declarant. They do exist, but they should be dealt with on an individualized basis, rather than with an across-the-board prohibition. For this reason, the trial court should have broad discretion to determine whether and to what extent to permit the use of extrinsic evidence in this context.

In exercising this discretion, trial courts will be engaged in a new and sometimes difficult task, because they will no longer be working under the mandate of a blanket rule excluding extrinsic evidence. The trial court will, of course, need to consider the particular facts and circumstances in each individual case. There are, however, certain factors that trial courts should generally consider. These factors include the need for impeachment in light of ***528** the importance of attacking the declarant's credibility with the extrinsic evidence, which will turn largely on the importance of the declarant's out-of-court statements and the availability of other forms of impeaching evidence; the quality of the impeaching evidence, in terms of its strength and reliability; the amount of time likely to be consumed, which will depend on the nature of the impeaching evidence and the extent to which it will be disputed; the potential confusion of issues; the likelihood of unfair surprise; and the risk of prejudice. [FN107]

These factors will play out differently in individual cases. The facts of United States v. Friedman, [FN108] however, provide a useful example. In that case, the defendant was charged with various racketeering activities in conjunction with the operation of the New York City Parking Violations Bureau. At trial, the prosecution introduced numerous statements by a local politician named Donald Manes under the hearsay exemption for statements of a coconspirator. [FN109] The defendant then sought to attack the credibility of Manes, the declarant, with evidence that Manes had initially lied to police about a recent suicide attempt, falsely telling them that the slash wounds in his wrist and ankle had been inflicted by unknown assailants. The defendant offered to prove that Manes had lied about the suicide attempt by presenting the testimony of the assistant district attorney to whom Manes had lied, as well as a videotape of Manes reading a public statement in which he admitted that he had lied. [FN110]

On these facts, if the court were to find that the evidence was sufficiently probative of untruthfulness under Rule 608(b), [FN111] the court would then need to determine whether it should permit the defendant to introduce the extrinsic evidence. In making that determination, two factors seem particularly important. First, the prosecution had introduced multiple statements that Manes--a coconspirator--had made which implicated the defendant. The defendant's need to impeach Manes's credibility effectively thus appears to have been significant. Second, Manes himself had publicly admitted that he had lied about the incident. The impeaching evidence thus seems highly reliable and unlikely to have generated much additional rebuttal evidence, thereby ***529** substantially reducing the risk of a time-consuming and distracting mini-trial on the issue. In addition, the suicide attempt was recent and notorious, which reduces the possibility of unfair surprise.

In circumstances such as these, therefore, it seems that the trial court should exercise its discretion to permit the use of extrinsic evidence. If, however, the facts were

altered so that, although Manes was suspected of having lied, he had continued to insist on his initial story, the trial court might well refuse to allow the extrinsic evidence. In this situation, there would be a great risk that the trial would devolve into a lengthy tussle over whether Manes had in fact lied about the incident, with each side calling witnesses to testify to their versions of the events and to dispute the testimony of the opposing witnesses. In such circumstances, the trial court would need to evaluate carefully whether the defendant's need to impeach Manes's credibility was sufficiently great to warrant this risk of delay and confusion, and whether the additional proof on the issue could appropriately be restricted in some manner.

Although determining whether to permit the use of extrinsic evidence to impeach a nontestifying declarant will in some circumstances be a difficult task for the trial court, the considerations favoring such impeachment justify the effort. Thus, Rule 806 should direct the trial court to use its discretion in determining whether to allow the attacking party to use extrinsic evidence when she seeks to impeach a nontestifying declarant with specific instances of conduct pursuant to Rule 608(b). [FN112] The explanatory notes to Rule 806 also should provide more detailed guidance about how the courts should exercise this discretion, by setting out the factors discussed above and encouraging the trial courts to work to minimize any confusion, surprise, or prejudice that ***530** might attend the introduction of extrinsic evidence.

Although this matter can safely be left within the trial court's discretion in most instances, there is one situation where the risk of prejudice is so high, and the effect of prejudice is so dramatic, that the bar against extrinsic evidence should remain firmly in place. This situation arises when the criminal defendant is the declarant subject to impeachment, but the defendant himself has not affirmatively placed his credibility in issue either by testifying or by introducing his own hearsay statements. In this situation, the rules of evidence should protect the criminal defendant from the potentially fatal prejudice of having the jury learn of his prior misdeeds. The reasons for this conclusion are elaborated in Part II of this Article, which addressed impeachment with prior convictions. [FN113]

C. Proposed Amendment of Rule 806

Rule 806 thus should be amended to provide the trial court with discretion to allow the use of extrinsic evidence to impeach a nontestifying declarant with specific instances of conduct pursuant to Rule 608(b). A proposed amendment to the text of Rule 806 follows:

When a hearsay statement, or a statement defined in Rule 801(d)(2), (C), (D), or (E), has been admitted in evidence, the credibility of the ***531** declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. If the declarant does not testify, the court may, in its discretion, permit the use of extrinsic evidence to prove specific instances of conduct that are probative of truthfulness or untruthfulness, as provided in Rule 608(b), as a means of attacking or supporting the credibility of the declarant. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross- examination. [FN114]

IV. APPLICATION OF RULE 806 TO PARTY ADMISSIONS

An additional concern with respect to Rule 806 involves the proper extent of its application to declarants of statements admitted as party admissions under Rule 801(d)(2). As written, Rule 806 specifies that it applies to two categories of declarants: (1) any declarant of a hearsay statement; and (2) any declarant of a statement admitted because it was authorized by the party-opponent, or made by the party-opponent's agent or employee, or made by a coconspirator within the terms of Rule 801(d)(2)(C), (D), or (E). [FN115]

***532** By its terms, however, Rule 806 does not apply to declarants of statements admitted under Rule 801(d)(2)(A) or (B). Consequently, Rule 806 does not authorize impeachment of the declarant when the statement is admitted either as the party-opponent's own statement (an "individual admission") or as a statement that the party-opponent has adopted (an "adoptive admission"). [FN116]

The issue is whether this exclusion is a sensible limitation on impeachment of nontestifying declarants, in light of the goals of Rule 806 and the structure of the evidence rules generally. As discussed earlier, the drafters of Rule 806 recognized that the declarant of an out-of-court statement admitted for its truth is, in effect, a witness. [FN117] Through Rule 806, they thus sought to allow a party to impeach the credibility of a declarant as if he were a testifying witness. [FN118] In evaluating whether declarants of statements admitted as individual and adoptive admissions should also be subject to impeachment under Rule 806, therefore, the critical question is whether it is appropriate to treat a nontestifying declarant as if he were a testifying witness in the particular setting of individual and adoptive admissions. Although there has been considerable misunderstanding and confusion in Congress and the courts over this question, [FN119] careful analysis suggests that the current text of Rule 806 embodies the most satisfactory resolution of the competing considerations.

A. Application of Rule 806 to Individual and Adoptive Admissions

Consider the following situation. In a criminal trial, the prosecutor calls a witness who testifies that the defendant told him that the defendant had committed the crime. The prosecutor is able to introduce this testimony as an individual admission under Rule 801(d)(2)(A) because the witness is repeating the defendant's own statement,

and it is being offered against the defendant. [FN120]

The question that immediately arises under Rule 806 is whether the defendant would have a right to impeach his own credibility as the declarant of ***533** this statement. In many cases, of course, the defendant would have no interest in impeaching his own credibility before the jury. In some circumstances, however, the defendant might well wish to exercise this option. For instance, in the situation described, the defendant might wish to impeach his own credibility by introducing a prior inconsistent statement--that is, a statement in which he denied any involvement with the crime. [FN121] Alternatively, the defendant might wish to suggest that his admission of guilt was false by showing that he has a reputation for untruthfulness--not a happy alternative, certainly, but one that may be preferable in a particular case to allowing a direct admission of guilt to go unchallenged.

Further, a small change in the facts described gives rise to a related question. Suppose a prosecution witness testifies that the defendant said that he had committed the crime, but that he had acted under duress. Again, the prosecutor could introduce this testimony as a party admission under Rule 801(d)(2)(A), but now, because the statement has an exculpatory component, the prosecutor might wish to impeach the defendant's credibility. This impeachment would be possible, at least with respect to a testifying witness, because the rules permit any party to attack the credibility of a witness, "including the party calling the witness." [FN122]

The plain language of Rule 806 would bar impeachment in both of these situations. Rule 806 specifically provides that it applies to the declarant of "a hearsay statement, or a statement defined in Rule 801(d)(2), (C), (D), or (E)." [FN123] The rule makes no reference to statements defined as individual or adoptive admissions in Rule 801(d)(2)(A) and (B). Under ordinary canons of statutory construction, the specific omission of subsections (A) and (B), coupled with the specific inclusion of the remaining subsections of Rule 801(d)(2), would dictate that courts interpret Rule 806 not to apply to declarants of statements admitted under Rule 801(d)(2)(A) and (B). [FN124]

***534** The question raised here, however, is whether Rule 806 should give litigants any right to engage in this type of impeachment. In evaluating this question, it is necessary first to consider any reasons that Congress may have had for crafting the text of Rule 806 to exclude individual and adoptive admissions.

1. The Drafting of Rule 806

When Congress initially considered Rule 806, the rule was in the form proposed by the Advisory Committee. At that point, the rule was drawn more narrowly, providing only for impeachment of declarants of hearsay statements. [FN125] In evaluating the proposed rule, however, Congress recognized that it contained a problematic gap, which stemmed from the structure of the hearsay rules themselves and, more particularly, from the way in which the Federal Rules of Evidence classify party admissions.

Under the Federal Rules, statements that meet the formal definition of hearsay, but nonetheless are admissible as party admissions, are not classified as hearsay exceptions, but rather are defined in Rule 801(d) as not being hearsay at all. [FN126] As a result, the language of proposed Rule 806, which referred only to declarants of hearsay statements, would not have reached statements defined as party admissions under Rule 801(d)(2).

Recognizing this problem, Congress amended the proposed rule to specify that it also applies to statements "defined in Rule 801(d)(2), (C), (D), or (E)." [FN127] This amendment extended the scope of Rule 806 to allow ***535** impeachment of the declarant when a statement is admitted because it was authorized by a party-opponent, or made by a party-opponent's agent or employee, or made by a coconspirator within the terms of Rule 801(d)(2). [FN128]

At the same time, however, Congress consciously omitted from Rule 806 any reference to statements admitted under Rule 801(d)(2)(A) and (B). As a result, Rule 806 does not authorize impeachment of the declarant when the statement is admitted either as an individual admission or as an adoptive admission. [FN129] The question at hand is whether Congress had any principled reason for carving such declarants out of Rule 806. The legislative history of the rule strongly suggests that Congress did not. Rather, the legislative history indicates that Congress excluded declarants of individual and adoptive admissions because it misunderstood how the impeachment rules operate with respect to the parties in a case.

In Congress, it was the Senate Judiciary Committee that recognized the need to include in Rule 806 a reference to statements defined as nonhearsay in Rule 801(d)(2). In its Report, the Committee explained that it had included statements introduced under Rule 801(d)(2)(C), (D), and (E) to ensure that Rule 806 would reach them. [FN130] The Committee then went on to explain why it had ***536** not included a reference to individual and adoptive admissions admitted under Rule 801(d)(2)(A) and (B): "The committee considered it unnecessary . . . because the credibility of the party-opponent is always subject to an attack on his credibility sic ." [FN131]

The Senate Judiciary Committee's assumption that a party's credibility is always subject to attack is inexplicable. A party may be impeached only if she testifies, or if her out-of-court statement is admitted such that Rule 806 applies. [FN132] The Committee's report clearly indicates, however, that it excluded Rule 801(d)(2)(A) and (B) from the text of Rule 806 based on its mistaken assumption that a party is always subject to impeachment.

In enacting Rule 806 with the Senate Judiciary Committee's language, Congress did not elaborate on the reasons for excluding declarants of individual and adoptive admissions. [FN133] In the absence of any

further explanation, Congress may have joined in or simply failed to notice the Senate Judiciary Committee's mistaken assumption that there was no need to include such declarants in the rule. In any event, however, Congress appears not to have had, or at least it did not articulate, any reason based in sound policy for excluding declarants of individual and adoptive admissions from the scope of Rule 806.

2. The Confusion Among and Within the Courts

The apparent lack of rationale for the exclusion of individual and adoptive admissions has generated confusion in the federal courts. The Seventh Circuit's treatment of the issue is illustrative. Three times in three successive years, that court addressed the question of whether Rule 806 applies to declarants of individual and adoptive admissions--with markedly inconsistent results.

***537** In the first of these cases, United States v. McClain, [FN134] the Seventh Circuit refused to countenance the defendant's argument that he was entitled to impeach the declarant of an adoptive admission under Rule 806. [FN135] In doing so, the court relied on the plain language of the rule, emphasizing that "Rule 806 says nothing of 801(d)(2)(B), which governs non- hearsay statements adopted by the party against its interest." [FN136]

The following year, the Seventh Circuit revisited the issue in United States v. Velasco. [FN137] In Velasco, however, the court departed from the language of the rule, relying instead on the contrary indications of congressional intent in the legislative history. Without mentioning its previous decision in McClain, the court announced:

Although [Rule 806's] language does not specifically include statements defined in 801(d)(2)(A), the rule under which [the defendant's] statement came in, Rule 806 is not inapplicable: "The committee considered it unnecessary to include statements contained in rule 801(d)(2)(A) and (B)--the statement by the party-opponent himself or the statement of which he has manifested his adoption--because the credibility of the party-opponent is always subject to an attack on his credibility [sic]." [FN138]

***538** The Seventh Circuit then reaffirmed its position that Rule 806 applies to declarants of statements admitted as individual and adoptive admissions the following year in United States v. Dent. [FN139] In that case, the court stated, "we have already held that this rule also applies to a party's own statement as defined in Rule 801(d)(2)(A) or (B) in Velasco." [FN140]

The Seventh Circuit's holdings in Velasco and Dent stand in direct conflict with its earlier decision in McClain. The confusion within the Seventh Circuit is especially curious, since two of the three judges on the panel that decided McClain (including its author) were on the panel in Velasco. [FN141] The Seventh Circuit's treatment of the issue is, however, symptomatic of the general confusion among the circuit courts of appeals that have addressed the issue. [FN142]

It is clear that this confusion can be attributed, at least in part, to the tension between the plain language of Rule 806 and the conflicting indications ***539** of congressional intent in the legislative history, [FN143] The courts' confusion, however, is also due to the lack of attention given the issue. The courts which have held that Rule 806 does not apply to adoptive admissions introduced under Rule 801(d)(2)(B) have, at most, noted that "Rule 806 says nothing of 801(d)(2)(B)." [FN144] The courts which have held that Rule 806 does apply to individual and adoptive admissions introduced under Rule 801(d)(2)(A) and (B) have either assumed the point, [FN145] or have merely quoted from the legislative history, without offering any discussion of the resulting contradiction with the text of the rule. [FN146] None of the courts has engaged in a thoughtful analysis of whether any principled reasons exist for either refusing or permitting impeachment of declarants of statements admitted as individual and adoptive admissions.

B. Analysis of Whether Rule 806 Should Permit Impeachment of Declarants of Individual and Adoptive Admissions

The task, then, is to evaluate whether Rule 806 should permit impeachment of the declarant of a statement admitted as an individual or adoptive admission. A threshold problem in this evaluation is identifying who constitutes the declarant in the context of both individual admissions and adoptive admissions. [FN147] The identity of the declarant is important because the declarant's status as a party to the case, as opposed to a nonparty, will have a significant influence on any policy considerations.

***540** 1. Identifying the Declarant

In the context of individual admissions, the answer is straightforward: the declarant is always the party against whom the statement has been offered. Rule 801(d)(2)(A) only exempts from the hearsay rule those statements that are offered against a party and that are the party's own statements. [FN148]

In the context of adoptive admissions under Rule 801(d)(2)(B), however, the declarant's identity is less obvious. The question is whether the declarant is the person who uttered the statement or the person who adopted the statement. The courts that have discussed this question un conjunction with Rule 806 have reached inconsistent conclusions. In United States v. Price, the Eleventh Circuit opined that "the utterer of words which have been adopted as an admission by the defendant, is subject to impeachment under FRE 806." [FN149] In United States v. Finley, [FN150] however, the district court held that " t he declarant of an adoptive admission is the one who adopts it as his own statement." [FN151]

The conclusion of the district court in Finley appears to be correct. Under ***541** the Federal Rules, another person's statement only becomes an adoptive admission if the party against whom the statement is offered adopted the statement, or manifested belief in its truth.

[FN152] If those requirements are met, then the party has, in a real sense, taken the other person's statement and made it her own. In other words, once the party has embraced the statement, the identity of the utterer is no longer relevant because the statement is being offered as though it were the adopting party's own statement, without regard to who actually uttered it. Indeed, that is the very rationale for the statement's admissibility. [FN153]

Courts have consistently recognized this same point in cases involving the Confrontation Clause. Defendants have argued that, if an adoptive confession is introduced against a criminal defendant, the Confrontation Clause requires that he have the opportunity to cross-examine the person who originally made it. But the courts have not been convinced. In Poole v. Perini, [FN154] for example, the Sixth Circuit explained that " a n adoptive confession avoids the confrontation problem because the words of the hearsay become the words of the defendant." [FN155] The court went on to hold that the defendant had not raised a legitimate claim under the Confrontation Clause because he was asserting, in essence, that he had not been given an opportunity to confront himself. [FN156] ***542** Similarly, in Oaks v. Patterson, [FN157] the court held that, once the defendant has adopted the statement of another, " s uch a statement is regarded as the acknowledgment of guilt or confession of the person assenting to it and not the statement of the original declarant." [FN158]

This reasoning applies with equal force to adoptive admissions under Rule 806 in both civil and criminal cases. Courts therefore should treat a statement falling within Rule 801(d)(2)(B) as having been made by the person who adopted it. As with individual admissions, therefore, the declarant of an adoptive admission will always be the party against whom the statement is offered. [FN159] This characteristic distinguishes individual and adoptive admissions under Rule 801(d)(2)(A) and (B) from admissions falling within Rule 801(d)(2)(C), (D), or (E) because the declarant of an individual or adoptive admission under (A) or (B) is always the party herself; under the other provisions, the declarant is always some third person (i.e., the authorized spokesperson, agent or employee, or coconspirator).

2. Legitimacy of Impeaching the Declarant-Party

When the declarant is the party against whom the statement is being offered, the question of impeachment can arise in one of two ways: the declarant-party may wish to impeach her own credibility, or the party who introduced the statement (the "sponsoring" or "calling" party) may wish to impeach the credibility of its maker (the "declarant-party"). [FN160] In determining ***543** whether Rule 806 should permit such impeachment, it is necessary to focus on whether there are special considerations that arise when the declarant is a party to the case, and whether those considerations warrant restricting the normal right of impeachment which would obtain if that party had testified.

a. Impeachment by the Sponsoring Party

A basic premise of Rule 806 is that the party who introduced the statement is, in effect, offering the declarant as a witness. [FN161] As a general matter, Rule 607 permits a party to impeach her own witness. [FN162] Thus, if Rule 806 were extended to individual and adoptive admissions, a party introducing her opponent's statement could then seek to impeach her opponent's credibility.

The sponsoring party might wish to impeach the declarant-party's credibility for two reasons. First, the sponsor might simply want to get otherwise inadmissible, but very powerful, impeachment evidence to the jury, hoping that the jury will also use the evidence substantively. In a criminal case, for instance, the prosecutor might wish not only to introduce the defendant's confession, but also evidence of the defendant's otherwise inadmissible prior convictions, past bad acts, and prior inconsistent statements. [FN163] Courts have uniformly denounced this practice. The federal courts of appeals have agreed that, under Rule 607, impeachment by the calling party is impermissible "where employed as a mere subterfuge to get before the jury evidence not ***544** otherwise admissible." [FN164]

By contrast, the sponsoring party may have a second, more legitimate reason for wanting to impeach the declarant-party. If the declarant's statement is both helpful and harmful to the sponsor's case, the sponsor might well wish to introduce the statement and then impeach the declarant's credibility in order to cast doubt on the harmful portion of the statement. [FN165]

Courts have confronted a related issue in cases in which the prosecution has sought to impeach its own testifying, nonparty witness with a substantively inadmissible prior inconsistent statement. In those cases, courts have permitted the prosecution to impeach the witness in some circumstances. [FN166] Courts have ***545** remained wary of the prosecution's motivation, however, requiring, for instance, that the prosecution show that its "primary purpose" is not to place otherwise inadmissible evidence before the jury. [FN167]

With this type of requirement, courts have, at least to some extent, alleviated the concern that the calling party is simply trying to sneak in inadmissible evidence. [FN168] Even so, the calling party's motivation is difficult to police and, regardless of that party's motive, there remains a substantial risk that the jury will be unable to cabin its use of substantively inadmissible evidence. Moreover, when the calling party is not dealing with a nonparty witness, but rather is introducing her opponent's out-of-court admission, there is a significant additional consideration.

That consideration arises because it is no longer simply a person tangential ***546** to the case whose credibility the calling party has put in issue and then seeks to attack. The target of the attack is a party to the case itself. The problems, therefore, go beyond the already significant risk that the calling party's motive may be impure and that the jury will receive (and misuse) substantively

inadmissible evidence. Now, the direct result of the use of the impeaching evidence is to damage the declarant-party's credibility.

The harm effected by this result is substantial because the credibility of a party is so centrally important to determining the outcome of any case. The Federal Rules and the common law contain a carefully balanced set of impeachment rules that restrict, in important ways, the ability of a party to impugn her opponent's credibility. [FN169] It is unfair to allow a party to sidestep these restrictions through the simple device of introducing an out-of- court statement that her opponent has made. When one party has introduced an out-of-court statement which puts her opponent's credibility in issue, therefore, that party should not, by virtue of her own act of introducing such evidence, thereby be liberated to take otherwise impermissible steps to attack her opponent's credibility. [FN170]

This possibility is of particular concern in a criminal case because the otherwise inadmissible impeaching evidence can be particularly damaging to the defendant. [FN171] But the harm caused by this result could be substantial in civil cases as well. As a matter of policy, therefore, a party should not be permitted to use her opponent's statements as a vehicle to introduce damaging, and otherwise inadmissible, impeachment evidence.

b. Impeachment by the Declarant-Party

The question remains, however, whether Rule 806 should permit the ***547** declarant-party to impeach her own credibility once her individual or adoptive admission has been introduced. [FN172] In many cases, of course, a party will not want to impeach her own credibility. There are exceptions, however. Most significantly, a party might want to introduce an inconsistent statement to suggest that her inconsistency undermines her credibility and thus casts doubt on the truth of her damaging admission. [FN173]

Impeachment in these circumstances, however, almost necessarily involves a suspect purpose. If the party's inconsistent statement was admissible substantively, then the party would not need to introduce it as impeaching evidence. It is only when the inconsistent statement is inadmissible substantively (because, for instance, it is hearsay) that using it for impeachment is attractive. And using the statement for impeachment is very attractive in that situation because it enables the party to place the inadmissible, but presumably helpful, evidence before the jury with the attendant likelihood that the jury will use it substantively. [FN174]

This risk also occurs when the calling party seeks to impeach her own witness with substantively inadmissible evidence. But the likelihood that the party seeking to impeach is acting in bad faith is much greater when the party ***548** seeks to impeach herself, rather than some nonparty witness. It seems highly unlikely that the party genuinely would want to introduce the statement not for its truth, but rather to impress upon the jury that she is not to be believed.

Clearly, Rule 806 should not permit impeachment where the declarant-party's purpose is the illegitimate one of giving the jury substantively inadmissible evidence in the guise of impeachment. The courts' reasoning in the Rule 607 cases--which uniformly hold that the calling party may not impeach her own witness where impeachment is a "mere subterfuge" to give the jury otherwise inadmissible evidence--necessarily leads to this conclusion. [FN175]

While it seems that the declarant-party's purpose in seeking to impeach herself with an inconsistent statement will almost always be improper, it is possible, although far less likely, that the declarant-party might wish to impeach her own credibility in other ways. She might wish to show, for instance, that she has a reputation for untruthfulness, or she might wish to show that she has some relevant defect in sensory or mental capacity which undermines the credibility of the admission. Although it certainly seems counter-intuitive that any party would genuinely seek to convince the jury that she is not credible, it is possible. For several interrelated reasons, however, Rule 806 should not permit a declarant-party to do so.

First, this conclusion is most consistent with the rationale for admitting party admissions into evidence. Party admissions are generally allowed into evidence not because they are inherently reliable, but rather based on notions of fairness in the adversary system. The sense that it is fair to allow one party to use her opponent's admissions stems, at least in part, from the feeling that the opponent "cannot object to [his own statement] being received as prima facie trustworthy." [FN176]

In addition, the critical concern about hearsay--the lack of opportunity to cross-examine--is absent in this setting because it is the adverse party's own statement that is being admitted. [FN177] Thus, any need that the party may have to ***549** challenge her own statements can be satisfied by providing the party with the opportunity to take the witness stand. [FN178] As Dean Wigmore stated in recognizing this distinction, "a party is in theory present during the trial, and has in fact ample opportunity to protect himself by taking the stand for any explanations which he may deem necessary after hearing the testimony to his alleged admissions." [FN179]

Second, the possibility that a party would be permitted to impeach her own admission, and thus to put her credibility in issue in only a limited way, is conceptually problematic. If, for example, a party were to testify that her statement was unreliable, the opposing party would certainly be given the opportunity to cross-examine such testimony to explore whether it was self- serving or misleading. If, on the other hand, Rule 806 were to permit the party to impeach her own credibility without taking the witness stand, the opposing party would have no effective rejoinder. Rather, opposing counsel would be relegated to the standard alternative of seeking to rehabilitate the credibility of the witness. [FN180] This alternative is unsatisfactory for the opposing counsel

because it would require her to bolster the credibility of her opponent in the case.

Finally, as noted above, it seems likely that in the vast majority of cases the declarant-party's purpose in offering the impeaching evidence will be illegitimate because the party will be attempting to present otherwise inadmissible evidence to the jury, in the hope that the jury will use the evidence substantively. [FN181] As a practical matter, it is difficult to conceptualize many ***550** cases in which a party would genuinely seek to impeach her own credibility. [FN182] This fact alone presents a significant argument for a blanket rule that will lead to the proper result in the great majority of cases. [FN183]

Thus, the special considerations involved when the declarant is a party to the case counsel in favor of limiting the impeachment rights that would normally be accorded if that party had testified as a witness. The better approach, therefore, is to refuse to allow impeachment of declarants of statements admitted as individual and adoptive admissions under Rule 801(d)(2)(A) and (B).

C. Proposed Clarification of Rule 806

For these reasons, Rule 806 should not authorize impeachment of the declarant of a statement admitted under Rule 801(d)(2)(A) or (B). [FN184] This result is consistent with Rule 806 as it is currently written, but it conflicts with the indications of congressional intent in the legislative history of the rule, a situation which has caused confusion for the federal courts. The exclusion of individual and adoptive admissions from the scope of Rule 806 should therefore ***551** be clarified with the following revision to the text of Rule 806:

When a hearsay statement, or a statement defined in Rule 801(d)(2), (C), (D), or (E) (but not (A) or (B), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay the declarant's statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

This proposed clarification includes minor changes in the second and third sentences of the rule. These changes are designed to clarify that Rule 806 provides uniform treatment with respect to declarants of hearsay statements and declarants of statements defined in Rule 801(d)(2)(C), (D), or (E). The references to "hearsay" statements in the second and third sentences of the current rule might be taken to suggest that those provisions apply only to declarants of hearsay statements. These references are likely a result of sloppy drafting; the amendment that added statements defined in Rule 801(d)(2)(C), (D), or (E) to Rule 806 was incorporated in the first sentence, and the rest of the rule was not then revised to accommodate this change. [FN185]

With respect to the second sentence, the omission of any reference to admissions is unproblematic. That sentence allows a party to impeach a hearsay declarant with evidence of an inconsistent statement without satisfying the requirement contained in Rule 613(b) that the witness be provided the opportunity to explain or deny. Rule 613(b) itself, however, specifically provides that it "does not apply to admissions of a party-opponent as defined in rule 801(d)(2)," thus obviating any need for Rule 806 to do the same. [FN186]

With respect to the third sentence, however, the reference only to "hearsay" statements suggests that, if the opposing party calls the declarant as a witness, that party will only be entitled to cross-examine the declarant if the declarant's statement was hearsay, and not if it was defined as nonhearsay in Rule 801(d)(2)(C), (D), or (E). There is no sound justification for any such distinction. If the sponsoring party had called the authorized spokesperson, employee, agent, or coconspirator as a witness, the opposing party would be ***552** entitled to cross-examine that witness. The opposing party should enjoy that same right against a declarant, especially since it is the sponsoring party's tactical decision to use an out-of-court statement rather than live testimony that forces the opposing party to call the declarant as a witness herself. The Supreme Court apparently recognized this point in United States v. Inadi, [FN187] in which the Court stated that "if the party against whom a co-conspirator statement has been admitted calls the declarant as a witness, ' the party is entitled to examine him on the statement as if under cross- examination."' [FN188] Two states, Alaska and Vermont, have corrected these drafting ambiguities in their versions of Rule 806. [FN189]

V. CONCLUSION

Rule 806 serves a useful and desirable purpose in the Federal Rules of Evidence by permitting a nontestifying declarant whose out-of-court statement is admitted for its truth to be impeached on the same grounds that are available to impeach the credibility of a witness who actually testifies in court. It thus affords the trier of fact a more complete context in which to assess the value of out-of-court statements that have been admitted into evidence. For the most part, Rule 806 works effectively to serve this sensible purpose.

It is nonetheless true that the peculiar nature of Rule 806, which always applies in tandem with the separate witness-impeachment rules, results in conceptual and practical difficulties. These difficulties stem from the fact that Rule 806, which permits impeachment of nontestifying declarants, must operate in conjunction with impeachment rules that were specifically and carefully ***553** designed for use against testifying witnesses.

In order for Rule 806 to work fairly and effectively,

therefore, it is important to analyze the policy considerations and the balancing of interests that shaped the other impeachment rules in the special context of impeachment of a declarant who is not a testifying witness. This Article has attempted to provide that kind of analysis in three areas, and it has reached the following conclusions. First, where the declarant is a criminal defendant, Rule 806 should only permit impeachment with prior convictions and specific instances of conduct showing untruthfulness if the defendant has affirmatively placed his credibility in issue. Second, Rule 806 should vest the trial court with discretion to allow the impeachment party to use extrinsic evidence of specific instances of conduct when impeaching a nontestifying declarant. Third, Rule 806 should not authorize impeachment of declarants of individual and adoptive admissions admitted under Rule 801(d)(2)(A) and (B).

Adoption of these proposals will better enable Rule 806 to work in harmony with the other impeachment rules. The full text of Rule 806 should thus be amended to read as follows:

RULE 806. ATTACKING AND SUPPORTING CREDIBILITY OF DECLARANT

When a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E) (but not (A) or (B)), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness, subject to the following:

(a) If the declarant is an accused, the credibility of the declarant may be attacked with specific instances of conduct that are probative of untruthfulness, as provided in Rule 608(b), or with prior convictions, only if the declarant has affirmatively placed the declarant's credibility in issue;

(b) Except as provided in subsection (a), if the declarant does not testify, the court may, in its discretion, permit the use of extrinsic evidence to prove specific instances of conduct that are probative of truthfulness or untruthfulness, as provided in Rule 608(b), as a means of attacking or supporting the credibility of the declarant;

(c) Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's statement, is not subject to any requirement that the declarant may have been afforded an opportunity ***554** to deny or explain.

If the party against whom the declarant's statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

In addition, the explanatory notes to Rule 806 should provide guidance to the courts on three points. First, they should describe when the declarant who is a criminal defendant should be considered to have affirmatively placed his credibility in issue, for purposes of applying subsection (a) of the proposed amended rule. [FN190] Second, they should provide guidance about how the courts should exercise their discretion under subsection (b) of the proposed amended rule in determining whether to permit the use of extrinsic evidence. [FN191] Third, they should caution that, when the declarant-party is a criminal defendant who seeks to impeach the credibility of his own statement, the court should take care that the defendant's right not to testify under the Fifth Amendment is not unduly burdened. [FN192]

[FNa1]. Assistant Professor of Law, Capital University Law and Graduate Center; B.A., University of the Pacific, 1983; J.D., Boalt Hall School of Law, 1986; B.C.L., Oxford University, 1988. I wish to thank Professors Eleanor Swift, Barbara Rook Snyder, Harry Litman, Max Kravitz, Daniel Kobil, Steven Kautz, Ronald Friedman, and William Bluth for their valuable suggestions. I also would like to express my thanks to Alesia Holliday for her assistance with the research of this Article.

[FN1]. Rule 806 was adopted in 1975 within the original body of the Federal Rules of Evidence. Although it was amended in 1987 to make its language gender-neutral, no substantive change has ever been made to the rule.

[FN2]. See ABA LITIGATION SECTION, EMERGING PROBLEMS UNDER THE FEDERAL RULES OF EVIDENCE 532 (2d ed. 1991) ("There is little doubt that Rule 806 is underutilized."). The rule also has received little discussion to date in the literature. See Anthony M. Brannon, Successful Shadowboxing: The Art of Impeaching Hearsay Declarants, 13 CAMPBELL L. REV. 157, 158 (1991); Kimberly B. Glass, Comment, Impeachment of Nontestifying Hearsay Declarants: A Neglected Weapon of Trial Practice, 43 ALA.L.REV. 445, 445, 460 (1992); cf. Maureen A. Gorman & James Smith, Evidence: The 1984-85 Term--A Selective Review of Seventh Circuit Decisions Applying the Federal Rules of Evidence, 62 CHI.-KENT L. Rev. 527, 546 (1986).

[FN3]. FED. R. EVID. 806. Rule 806 provides in full:

When a hearsay statement, or a statement defined in Rule 801(d)(2), (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

Id. Rule 801 defines a declarant as "a person who makes a statement" and defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FED. R. EVID. 801 (b), (c). Federal Rule of Evidence 801(d)(2) defines statements that qualify as party admissions; those definitions are set out infra at note 126.

[FN4]. FED. R. EVID. 806 advisory committee's note; see also United States v. Moody, 903 F.2d 321, 328-29 (5th Cir.1990); United States v. Finley, 934 F.2d 837, 839 (7th Cir.1991); United States v. Graham, 858 F.2d 986, 990 (5th Cir.1988), cert. denied, 489 U.S. 1020 (1989).

[FN5]. United States v. Scott, No. 93-7552, 1995 U.S. App. LEXIS 5598, at *21 (5th Cir. Mar. 21, 1995) ("[A]ny evidence that would have been admissible to impeach [the declarant] had he testified was admissible to impeach [the declarant] even though he did not testify."); see also MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 806.1, at 1005-06 (3d ed. 1991); 4 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE § 501, at 1240 (1980).

[FN6]. See Finley, 934 F.2d at 839 (stating that Rule 806 "does not allow the use of evidence made inadmissible by some other rule. Rule 806 extends the privilege of impeaching the declarant of a hearsay statement but does not obliterate the rules of evidence that govern how impeachment is to proceed."). More generally, as the Fifth Circuit has explained: "The scope of impeachment parallels that available if the declarant had testified in court, since rule 806 treats the physical location of the testifying declarant, for impeachment purposes, as legally insignificant." Moody, 903 F.2d at 329.

[FN7]. FED. R. EVID. 609 (prior convictions), 608(b) (past bad acts), 613 (prior inconsistent statements).

[FN8]. See, e.g., 120 CONG. REC. 2376 (1974) (remarks of Rep. Hogan); id. at 2377 (remarks of Rep. Dennis); see also infra note 17 and accompanying text.

[FN9]. Rule 806 does contain a provision designed to facilitate its combination with Rule 613, which governs impeachment with inconsistent statements. Rule 613 generally provides that extrinsic evidence of inconsistent statements may be admitted only if "the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require." FED. R. EVID. 613(b).

Recognizing the difficulty, and sometimes the impossibility, of complying with Rule 613's requirements with respect to a declarant who may not be present at trial, Rule 806 specifically directs that "[e]vidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain." FED. R. EVID. 806; see also id. advisory committee's note.

[FN10]. The Judicial Conference of the United States' Advisory Committee on the Federal Rules of Evidence is currently studying the Federal Rules of Evidence with the aim of proposing amendments to update and improve them. The Advisory Committee is chaired by Judge Ralph K. Winter, Jr., with Professor Margaret A. Berger serving as the Committee's Reporter. See Ernest E. Svenson, Judicial Conference to Review Rules of Evidence, 18 LITIGATION NEWS No. 6 Aug. 1993, at 2.

[FN11]. FED. R. EVID. 609. Rule 609(a), which sets forth the "[g]eneral rule" on impeachment with prior convictions, provides:

> For the purpose of attacking the credibility 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 if it involved dishonesty or false statement, regardless of the punishment.

Id.

[FN12]. See, e.g., FED. R. EVID. 609 advisory committee's note to Amended Rule 609(a) (amended 1990); 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 609[02], at 609-31 (Aug. 1991); Gene R. Nichol, Jr., Prior Crime Impeachment of Criminal Defendants: A Constitutional Analysis of Rule 609, 82 W. VA. L. REV. 391, 392 (1980).

[FN13]. See United States v. Smith, 551 F.2d 348, 360-61 (D.C. Cir.1976) (describing the "labyrinthine history of Rule 609"); see also Green v. Bock Laundry Machine Co., 490 U.S. 504, 511-24 (1989) (same); United States v. Lipscomb, 702 F.2d 1049, 1059-62 (D.C. Cir.1983) (same); 3 WEINSTEIN & BERGER, supra note 12, ¶ 609[01]-[03], at 609-1 to-41 (same).

[FN14]. FED. R. EVID. 609(a)(2).

[FN15]. FED. R. EVID. 609(a)(1). More precisely, Rule 609(a)(1) requires that "the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted . . . ." This definition is generally co-extensive with the definition of a felony.

[FN16]. Green, 490 U.S. at 523 n.28 (quoting Teree E. Foster, Rule 609(a) in the Civil Context: A Recommendation for Reform, 57 FORDHAM L. REV. 1, 8 (1988)); see also Smith, 551 F.2d at 360-61 ("Rule 609 was one of the most hotly contested provisions in the Federal Rules of Evidence. The current language of the rule is unquestionably the product of careful deliberation and compromise."); Lipscomb, 702 F.2d at 1063 ("the final version of Rule 609(a)(1) must be understood as a compromise between the House preference for excluding all prior convictions unless the crime involved 'dishonesty or false statement' and the Senate preference for admitting all prior felony convictions"); 3 WEINSTEIN & BERGER, supra note 12, at 609-8,-25.

[FN17]. For instance, Representative Hogan, a principal proponent of broad rights to impeach, argued: "The

proponents of [allowing impeachment only with convictions of crimes involving dishonesty or false statement] argue that allowing proof of prior convictions unfairly prejudices the jury against the accused who takes the stand. First of all, the fifth amendment gives him the right to refuse to take the stand at all and thereby prevent all prior convictions from coming to the jury's attention." 120 CONG. REC. 2376 (1974) (emphasis added); see also id. at 1414 (remarks of Rep. Hogan). Similarly, Representative Dennis, a principal proponent of narrow rights to impeach, argued: "Now, it is a great anomaly that we [permit unrestricted cross-examination with prior convictions], because unless the man takes the witness stand, if he is a criminal defendant, it is absolutely impossible, ordinarily, to put in any evidence concerning his previous convictions . . . ." Id. at 2377 (emphasis added); see id. at 1419 (remarks of Rep. Dennis). Many other speakers echoed this same point. See, e.g., id. at 2378 (remarks of Rep. Brasco); id. at 2381 (remarks of Rep. Lott); id. at 37,080 (remarks of Sen. Kennedy). This assumption that Rule 609 would permit impeachment only of a defendant who chose to testify is not surprising because Rule 609, by itself, only operates against a testifying witness.

[FN18]. See United States v. Newman, 849 F.2d 156, 161-63 (5th Cir.1988); United States v. Robinson, 783 F.2d 64, 67-68 (7th Cir.1986); United States v. Bovain, 708 F.2d 606, 613-14 (11th Cir.), cert. denied, 464 U.S. 898, and cert. denied, 464 U.S. 997, and cert. denied, 464 U.S. 1018 (1983); United States v. Lawson, 608 F.2d 1129, 1129-30 (6th Cir.1979), cert. denied, 444 U.S. 1091 (1980).

[FN19]. See FED. R. EVID. 806 advisory committee's note (citing Rule 609 in explaining the scope and rationale of Rule 806).

[FN20]. United States v. Moody, 903 F.2d 321, 328-29 (5th Cir.1990); United States v. Hall, 854 F.2d 1036, 1042-43 (7th Cir.1988); Newman, 849 F.2d at 161-63; Robinson, 783 F.2d at 67-68; United States v. Noble, 754 F.2d 1324, 1330-31 (7th Cir.), cert. denied, 474 U.S. 818 (1985); Bovain, 708 F.2d at 613-14; Lawson, 608 F.2d at 1130; see also Rose Hall Ltd. v. Chase Manhattan Overseas Banking Corp., 576 F.Supp. 107, 156-57 (D.Del. 1983) (apparently assuming that Rule 609 would apply through Rule 806), aff'd mem., 740 F.2d 958 (3d Cir.1984), cert. denied, 469 U.S. 1159 (1985).

[FN21]. See Noble, 754 F.2d at 1330-31; Bovain, 708 F.2d at 613-14; Lawson, 608 F.2d at 1130.

[FN22]. FED. R. EVID. 801(c).

[FN23]. See Noble, 754 F.2d at 1330-31; Lawson, 608 F.2d at 1129-30.

[FN24]. See Bovain, 708 F.2d at 613-14; Robinson, 783 F.2d at 67-68.

[FN25]. 754 F.2d 1324.

[FN26]. Id. at 1330-31. Similarly, in Lawson, the defendant was charged with uttering and possessing counterfeit money. Lawson, 608 F.2d at 1130. Although Lawson did not testify, Lawson's counsel introduced a written statement in which Lawson denied all complicity in the counterfeiting activities. In addition, in cross-examining a prosecution witness (a Secret Service agent), Lawson's counsel brought out the fact that Lawson had consistently denied any involvement in the scheme. The prosecution then impeached Lawson with two prior felony convictions. Id. The courts did not identify in either Noble or Lawson the specific hearsay exceptions that rendered the defendants' own hearsay statements admissible.

[FN27]. FED. R. EVID. 806. In affirming Noble's conviction, the Seventh Circuit held that Rule 806 applied. The court reasoned: "When Noble's counsel introduced the taped conversation into evidence containing the defendant's exculpatory hearsay statements, the defense counsel made the defendant's credibility an issue." Noble, 754 F.2d at 1331; see also Lawson, 608 F.2d at 1130.

[FN28]. FED. R. EVID. 806 advisory committee's note.

[FN29]. 120 CONG. REC. 1414 (1974) (remarks of Rep. Hogan); 1 MCCORMICK ON EVIDENCE § 42, at 153 (John W. Strong ed., 4th ed. 1992) [hereinafter MCCORMICK]; 3 WEINSTEIN & BERGER, supra note 12, ¶ 609[02], at 609-41; Nichol, supra note 12, at 407-09.

[FN30]. With respect to felonies not bearing directly on the defendant's veracity, the compromise embodied in Rule 609 recognizes the need for a case-by-case determination of whether the probative value of the impeaching evidence is sufficient to justify subjecting the defendant to such prejudice. See, e.g., United States v. Lipscomb, 702 F.2d 1049, 1064-66 (D.C. Cir.1983).

[FN31]. Noble, 754 F.2d at 1330-31; see also Lawson, 608 F.2d at 1130 ("By putting these hearsay statements before the jury his counsel made Lawson's credibility an issue in the case the same as if Lawson had made the statements from the witness stand.").

[FN32]. See United States v. McClain, 934 F.2d 822, 833-34 (7th Cir.1991) ("[T]he defendant should not be able to avoid completely this legitimate attack by, instead of testifying, presenting only exculpatory statements made in the past.").

[FN33]. See generally Adam H. Kurland, Prosecuting Ol' Man River: The Fifth Amendment, the Good Faith Defense, and the Non-Testifying Defendant, 51 U. PITT. L. REV. 841, 910-11 n.210 (1990) (noting that the effect of Rule 806 "is not inconsiderable. However, a defendant may determine that it may not be as damaging as facing cross-examination.").

[FN34]. FED. R. EVID. 806.

[FN35]. 708 F.2d 606 (11th Cir.), cert. denied, 464 U.S. 898, and cert. denied, 464 U.S. 997, and cert. denied, 464

U.S. 1018 (1983).

[FN36]. Id. at 613. The trial court refused to admit evidence of Finch's convictions for forgery and escape. The reviewing court did not explain why the forgery conviction, which would normally be automatically admissible under Rule 609(a)(2), was excluded. Id. at 613-14.

[FN37]. FED. R. EVID. 806.

[FN38]. Bovain, 708 F.2d at 613. The court elaborated: "Because Finch is a hearsay declarant, his testimony may be treated like that of a witness (Rule 806), and as a witness, he can be impeached (Rules 608, 609). Therefore, the certified records of Finch's prior convictions were admissible for impeachment purposes (Rule 609)." Id.

[FN39]. Id. at 614.

[FN40]. More specifically, advocates of this view would have given counsel the right to impeach any witness, including the criminal defendant, with any conviction for a crime punishable by death or imprisonment in excess of one year and with any conviction (regardless of punishment) for a crime involving dishonesty or false statement. See 120 CONG. REC. 1414 (1974) (remarks of Rep. Hogan); id. at 37,076 (remarks of Sen. McClellan). The Senate Bill embodied this view. Id. at 37,083.

[FN41]. See id. at 1419 (remarks of Rep. Dennis). The House Bill embodied this view. Id. at 2374, 2381, 2393-94.

[FN42]. See id. at 2379 (remarks of Rep. Wiggins) (admonishing the Congress should not "underestimate for one moment the prejudicial impact of permitting an inquiry into unrelated prior crimes by a man who is a party defendant in a criminal trial. . . . [T]he admission of evidence of unrelated crimes when the defendant himself is on the stand, borders upon a denial of due process . . . ."); id. at 37,080 (remarks of Sen. Kennedy) (commenting that "all authorities agree that the greatest source of prejudice to a defendant is a prior felony conviction"); id. at 2377 (remarks of Rep. Dennis); id. at 37,078 (remarks of Sen. Hart).

[FN43]. FED. R. EVID. 609 advisory committee's note to Amended Rule 609(a) (amended 1990) (noting that the Rule is clear that "evidence offered under Rule 609 is offered only for purposes of impeachment"); see also United States v. Gilliam, 994 F.2d 97, 99-100 (2d Cir.), cert. denied, 114 S.Ct. 335 (1993).

[FN44]. See FED. R. EVID. 609 advisory committee's note to Amended Rule 609(a) (amended 1990); 1 MCCORMICK, supra note 29, § 42, at 153; 3 WEINSTEIN & BERGER, supra note 12, ¶ 609[02], at 609-30 to 609-31; James W. Betro, The Use of Prior Convictions to Impeach Criminal Defendants--Do the Risks Outweigh the Benefits?, 4 ANTIOCH L.J. 211, 211-12 (1986); Robert G. Spector, Impeaching the Defendant by his Prior Convictions and the Proposed Federal Rules of Evidence: A Half Step Forward and Three Steps Backward, 1 LOY. U. CHI. L.J. 247, 249 (1970).

[FN45]. See, e.g., Nash v. United States, 54 F.2d 1006, 1007 (2d Cir.) (Learned Hand, J.) (explaining that it is unlikely that jurors can perform this type of "mental gymnastic"), cert. denied, 285 U.S. 556 (1932); Bruton v. United States, 391 U.S. 123, 131-37 (1968); Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) ("The naive assumption that prejudicial effects can be overcome by instructions to the jury, . . . all practicing lawyers know to be unmitigated fiction."); Dunn v. United States, 307 F.2d 883, 886 (5th Cir.1962) ("[A]fter the thrust of the saber, it is difficult to say forget the wound.").

[FN46]. Nichol, supra note 12, at 419; see also Abraham P. Ordover, Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b) and 609(a), 38 EMORY L.J. 135, 175-77 (1989); H. Richard Uviller, Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom, 130 U. PA. L. REV. 845, 869 (1982).

[FN47]. See FED. R. EVID. 609 advisory committee's note to Amended Rule 609(a) (amended 1990), which states:

> [I]n virtually every case in which prior convictions are used to impeach the testifying defendant, the defendant faces a unique risk of prejudice-- i.e., the danger that convictions that would be excluded under Fed. R. Evid. 404 will be misused by a jury as propensity evidence despite their introduction solely for impeachment purposes.

Id.; see also United States v. Bagley, 772 F.2d 482, 488 (9th Cir.1985) (discussing the risk of prejudice that the defendant faces after impeachment with prior convictions), cert. denied, 475 U.S. 1023 (1986); United States v. Fountain, 642 F.2d 1083, 1091 (7th Cir.) (same), cert. denied, 451 U.S. 993 (1981); United States v. Avarello, 592 F.2d 1339, 1346 (5th Cir.) (same), cert. denied, 444 U.S. 844 (1979); Gordon v. United States, 383 F.2d 936, 940 (D.C. Cir.1967) (same), cert. denied, 390 U.S. 1029 (1968); 120 CONG. REC. 37,078 (1974) (remarks of Sen. Hart); 1 MCCORMICK, supra note 29, § 42, at 153.

[FN48]. HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 159-60 (1966) (studying the American jury system and finding that when the strength of the evidence was otherwise constant, conviction rates were up to 27% higher when the jury knew that the defendant had a prior conviction); Anthony N. Doob & Hershi M. Kirshenbaum, Some Empirical Evidence on the Effect of s. 12 of the Canada Evidence Act upon an Accused, 15 CRIM. L.Q. 88, 91-95 (1972- 1973) (giving forty-eight mock jurors a breaking and entering fact pattern, and informing half that the defendant had prior convictions--those jurors who learned of the prior convictions gave the defendant a higher rating of guilt regardless of whether they received limiting instructions); Note, To Take the Stand or Not to Take the

Stand: The Dilemma of the Defendant with a Criminal Record, 4 COLUM. J.L. & SOC. PROBS. 215, 218-19 (1968) (finding that 43% of trial judges and 98% of criminal defense attorneys responding to a questionnaire thought that jurors could not follow an instruction to consider prior crimes evidence only with respect to credibility and not guilt). See generally Robert D. Okun, Character and Credibility: A Proposal to Realign Federal Rules of Evidence 608 and 609, 37 VILL. L. REV. 533, 552-54 (1992) (citing, describing, and evaluating a variety of studies).

[FN49]. For example, Representative Dennis argued:

[M]ost of the research on the subject indicates that a very large proportion of the miscarriages of justice which occur are in those cases where either we prejudice the man because he does take the witness stand in his own defense, or we scare him off and he does not tell his story because of that rule [allowing impeachment with prior convictions].

. . . .

We amended this section [Rule 609], on my motion, to hold cross examination as to prior to [sic] convictions down to previous convictions which do in fact bear on credibility, that is convictions which involve falsehood or dishonesty and those only.

120 CONG. REC. 1419 (1974); see also supra note 42. Many commentators also advocate significant restrictions on impeachment with prior convictions. See, e.g., James E. Beaver & Steven L. Marques, A Proposal to Modify the Rule on Criminal Conviction Impeachment, 58 TEMP. L.Q. 585, 619-21 (1985); James H. Gold, Sanitizing Prior Conviction Impeachment Evidence to Reduce Its Prejudicial Effects, 27 ARIZ.L.REV. 691, 697-708 (1985); Nichol, supra note 12, at 418-21; Okun, supra note 48, at 568-72; Note, Character Evidence by Any Other Name . . .: A Proposal to Limit Impeachment by Prior Conviction Under Rule 609, 58 GEO. WASH. L. REV. 762, 794-801 (1990).

[FN50]. 120 CONG. REC. 2374, 2393-94 (1974). Under the House Bill, Rule 609(a) would have stated: "For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible only if the crime involved dishonesty or false statement." Id.

[FN51]. Id. at 1414 (remarks of Rep. Hogan).

[FN52]. Id.; see also id. at 2376, 2380; MCCORMICK, supra note 29, § 42, at 153 ("Most prosecutors would argue with much force that it would be misleading to permit the accused to appear as a witness of blameless life, and this argument has prevailed widely."); 3 WEINSTEIN & BERGER, supra note 12, ¶ 609 [02], at 609-29 (noting that this view has been persuasive to some courts); Nichol, supra note 12, at 407-09 ("Fears have traditionally been expressed that, absent the availability of prior crime impeachment, a criminal defendant will be able to unfairly portray himself as a model citizen." The author proceeds persuasively to challenge this view, arguing that jurors recognize both that the defendant has an obvious motive to lie and that, having gotten this far in the system, there is a substantial possibility that he is guilty.).

[FN53]. 120 CONG. REC. 37,076 (1974). Other members of Congress echoed the same concerns. See id. at 2381 (remarks of Rep. Lott); id. at 2380 (remarks of Rep. Hogan); id. at 37,080 (remarks of Sen. Thurmond). Judicial opinions also reflect this concern. See United States v. Garber, 471 F.2d 212, 214-15 (5th Cir.1972) ("The present rationale for admitting prior conviction evidence for impeachment purposes is that the jury should be informed about the character of a witness who asks the jury to believe his testimony."); State v. Duke, 123 A.2d 745, 746 (N.H. 1956) (opining that, when a criminal defendant testifies, "he asks the jury to accept his word. No sufficient reason appears why the jury should not be informed what sort of person is asking them to take his word. In transactions of everyday life this is probably the first thing that they would wish to know.").

[FN54]. 120 CONG. REC. 37,083 (1974).

[FN55]. FED. R. EVID. 609(a); see supra notes 11-15 and accompanying text.

[FN56]. See supra note 17 and accompanying text.

[FN57]. See, e.g., United States v. Booker, 706 F.2d 860, 862 (8th Cir.) (stating that the defendant "was not, of course, required to take the stand. By his election to do so, he voluntarily exposed himself to impeachment by these prior felony convictions."), cert. denied, 464 U.S. 917 (1983); see also FED. R. EVID. 609 advisory committee's note to Amended Rule 609(a) (amended 1990); United States v. Fountain, 642 F.2d 1083, 1092 (7th Cir.), cert. denied, 451 U.S. 993 (1981); Gordon v. United States, 383 F.2d 936, 939-41 (D.C. Cir.1967), cert. denied, 390 U.S. 1029 (1968).

[FN58]. See FED. R. EVID. 404(b) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."); see also Michelson v. United States, 335 U.S. 469, 475-76 (1948). Justice Jackson explained:

The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.

Id. (footnote omitted); Beaver & Marques, supra note 49, at 585 ("The rule against admitting evidence of prior convictions as substantive proof stems from the Anglo-American prejudice, a very noble prejudice, in favor of trying cases instead of trying people."); Okun, supra note 48, at 533; Uviller, supra note 46, at 868. See generally 1 MCCORMICK, supra note 29, § 188, at 793.

[FN59]. 3 WEINSTEIN & BERGER, supra note 12, ¶ 609[02], at 609-31; see also 120 CONG. REC. 37,080

(1974) (remarks of Sen. Kennedy); Spector, supra note 44, at 250 ("The defendant is 'damned if he does and damned if he doesn't.'").

[FN60]. See, e.g., United States v. Holloway, 1 F.3d 307, 311 (5th Cir.1993) ("Since Rule 609(a) permits the use of a prior conviction for the impeachment of a defendant's testimony, by opting not to testify Holloway could have precluded the government from introducing the evidence that he was a convicted felon . . . ."); see also Fountain, 642 F.2d at 1092; Gordon, 383 F.2d at 940.

[FN61]. United States v. Bovain, 708 F.2d 606, 613 (11th Cir.), cert. denied, 464 U.S. 898, and cert. denied, 464 U.S. 997, and cert. denied, 464 U.S. 1018 (1983). In Bovain, a prosecution witness testified about incriminating statements that Finch--a defendant--had made about Rickett--a codefendant. Rickett was then permitted to impeach Finch's credibility with his prior convictions under Rule 806. For a more detailed description of Bovain, see supra notes 35-39 and accompanying text.

[FN62]. Bovain, 708 F.2d at 613. Finch was charged with distribution of, and conspiracy to distribute, heroin. His criminal record included convictions for a narcotics offense, stolen money orders, forgery, and escape. Id.

[FN63]. In joint trial, the defendant can also become a hearsay declarant if a codefendant's witness repeats one of the defendant's hearsay statements.

[FN64]. 120 CONG. REC. 1414 (1974) (remarks of Rep. Hogan); see supra note 52 and accompanying text.

[FN65]. See supra note 53 and accompanying text.

[FN66]. See supra note 17 and accompanying text.

[FN67]. The federal circuit courts have held that, in some circumstances, preventing a criminal defendant from impeaching the credibility of the declarant of an out-of-court statement admitted for its truth can violate the Confrontation Clause. See United States v. Barrett, 8 F.3d 1296, 1299 (8th Cir.1993); United States v. Moody, 903 F.2d 321, 329 (5th Cir.1990); Smith v. Fairman, 862 F.2d 630, 638 (7th Cir.1988), cert. denied, 490 U.S. 1008 (1989). Thus, if the litigant adversly affected by the defendant's out-of-court statement is also a criminal defendant, then prohibiting that defendant from impeaching the declarant--his codefendant--with prior convictions might violate the Confrontation Clause. United States v. Burton, 937 F.2d 324, 329 (7th Cir.1991)(indicating that refusing to allow a criminal defendant to impeach a declarant with prior convictions can violate the Confrontation Clause, but holding that the defendant had waived the issue and that there was not plain error in the district court's refusal to allow such impeachment in that case). But see United States v. Robinson, 783 F.2d 64, 67-68 & n.2 (7th Cir.1986) (holding that refusing to allow the defendant to impeach the codefendants whose out-of-court statements had been admitted against him with their prior convictions did not violate the Confrontation Clause).

If the defendant's inability to impeach a codefendant with prior convictions were to violate the Confrontation Clause, the prosecution would, presumably, be required either to forgo use of the out-of-court statement or to sever the trial. Cf. United States v. Bruton, 391 U.S. 123, 143-44 (1968) (White, J., dissenting) (describing the practical consequences of the Court's holding that introduction of a codefendant's confession that implicates, but is inadmissible against, the defendant violates the Confrontation Clause). Even if the inability to impeach with prior convictions does not amount to a constitutional violation, however, such a restriction on impeachment may cause grave prejudice to the adversely affected defendant. This prejudice arises because the adversely affected defendant would be deprived of a powerful form of impeachment, which may hinder his efforts to undermine the credibility of a witness against him. For this reason, even if there is not a constitutional violation, the court should consider whether the restriction on impeachment is so prejudicial to the adversely affected defendant that the trial should be severed. See FED. R. CRIM. P. 14 (enabling the court to grant severance when joinder is prejudicial). The distinct questions of whether the facts in a particular case might violate the Confrontation Clause or whether, in the absence of such a constitutional violation, the trial court should nonetheless grant severance to avoid grave prejudice to the defendant, present difficult issues that are beyond the scope of this Article.

[FN68]. In Robinson, the Seventh Circuit upheld the district court's decision prohibiting the defendant from impeaching codefendants--whose out-of- court statements had been admitted against him--with their prior convictions. In doing so, the Seventh Circuit emphasized that there "is a danger of prejudicing the presumption of innocence of that co-defendant by admission of evidence of his prior crimes, such evidence being generally inadmissible to show the character or guilt of the co-defendant." Robinson, 783 F.2d at 67; see also United States v. Hall, 854 F.2d 1036, 1043 (7th Cir.1988).

[FN69]. See supra notes 25-33 and accompanying text.

[FN70]. See supra notes 34-68 and accompanying text. If the prosecution calls a witness who testifies on direct examination to an exculpatory out-of- court statement that the defendant made, then the defendant likewise should not be subject to impeachment with prior convictions by the prosecution. In this situation, even though the statement may be helpful to the defense, it was not the defendant who elicited it; rather, it was the prosecution that elicited the statement from a prosecution witness. From the defendant's perspective, this situation is equivalent to the situation in Bovain; in both, the defendant did nothing to put his credibility in issue. Cf. Tubbs v. State, No. B14-89- 00560-CR, 1990 Tex. App. LEXIS 681 (Mar. 29, 1990). In Tubbs, the prosecution used the state counterpart to Rule 806 to impeach the defendant with his prior convictions after a prosecution witness testified on direct examination about an exculpatory out-of-court statement made by the

defendant. On appeal, the court found error, stating: "If the state chose to offer this statement for its veracity, their sole reason for doing so would be to introduce the otherwise in admissible [sic] convictions of the appellant. We choose not to believe this strategy was the intention of the state . . . ." Id. at *3-4.

This same result would be reached if the proposal advanced in Part IV of this Article were adopted. If the prosecution introduced the defendant's out-of- court statement--inculpatory or exculpatory--the statement would qualify as an individual admission under Rule 801(d)(2)(A).

[FN71]. A situation of this nature arose in United States v. Lawson, 608 F.2d 1129, 1129-30 (6th Cir.1979), cert. denied, 444 U.S. 1091 (1980). In that case, during cross-examination of a prosecution witness (a Secret Service agent), defendant Lawson's counsel brought out the fact that Lawson had consistently denied any involvement in the alleged counterfeiting scheme. Had the prosecution sought to impeach Lawson with his prior convictions based on that exchange alone, the court would have been confronted with the question whether Lawson had affirmatively placed his credibility in issue. Lawson's counsel, however, also later introduced a written statement in which Lawson denied all complicity in the counterfeiting activities, and in doing so, he affirmatively placed Lawson's credibility in issue. Id. at 1130; see also supra notes 26-33.

[FN72]. The underlying principle here is directly analogous to that underlying the "rule of completeness." FED. R. EVID. 106 advisory committee's note. Both are founded on the notion that the litigant should be given greater leeway to introduce evidence that is necessary to "explain and shed light on the meaning of the part already received." 1 MCCORMICK, supra note 29, § 56, at 228; see also LOUISELL & MUELLER, supra note 5, § 49, at 352- 60; 1 WEINSTEIN & BERGER, supra note 12, ¶ ¶ 106[01]-[02], at 106-2.1 to -21.

[FN73]. Another possible approach would be to employ a standard similar to that which the Supreme Court adopted in United States v. Havens, 446 U.S. 620 (1980). In Havens, the Court held that the government may use illegally obtained evidence to impeach a defendant's testimony on cross-examination, if the defendant's statements were "made in response to proper cross-examination reasonably suggested by the defendant's direct examination . . . ." Id. at 627-28. In the context of Rule 806, courts could employ a similar standard by refusing to permit the defendant to be impeached with prior convictions if the defendant's hearsay statements were introduced in response to proper cross- examination reasonably suggested by the witness's direct examination. The disadvantage of this approach is that it is vague and easily manipulated. Courts have widely divergent views as to what constitutes the scope of direct examination, and those views would likely inform any decision as to whether the cross-examination was reasonably suggested by the witness's direct examination. See generally FED. R. EVID. 611(b); 1 MCCORMICK, supra note 29, § § 21-27, at 83-95. In addition, "even the moderately talented" defense counsel should generally be able to find a way to introduce evidence on cross-examination that she would otherwise introduce during her case-in-chief. Havens, 446 U.S. at 632 (Brennan, J., dissenting) (citing Walden v. United States, 347 U.S. 62, 66 (1954)).

[FN74]. See generally ROBERT H. KLONOFF & PAUL L. COLBY, SPONSORSHIP STRATEGY 17-45 (1990) (describing and explaining, as a matter of trial tactics and strategy, how a jury tends to magnify or diminish the credibility of evidence depending on which party presents the evidence and the circumstances of its presentation).

[FN75]. See 1 MCCORMICK, supra note 29, § 52, at 201.

[FN76]. Although requiring the prosecution to object to evidence as a prerequisite to impeachment is somewhat unusual, it seems a salutary measure in this situation. Imposing such a requirement will serve to put the defense on notice that, if it succeeds in admitting tho defendant's hearsay statements, the defendant's credibility will be laid open to attack with prior convictions. The requirement thus will allow the defense counsel to withdraw the statement without appearing to discredit it; it also will protect the unwary defendant from potentially devastating impeachment in situations where the defense did not affirmatively seek to place the defendant's credibility in issue.

[FN77]. Some commentators have persuasively argued that, with respect to impeachment of criminal defendants, Rule 609 should be restricted to situations "where a defendant affirmatively places his or her character for truthful or law-abiding behavior in issue." Okun, supra note 48, at 537, 568- 70; see also Beaver & Marques, supra note 49, at 619-21. This Article's use of the concept of a defendant who "affirmatively places his credibility in issue" is different; it refers to the issue of credibility necessarily raised by the defendant's decision to testify.

[FN78]. If this proposed amendment to Rule 806 were adopted, the explanatory notes should include some guidance for trial courts on how to determine whether the declarant has affirmatively placed his credibility in issue. See supra notes 69-77 and accompanying text.

[FN79]. Rule 806 permits a declarant to be impeached under Rule 608. See FED. R. EVID. 806 advisory committee's note (citing Rule 608 in explaining the scope of Rule 806); United States v. Barrett, 8 F.3d 1296, 1299 (8th Cir.1993) ("Federal Rule of Evidence 806 permits the impeachment of a hearsay declarant's reputation for truthfulness."); United States v. Friedman, 854 F.2d 535, 569-70 (2d Cir.1988), cert. denied, 490 U.S. 1004 (1989); see also 4 LOUISELL & MUELLER, supra note 5, § 501, at 1240-49; 1 MCCORMICK, supra note 29, § 324.2, at 370-71.

[FN80]. This impeachment method is one of a variety permitted by the Federal Rules and the common law. See, e.g., FED. R. EVID. 613 (impeachment with inconsistent statements); FED. R. EVID. 609

(impeachment with prior convictions); United States v. Abel, 469 U.S. 45 (1984) (impeachment with evidence of bias). Impeachment pursuant to Rule 608 is permissible in both civil and criminal cases. Although the cases cited in this section of the Article tend to be criminal cases, the principles discussed apply in civil cases as well.

[FN81]. FED. R. EVID. 608. This method of impeachment is also authorized and regulated by Federal Rule of Evidence 609, which governs the use of prior convictions as a means of showing that the witness has a poor character for veracity.

[FN82]. Rule 608 provides:

(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross- examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility.

FED. R. EVID. 608.

[FN83]. Rule 608(b) provides, in pertinent part: "Specifc instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence." FED. R. EVID. 608(b).

[FN84]. See Abel, 469 U.S. at 55 (stating that Rule 608(b) "limits the inquiry to cross-examination of the witness, however, and prohibits the cross- examiner from introducing extrinsic evidence of the witness' past conduct"); United States v. Brooke, 4 F.3d 1480, 1484 (9th Cir.1993) (refusing admission of extrinsic evidence of a specific instance of conduct for the purpose of impeaching credibility); United States v. Martz, 964 F.2d 787, 789 (8th Cir.1992) (explaining that Rule 608(b) "forbids the use of extrinsic evidence to prove that the specific bad acts occurred"), cert. denied, 113 S.Ct. 823 (1993); United States v. Weiss, 930 F.2d 185, 199 (2d Cir.) (stating that Rule 608(b) "expressly precludes the use of extrinsic evidence to prove specific instances of misconduct"), cert. denied, 502 U.S. 842 (1991); United States v. Frost, 914 F.2d 756, 767 (6th Cir.1990) (stating that defense counsel is "'stuck with' the response given on cross-examination" under Rule 608(b)); United States v. May, 727 F.2d 764, 765 (8th Cir.1984) (stating that "specific instances of a witness's conduct used for impeachment may not be proved by extrinsic evidence"); cf. Carter v. Hewitt, 617 F.2d 961, 971 (3d Cir.1980) (holding that extrinsic evidence may be used, but only if the witness admits that he engaged in the specific instance of conduct).

[FN85]. 4 LOUISELL & MUELLER, supra note 5, § 306, at 243 ("[I]ndependent evidence of misconduct by a witness is often unnecessary as a means of conveying to the jury a caution as to his truthfulness, for questions alone may impart such a caution, despite denials by the witness."); Ordover, supra note 46, at 144 ("The great danger in [impeachment with specific instances under Rule 608(b)] is that the insinuation of wrong-doing in the question may be adopted by the jury, which cannot satisfy itself as to the truth or falsity of the allegation."); see also Brooke, 4 F.3d at 1484 (holding that the attacking lawyer may continue to press the point even after the witness has denied engaging in the alleged misconduct); United States v. Ling, 581 F.2d 1118, 1121 (4th Cir.1978) (same); 3 WEINSTEIN & BERGER, supra note 12, ¶ 608 [05], at 608-30 to -31 ("Courts often summarize the no extrinsic evidence rule by stating that 'the examiner must take his answer.' This phrase . . . is misleading insofar as it suggests that the cross-examiner cannot continue pressing for an admission.") (citations omitted).

[FN86]. FED. R. EVID. 608(b).

[FN87]. FED. R. EVID. 806. Courts have consistently interpreted this language to restrict impeachment under Rule 806 to that which is permissible under the other impeachment rules. See United States v. Finley, 934 F.2d 837, 839 (7th Cir.1991) (Rule 806 "does not allow the use of evidence made inadmissible by some other rule. Rule 806 extends the privilege of impeaching the declarant of a hearsay statement but does not obliterate the rules of evidence that govern how impeachment is to proceed."); United States v. Moody, 903 F.2d 321, 329 (5th Cir.1990) (noting that the "scope of impeachment parallels that available if the declarant had testified in court"); cf. State v. Evans, 522 N.W. 2d 554, 557-59 (Wis. Ct. App. 1994) (holding that, under the state counterpart to Rule 806, the credibility of a nontestifying declarant could not be attacked wim specific instances of conduct).

[FN88]. 854 F.2d 535 (2d Cir.1988), cert. denied, 490 U.S. 1004 (1989).

[FN89]. Id. at 570 n.8; see also GRAHAM, supra note 5, § 806.1, at 1006 n.4; 4 LOUISELL & MUELLER, supra note 5, § 501, at 1241.

Only one other federal court--a district court in the Seventh Circuit--has specifically addressed the issue. United States v. Finley, No. 87 CR 364-1, 1989 U.S. Dist. LEXIS 6175, at *4 n.1 (N.D. Ill. May 19, 1989), aff'd, 934 F.2d 837 (7th Cir.1991). Finding "no contrary authority," the district court indicated that it would permit extrinsic evidence in the Rule 806 context. The

integrity of the district court's determination on this point, however, is suspect. Although the Seventh Circuit affirmed the district court's ultimate holding that the evidence offered under the conjunction of Rule 805 and Rule 608(b) was inadmissible hearsay, it took care to admonish that Rule 806 "does not allow the use of evidence made inadmissible by some other rule." Finley, 934 F.2d at 839. Taken seriously, the court's admonition would, of course, require enforcement of Rule 608(b)'s ban on extrinsic evidence.

[FN90]. See, e.g., 1 MCCORMICK, supra note 29, § 41, at 137-41; 3 WEINSTEIN & BERGER, supra note 12, ¶ 608[05], at 608-28.

[FN91]. See 1 MCCORMICK, supra note 29, § 41, at 141; 3A JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 979 (Chadbourn rev. 1970).

[FN92]. 3A WIGMORE, supra note 91, § 979, at 826; see also 3 WEINSTEIN & BERGER, supra note 12, ¶ 608[05], at 608-29; William G. Hale, Specific Acts and Related Matters as Affecting Credibility, 1 HASTINGS L.J. 89, 89-90 (1950) (extrinsic evidence is excluded because of "(1) confusion of issues; (2) undue consumption of time; (3) unfair surprise since such collateral issue cannot be anticipated and, hence, no preparation can be made to meet it").

[FN93]. 964 F.2d 787 (8th Cir.1992), cert. denied, 113 S.Ct. 823 (1993).

[FN94]. Id. at 789; see also United States v. May, 727 F.2d 764, 765 (8th Cir.1984) ("Impeachment by extrinsic evidence threatens to expand the trial to an inquiry into collateral matters which could distract and confuse the jury."); Carter v. Hewitt, 617 F.2d 961, 971 (3d Cir.1980) ("The purpose of rule 608(b)'s extrinsic evidence ban, as noted, is 'to avoid minitrials on wholly collateral matters which tend to distract and confuse the jury.'"); United States v. Banks, 475 F.2d 1367, 1368 (5th Cir.1973); Foster v. United States, 282 F.2d 222, 223 (10th Cir.1960) ("the witness is not on trial, his character is not in issue and extrinsic testimony in respect thereto tends to confuse the issues and promote unfair surprise and multifariousness").

[FN95]. 3A WIGMORE, supra note 91, § 979, at 827.

[FN96]. Id. Courts also have noted the prevention of unfair surprise as a reason for the rule banning extrinsic evidence. See, e.g., Banks, 475 F.2d at 1368; Foster, 282 F.2d at 223.

[FN97]. See, e.g., 4 LOUISELL & MUELLER, supra note 5, § 306, at 242-43 (noting that the third purpose for the ban is that "it reduces the risk of prejudice which unavoidably attends the introduction of evidence of specific bad acts, since juries are likely to misuse such evidence . . . ."); 3 WEINSTEIN & BERGER, supra note 12, ¶ 608[05], at 608-29 (explaining that Rule 608(b)'s ban on extrinsic evidence "is mandated by considerations of policy against unduly extending the trial, surprise and prejudice"); Okun, supra note 48, at 544.

[FN98]. See, e.g., United States v. Benedetto, 571 F.2d 1246, 1248-49 (2d Cir.1978); 3 WEINSTEIN & BERGER, supra note 12, ¶ 608[01], at 608-11.

[FN99]. See e.g., 3 LOUISELL & MUELLER, supra note 5, § 305, at 239; 3 WEINSTEIN & BERGER, supra note 12, ¶ 608[01], at 608-11.

[FN100]. FED. R. EVID. 806 advisory committee's note.

[FN101]. Cf. FED. R. EVID. 405 advisory committee's note ("Of the three methods of proving character provided by the rule, evidence of specific instances of conduct is the most convincing."); see also supra note 85 and accompanying text.

[FN102]. The final sentence of Federal Rule of Evidence 806 states: "If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination." FED. R. EVID. 806.

[FN103]. 4 LOUISELL & MUELLER, supra note 5, § 501, at 1241. Professors Louisell and Mueller thus urge that "Rule 806 should be read as modifying the otherwise-applicable Rule (in this case, Rule 608) to the extent of permitting extrinsic evidence of such misconduct." Id.

[FN104]. See 3 WEINSTEIN & BERGER, supra note 12, ¶ 608[05], at 608-36; see also 3A WIGMORE, supra note 91, § 979, at 823-28 (denominating the reasons of confusion and surprise as "reasons of auxiliary policy").

[FN105]. The Second Circuit emphasized this point in concluding that the impeaching party should be permitted to use extrinsic evidence when applying Rule 608(b) through Rule 806. United States v. Friedman, 854 F.2d 535, 570 n.8 (2d Cir.1988) ("Rule 806 applies, of course, when the declarant has not testified and there has by definition been no cross-examination, and resort to extrinsic evidence may be the only means of presenting such evidence to the jury."), cert. denied, 490 U.S. 1004 (1989).

[FN106]. Faced with a similar problem, the Advisory Committee determined that the need for effective impeachment of a declarant is sufficiently important to justify eliminating important restrictions on impeachment with inconsistent statements. Federal Rule of Evidence 613(b), governing impeachment with inconsistent statements, provides in part: "Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same." FED. R. EVID. 613(b). Recognizing that these requirements would preclude use of this impeachment weapon against a nontestifying hearsay declarant, the Advisory Committee stated: "The result of insisting upon observation of this impossible requirement in the hearsay situation is to deny the opponent, already barred from cross-examination, any benefit from this important

technique of impeachment." FED. R. EVID. 806 advisory committee's note. Rule 806 thus directs: "Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain." FED. R. EVID. 806.

[FN107]. In order to give the judge sufficient room to exclude extrinsic evidence, Rule 806 should expressly provide the district judge with broad discretion, making it clear that the judge need not employ the high standard for exclusion contained in Rule 403.

[FN108]. 854 F.2d 535, 569-70 (2d Cir.1988), cert. denied, 490 U.S. 1004 (1989).

[FN109]. FED. R. EVID. 801(d)(2)(E).

[FN110]. Friedman, 854 F.2d at 569.

[FN111]. In Friedman, the Second Circuit affirmed the district court's ruling that the incident was not sufficiently probative of untruthfulness to meet the requirements of Rule 608(b). Id. at 570. The court also indicated that its decision on this point was influenced by its concern that the jury would also use the false story as evidence of Manes's guilty state of mind. Id.

[FN112]. The opportunity to use extrinsic evidence, however, should be limited to situations in which the declarant does not testify. There is no need to give the attacking lawyer an additional weapon when the declarant is on the witness stand, available for questioning about specific instances of conduct showing untruthfulness.

This reasoning also applies to impeachment with inconsistent statements. If the declarant testifies, then the normal requirements of Rule 613 should apply: unless justice otherwise requires, the witness must be afforded the opportunity to explain or deny. In interpreting the Ohio counterpart to Rule 806, the court in State v. Mathias, No. 91CA31, 1994 Ohio App. LEXIS 1458 (Mar. 31, 1994), concluded:

> The waiver of the [Ohio] Evid.R. 613(B) foundational requirement in [Ohio] Evid.R. 806 merely removes an impossible obstacle when the hearsay declarant does not testify and thus, cannot be confronted with the inconsistent statement. Accordingly, where, as here, a hearsay declarant also testifies as a witness, [Ohio] Evid.R. 806 does not excuse the [Ohio] Evid.R. 613 foundational requirement. . . .

Id. at *9-10 (citation omitted).

[FN113]. See supra notes 34-68 and accompanying text. Although evidence of prior convictions may be somewhat more prejudicial than evidence of misdeeds which did not result in conviction--because the conviction conclusively proves that the defendant committed the misdeed--both produce the same type and quality of prejudice. See Okun, supra note 48, at 536 n.11 ("Although most of the legal commentary has focused on impeachment with prior convictions, many of the criticisms of such impeachment apply with similar force to impeachment with prior bad acts that were not the subject of convictions."); Ordover, supra note 46, at 141-50 (calling for a closer alignment of Rule 608(b), governing impeachment with prior misdeeds, and Rule 609, governing impeachment with prior convictions). Impeachment of a criminal defendant with prior misdeeds under the conjunction of Rules 806 and 608(b) thus should be subject to the same restriction proposed in Part II for impeachment with prior convictions.

An alternative approach would be to leave this matter within the discretion of the trial court. The argument in favor of this approach is that prior misdeeds can come in many forms; sometimes they are not even criminal in nature. As a result, the likelihood and extent of prejudice that the criminal defendant would face if impeached with prior misdeeds will vary depending on the particular misdeed at issue. If this approach were adopted, however, the trial court's discretion should be sharply confined with language in the explanatory notes directing trial courts to act with caution in permitting a criminal defendant who has not affirmatively placed his credibility in issue to be impeached with prior misdeeds.

[FN114]. If this proposed amendment to Rule 806 is adopted, the explanatory notes should include guidance for the trial court on how to exercise its discretion in determining whether to permit the use of extrinsic evidence. See supra notes 107-12 and accompanying text.

Rule 806 also should be amended to make clear that the criminal defendant who has not affirmatively placed his credibility in issue is not subject to impeachment with specific instances of conduct showing untruthfulness. This limitation on impeachement can best be accomplished by expanding the revision proposed in Part II to state: "If the declarant is an accused, the credibility of the declarant may be attacked with specific instances of conduct that are probative of untruthfulness, as provided in Rule 608(b), or with prior convictions, only if the declarant has affirmatively placed the declarant's credibility in issue." See supra note 78 and accompanying text. The explanatory notes to Rule 806 should also provide guidance for the trial court in determining whether the declarant has affirmatively placed his credibility in issue. See supra notes 69-77 and accompanying text. A comprehensive proposal for revising the text of Rule 806 is set out in the Conclusion of this Article.

[FN115]. FED. R. EVID. 806; see also FED. R. EVID. 801(d)(2)(C) (exempting "a statement by a person authorized by the party to make a statement concerning the subject" from hearsay when offered against a party); FED. R. EVID. 801(d)(2)(D) (exempting "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during me existence of the relationship" from hearsay when offered against a party); FED. R. EVID. 801(d)(2)(E) (exempting "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy" from hearsay when offered against a party).

[FN116]. FED. R. EVID. 801(d)(2)(A) (exempting "the party's own statement, in either an individual or a

representative capacity" from hearsay when offered against a party); FED. R. EVID. 801(d)(2)(B) (exempting "a statement of which the party has manifested an adoption or belief in its truth" from hearsay when offered against a party).

[FN117]. FED. R. EVID. 806 advisory committee's note; see supra note 4 and accompanying text.

[FN118]. FED. R. EVID. 806 advisory committee's note.

[FN119]. See infra part IV.A.1-2.

[FN120]. FED. R. EVID. 801(d)(2)(A). A similar situation could arise in a civil case as well.

[FN121]. See, e.g., United States v. Dent, 984 F.2d 1453, 1460 (7th Cir.) (following the prosecutor's introduction of the defendant's guilty plea to a related state charge under Rule 801(d)(2)(A), the defendant sought to impeach his own credibility through Rule 806 by introducing statements that he had made to his lawyer which were inconsistent with the guilty plea), cert. denied, 114 S.Ct. 169, and cert. denied, 114 S.Ct. 209 (1993).

[FN122]. FED. R. EVID. 607. Again, a similar situation could arise in a civil case as well.

[FN123]. FED. R. EVID. 806.

[FN124]. The relevant canon of statutory construction is expressio unius est exclusio alterius, which admonishes that the expression of specific situations encompassed by the provision acts to exclude others not so expressed. See, e.g., Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 113 S.Ct. 1160, 1163 (1993) (applying the canon in interpreting Federal Rule of Civil Procedure 9(b)); Camp v. Gress, 250 U.S. 308, 314- 15 (1919) (applying the canon in interpreting the Judicial Code); see also 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47.23 (5th ed. 1992).

[FN125]. See Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 329 (1973).

[FN126]. Rule 801(d) provides, in pertinent part:

(d) Statements which are not hearsay. A statement is not hearsay if--

. . . .

(2) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement, in either an individual or representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

FED. R. EVID 801(d)(2).

[FN127]. FED. R. EVID. 806. The Senate Judiciary Committee's Report explained:

Rule 801 defines what is a hearsay statement. While statements by a person authorized by a party-opponent to make a statement concerning the subject, by the party-opponent's agent or by a coconspirator of a party--see rule 801(d)(2)(c), (d), and(e)--are traditionally defined as exceptions to the hearsay rule, rule 801 defines such admission by a party-opponent as statements which are not hearsay. Consequently, rule 806 by referring exclusively to the admission of hearsay statements, does not appear to allow the credibility of the declarant to be attacked when the declarant is a coconspirator, agent or authorized spokesman. The committee is of the view that such statements should open the declarant to attacks on his credibility. Indeed, the reason such statements are excluded from the operation of rule 806 is likely attributable to the drafting technique used to codify the hearsay rule, viz some statements, instead of being referred to as exceptions to the hearsay rule, are defined as statements which are not hearsay. The phrase "or a statement defined in rule 801(d)(2)(c), (d), and (e)" is added to the rule in order to subject the declarant of such statements, like the declarant of hearsay statements, to attacks on his credibility.

NOTES OF THE SENATE COMM. ON THE JUDICIARY, S. REP. NO. 1277, 93d Cong., 2d Sess. 22 (1974), reprinted in 1974 U.S.C.C.A.N. 7051, 7068-69 (footnote omitted).

[FN128]. See FED. R. EVID. 801(d)(2)(C)-(E); see supra note 126.

[FN129]. See FED. R. EVID. 801(d)(2)(A)-(B); see supra note 126.

[FN130]. NOTES OF THE SENATE COMM. ON THE JUDICIARY, supra note 127, at 7069. Because party admissions were defined as nonhearsay in Rule 801(d)(2), Rule 806 would not have reached them if it had only authorized impeachment of declarants of hearsay statements. See supra text accompanying note 127.

[FN131]. NOTES OF THE SENATE COMM. ON THE JUDICIARY, supra note 127, at 7069 n.28.

[FN132]. 4 LOUISELL & MUELLER, supra note 5, § 500, at 1238 n.82. It is surprising that the Senate Judiciary Committee misunderstood this basic point because there was extensive discussion in both the House and the Senate with respect to the fact that a criminal defendant cannot be impeached with his prior convictions unless he testifies. See, e.g., 120 CONG. REC. 2376 (1974) (remarks of Rep. Hogan); id. at 2377 (remarks of Rep. Dennis); id. at 2378 (remarks of Rep. Brasco); id. at 2381 (remarks of Rep. Lott); id. at 37,080 (remarks of Sen. Kennedy).

[FN133]. Id. at 37,083. The Senate Judiciary Commitee's recommendation was accepted by the full Senate without further explanation. The Committee of Conference for both chambers then adopted the Senate amendment, also

without further explanation as to the exclusion of individual and adoptive admissions. Id. at 39,942. The Committee did state, however, that it was adopting the Senate's version of the rule as that version "conforms the rule to present practice." Id.

[FN134]. 934 F.2d 822 (7th Cir.1991).

[FN135]. In McClain, the prosecutor introduced tape recordings of incriminating conversations between the defendant and a government informant. McClain, the defendant, sought to impeach the informant's credibility under Rule 806. The trial judge refused to permit the impeachment, on the ground that the informant's statements were not hearsay because they were admitted only for the context that they provided, and not for their truth. On appeal, McClain argued that because the jury treated the informant's statements as adoptive admissions, he was entitled to impeach the informant under Rule 806. Id. at 832-33.

[FN136]. Id. at 833. In rejecting the defendant's argument, the Seventh Circuit also held that impeachment was improper because the trial judge admitted the statements to provide context only. Id.

Even if the court had agreed that the informant's statements were adoptive admissions, and that the declarant of an adoptive admission is impeachable under Rule 806, there is a further question of whether the declarant for impeachment purposes is the informant, who uttered the statement, or the defendant, who adopted it. This issue is analyzed infra at notes 147-59 and accompanying text.

[FN137]. 953 F.2d 1467 (7th Cir.1992). In Velasco, the prosecution introduced a portion of the defendant's postarrest statement under Rule 801(d)(2)(A). The defendant sought to introduce the rest of the statement under Federal Rule Evidence 106, the rule of completeness. Although the Seventh Circuit ultimately upheld the trial judge's decision to refuse admission of the remaining portion, the court noted that admission of that portion would subject the defendant to impeachment under Rule 806. Id. at 1473-76.

[FN138]. Id. at 1473 n.5 (quoting NOTES OF THE SENATE COMM. ON THE JUDICIARY, supra note 127, at 7069 n.28 (emphasis added)).

[FN139]. 984 F.2d 1453 (7th Cir.), cert. denied, 114 S.Ct. 169, and cert. denied, 114 S.Ct. 209 (1993). In Dent, the prosecutor introduced the defendant's guilty plea to a related state charge as an individual admission under Rule 801(d)(2)(A). The defendant then sought to impeach his own credibility through Rule 806 by introducing statements that he had made to his lawyer which were inconsistent with the guilty plea. Id. at 1460.

[FN140]. Id.

[FN141]. In McClain, Judge Cudahy wrote the opinion, in which Judges Easterbrook and Posner joined. (Judge Easterbrook wrote a brief concurring opinion on a different point.) In Velasco, Chief Judge Bauer wrote the opinion, in which Judges Cudahy and Easterbrook joined. (Judge Cudahy wrote a brief concurring opinion on a different point.) Judges Easterbrook and Bauer were also on the panel in Dent.

[FN142]. The Eleventh Circuit addressed the issue in United States v. Price, 792 F.2d 994 (11th Cir.1986). In Price, the prosecutor introduced taped conversations between the defendant and a government informant. On appeal, the defendant argued that the trial judge should have permitted him to impeach the informant's credibility under Rule 806, because the informant's statements were admitted as adoptive admissions. Id. at 996-97. Although the court ultimately held that the statements were admitted for context only, it was careful to note that "the utterer of words which have been adopted as an admission by the defendant, is subject to impeachment under FRE 806." Id. at 997.

The Ninth Circuit reached the opposite conclusion with respect to this issue in United States v. Becerra, 992 F.2d 960 (9th Cir.1993). In Becerra, a prosecution witness had testified that Angela, a government informant, had told him, in the defendant's presence, that the defendant knew the cocaine source. The defendant then sought to attack Angela's credibility under Rule 806, but the trial judge refused to permit it. On appeal, the Ninth Circuit affirmed the trial judge's ruling on alternate grounds. First, the court held that Angela's statement was not hearsay because it was admitted as foundation and not for its truth. Alternatively, however, the court held that "[e]ven if admitted for its truth, the statement was an adoptive admission, which is not hearsay. . . . Rule 806 does not apply." Id. at 965 (citations omitted).

[FN143]. Since the disagreement among the courts turns on whether they rely on the plain language of Rule 806 or its legislative history, it appears inevitable that the disagreement will continue unless the problem is addressed in Rule 806 itself. Cf. Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 609-10 n.4 (1991) (discussing the proper role of legislative history in interpreting statutes); id. at 2488-90 (Scalia, J., concurring) (taking a contrary view of the proper role of legislative history); Blanchard v. Bergeron, 489 U.S. 87, 97-99 (1989) (Scalia, J., concurring) (same).

[FN144]. United States v. McClain, 934 F.2d 822, 833 (7th Cir.1991). In Becerra, the court's entire discussion of the issue was as follows: "Even if admitted for its truth, the statement was an adoptive admission, which is not hearsay. See United States v. Monks, 774 F.2d 945, 950 (9th Cir.1985); FED. R. EVID. 801(d)(2)(B). Rule 806 does not apply." Becerra, 992 F.2d at 965. The Monks decision provided no analysis of the issue either.

[FN145]. See Price, 792 F.2d at 996-97.

[FN146]. See United States v. Velasco, 953 F.2d 1467, 1473 n.5 (7th Cir.1992); United States v. Dent, 984 F.2d 1453, 1460 (7th Cir.), cert. denied, 114 S.Ct. 169, and cert. denied, 114 S.Ct. 209 (1993).

[FN147]. Rule 801(b) defines a "declarant" as "a person who makes a statement." FED. R. EVID. 801(b).

[FN148]. Rule 801(d)(2)(A) provides, in part: "A statement is not hearsay if . . . the statement is offered against a party and is (A) the party's own statement, in either an individual or representative capacity." FED. R. EVID. 801(d)(2)(A).

[FN149]. 792 F.2d 994, 997 (11th Cir.1986) (emphasis added). For a discussion of the facts of Price, see supra note 142. The Seventh Circuit in McClain and the Ninth Circuit in Becerra also addressed situations in which the defendant sought to impeach the person who uttered a statement adopted by the defendant. In both cases, the courts held that Rule 806 does not apply to adoptive admissions, thus bypassing the question whether the person who uttered the statement is the declarant for Rule 806 purposes. United States v. Becerra, 992 F.2d 960, 965 (9th Cir.1993); United States v. McClain, 934 F.2d 822, 833 (7th Cir.1991).

[FN150]. 708 F.Supp. 906 (N.D. Ill. 1989).

[FN151]. Id. at 911 (emphasis added). In Finley, the prosecutor planned to introduce taped conversations between the defendants and a government informant named Burnett. On a motion in limine, the defense argued that it should be entitled to impeach Burnett under Rule 806, because his statements were adoptive admissions of the defendants. The court rejected the argument, stating:

[E]ven assuming defendants did adopt Burnett's statements, making them admissible pursuant to Rule 801(d)(2)(B), that does not make Burnett subject to impeachment. The declarant of an adoptive admission is the one who adopts it as his own statement; the declarants would therefore be defendants, not Burnett. Thus if Burnett's statements are admissible as adoptive admissions of defendants, they may be introduced pursuant to Rule 801(d)(2)(B) only by the government. They do not afford defendants an excuse to impeach Burnett.

Id.

[FN152]. Rule 801(d)(2)(B) provides, in part: "A statement is not hearsay if . . . [t]he statement is offered against a party and is . . . (B) a statement of which the party has manifested an adoption or belief in its truth." FID. R. EVID. 801(d)(2)(B).

[FN153]. It could be argued that the person who uttered the statement should be considered the declarant where the person who adopted the statement did not have firsthand knowledge of the matters described in the statement, but rather was relying entirely on the credit of the utterer. In this situation, the argument could be made that it is the testimonial qualities of the utterer, and not those of the person who adopted the statement, that are important. Cf. RONALD J. ALLEN & RICHARD B. KUHNS, AN ANALYTICAL APPROACH TO EVIDENCE: TEXT, PROBLEMS, AND CASES 387-89 (1989). Even in that situation, however, the person who adopted the statement should be considered the declarant, for when a person adopts the statement of another, or manifests belief in its truth, that person takes the statement as her own. Although she may demonstrate her adoption in some shorthand way (trough, for instance, nodding or tacitly accepting), once she has adopted the statement within the meaning of Rule 801(d)(2)(B), she has essentially reiterated the utterer's statement. Her adoption may thus be viewed as the functional equivalent of an individual admission. See id. On this understanding, it is clear that the person adopting the statement should still be considered the declarant, despite her lack of firsthand knowledge, because if she had repeated the statement that she adopted, there would be no question but that she was the declarant of an individual admission. See CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES 216 (2d ed. 1993).

[FN154]. 659 F.2d 730 (6th Cir.1981), cert. denied, 455 U.S. 910 (1982).

[FN155]. Id. at 733.

[FN156]. Id.

[FN157]. 278 F.Supp. 703 (D.Colo.), aff'd per curiam, 400 F.2d 392 (10th Cir.1968).

[FN158]. Id. at 706; see also Wernert v. Arn, 819 F.2d 613, 616-17 (6th Cir.1987), cert. denied, 484 U.S. 1011 (1988); Shiflett v. Virginia, 447 F.2d 50, 58 (4th Cir.1971), cert. denied, 405 U.S. 994 (1972); United States v. Rollins, 862 F.2d 1282, 1297 (7th Cir.1988), cert. denied, 490 U.S. 1074 (1989); United States ex rel. Cheeks v. Russell, 424 F.2d 647, 653 (3d Cir.1970), cert. denied, 400 U.S. 994 (1971); cf. United States v. Monks, 774 F.2d 945, 952 (9th Cir.1985) (stating that the person adopting the statement can confront himself, but holding that the court must do a case- by-case Confrontation Clause analysis when the utterer's statement has independent significance).

[FN159]. The Senate Judiciary Committee apparently recognized this point, for it excluded statements falling within both Rule 801(d)(2)(A) and Rule 801(d)(2)(B) on the ground that the party-opponent's credibility is always subject to attack. NOTES OF THE SENATE COMM. ON THE JUDICIARY, supra note 127, at 7069 n.28. In other words, the Committee assumed that the party-opponent would always be the declarant of a statement introduced under Rule 801(d)(2)(A) and (B).

[FN160]. Even in a joint trial, the attacking party could only be the party who introduced the statement (the "sponsor") or the party who made or adopted the statement. If the sponsor wished to use the statement against another party in the case, the sponsor would have to offer the statement against that party as either a party admission under Rule 801(d)(2)(C), (D), or (E) or as hearsay within some exception. Either way, Rule 806 clearly would permit impeachment. Alternatively, if the sponsor was unable to introduce the statement against the other party, or was not interested in doing so, that party would be entitled to a limiting instruction, directing the jury to use the evidence only against the declarant. That party, however, would not be entitled to impeach the

declarant's credibility because, at least theoretically, the jury would not be considering the declarant's statement against that party.

[FN161]. See FED. R. EVID. 806 advisory committee's note.

[FN162]. FED. R. EVID. 607; see supra note 122 and accompanying text.

[FN163]. Federal Rule of Evidence 609 permits impeachment with prior convictions, Federal Rule of Evidence 608(b) permits impeachment with specific instances of misconduct, and Federal Rule of Evidence 613 permits impeachment with prior inconsistent statements. Normally, the prosecution will be able to introduce the defendant's inconsistent statements as substantive evidence under Rule 801(d)(2)(A) or (B). If such statements are substantively inadmissible, because, for instance, they were taken in violation of the defendant's Miranda rights, the the prosecution might seek to use them as impeaching evidence. See Harris v. New York, 401 U.S. 222 (1971) (holding that the prosecutor may use Miranda-barred statements to impeach the credibility of the defendant's testimony); Oregon v. Hass, 420 U.S. 714 (1975) (holding that the prosecution may use statements taken in violation of the defendant's right to counsel to impeach the credibility of the defendant's testimony).

[FN164]. United States v. Morlang, 531 F.2d 183, 190 (4th Cir.1975); see also United States v. Webster, 734 F.2d 1191, 1192 (7th Cir.1984) (noting that, although Morlang is a pre-rules case, its limitation on the prosecutor's rights under Rule 607 "has been accepted in all circuits that have considered the issue"). The following cases indicate the uniformity of the circuits: United States v. DeLillo, 620 F.2d 939, 946-47 (2d Cir.), cert. denied, 449 U.S. 835 (1980); United States v. Sebetich, 776 F.2d 412, 428-29 (3d Cir.1985), reh'g denied, 828 F.2d 1020 (3d Cir.1987), cert. denied, 484 U.S. 1017 (1988); United States v. Hogan, 763 F.2d 697, 701- 02 (5th Cir.), modified on other grounds, 771 F.2d 82 (5th Cir.1985) and 779 F.2d 296 (5th Cir.1986); United States v. Crouch, 731 F.2d 621, 622 n.1, 623-24 (9th Cir.1984), cert. denied, 469 U.S. 1105 (1985); United States v. Carter, 973 F.2d 1509, 1513 (10th Cir.1992), cert. denied, 113 S.Ct. 1289 (1993); United States v. Billue, 994 F.2d 1562, 1566 (11th Cir.1993), cert. denied, 114 S.Ct. 939 (1994); United States v. Johnson, 802 F.2d 1459, 1466 (D.C. Cir.1986).

[FN165]. See, e.g., United States v. Velasco, 953 F.2d 1467, 1473 (7th Cir.1992). In Velasco, the prosecutor introduced a portion of the defendant's postarrest statement, in which the defendant admitted involvement in the crime. The defendant sought to introduce the rest of his statement, in which he explained why he was involved. The court held that, if the remaining portion were admitted, then Rule 806 would give the prosecution the right to impeach the defendant's credibility. Id. at 1473 n.5; see supra notes 137-38 and accompanying text. Ultimately, the court held that the defendant was not entitled to introduce the explanatory portion of his postarrest statement. Id. at 1474-76.

In certain cases the declarant-party might succeed in introducing the remaining portion of her statement. She might do so, for example, under me rule of completeness, Rule 106, because the other party had introduced only a portion of the statement out of context. If the declarant-party did succeed in introducing the remainder, then the trial court would have to determine whether that portion of the statement should be treated, for purposes of Rule 806, as part of the statement that the other party introduced under Rule 801(d)(2)(A) or (B). That determination would lie within the trial court's discretion. Nonetheless, it seems that in many cases the court should hold that the party who initiated introduction of the statement should be considered to have introduced the entire statement, because a party should not be able to avoid responsibility for the entire statement's introduction by carving out and offering only the favorable portions.

[FN166]. See, e.g., Webster, 734 F.2d at 1193. In Webster, the Seventh Circuit discussed the prosecution's need to impeach its own witness:

Suppose the government called an adverse witness that it thought would give evidence both helpful and harmful to it, but it also thought that the harmful aspect could be nullified by introducing the witness's prior inconsistent statement. . . . [W]e are at a loss to understand why the government should be put to the choice between the Scylla of forgoing impeachment and the Charybdis of not calling at all a witness from whom it expects to elicit genuinely helpful evidence.

Id.

[FN167]. Hogan, 763 F.2d at 702. Other courts have imposed similar, though potentially somewhat different, requirements. See, e.g., Webster, 734 F.2d at 1192-93 (permitting the prosecution to impeach its own witness with a substantively inadmissible prior inconsistent statement as long as the prosecution acted in good faith); DeLillo, 620 F.2d at 946-47 (permitting the prosecution to impeach its own witness with a substantively inadmissible prior inconsistent statement if the witness's testimony was essential to the prosecution's case).

[FN168]. Professor Graham has argued strenuously that the courts should return to requiring the calling party to show that it was both surprised and affirmatively damaged by the witness's adverse testimony. In explaining the advantages of the stricter rule, Professor Graham has stated:

The requirement of surprise and affirmative damage permitted a party to impeach his own witness when truly necessary. At the same time, the requirement prevented a party from calling a witness solely to place a substantively inadmissible prior inconsistent statement before the jury in the hope that the jury would disregard a limiting instruction and consider the statement as substantive evidence.

GRAHAM, supra note 5, § 607.3, at 425. In the context of Rule 806, imposing these requirements on the sponsoring party would effectively preclude that party from impeaching the declarant's credibility because the sponsoring party obviously would not be surprised by the

content of the out-of-court statement that the sponsoring party itself had introduced.

[FN169]. See, e.g., United States v. May, 727 F.2d 764, 765 (8th Cir.1984) ("Although the Federal Rules of Evidence allow impeachment of a witness's credibility, Fed. R. Evid. 607, the rules carefully limit methods of impeachment.").

[FN170]. Professors Louisell and Mueller have suggested that, because the sponsoring party would be entitled under Rule 607 to impeach the declarant- party if she had called the declarant-party as a witness, "[n]o good reason appears for a different result if one party introduces the out-of-court statements of the other as admissions." 4 LOUISELL & MUELLER, supra note 5, § 501, at 1255 n.28. The reasons described above, however, counsel strongly against permitting the sponsoring party to engage in such impeachment. Further, in a civil case, if the sponsoring party wishes to impeach her opponent, she may do so by calling her opponent as a witness, rather than merely introducing her opponent's out-of-court statement.

[FN171]. The most prominent example of such overwhelmingly prejudicial evidence, of course, is impeachment of the defendant with prior convictions under Rule 609. The extent and effect of this type of prejudice, in particular, is discussed in Part II.

[FN172]. It is important to distinguish the issue here, which is whether the declarant-party should be permitted to impeach her own credibility, from a situation in which the declarant-party is simply trying to place her statement in context. The declarant-party should be permitted to place her statement in context by, for instance, developing or clarifying the circumstances in which the statement was made, the tone that was used, or the content of any other statements which accompanied and shed light on the statement introduced. If the declarant-party is providing context that will help the jury understand the statement, she is not impeaching her credibility, but rather is affording the jury a broader perspective on the tenor and meaning of the statement. This procedure is consistent with the principle of completeness, which permits a party to introduce further evidence that will help ensure that a statement admitted by the other party is presented fairly. See 1 LOUISELL & MUELLER, supra note 5, § 49, at 352-60; 1 MCCORMICK, supra note 29, § 56, at 225-28; 1 WEINSTEIN & BERGER, supra note 12, ¶ ¶ 106[01]-[02], at 106-2.1 to -21.

[FN173]. See, e.g., United States v. Dent, 984 F.2d 1453 (7th Cir.), cert. denied, 114 S.Ct. 169, and cert. denied, 114 S.Ct. 209 (1993). In Dent, federal charges were brought against the defendant for being a felon in knowing possession of a firearm. At trial, the prosecutor introduced the defendant's plea of guilty to a misdemeanor state charge for unlawful use of a weapon, which arose out of the same facts. After the guilty plea was admitted under Rule 801(d)(2)(A), the defendant sought to impeach his own credibility through Rule 806 by introducing inconsistent, exculpatory statements that he had made to his state court lawyer. Id. at 1457, 1460.

[FN174]. The court apparently recognized this point in Dent. There, the Seventh Circuit upheld the district court's ruling that "the lawyer's testimony regarding Dent's lack of any knowledge of the gun was not sought simply to impeach the plea, but to prove that Dent did not know the gun was present." Id. at 1460.

[FN175]. United States v. Morlang, 531 F.2d 183, 190 (4th Cir.1975); see supra note 164 and accompanying text.

[FN176]. Edmund M. Morgan, Admissions as an Exception to the Hearsay Rule, 30 YALE L.J. 355, 361 (1920); see also CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 239, at 503 (1st ed. 1954) ("This notion that it does not lie in the opponent's mouth to question the trustworthiness of his own declarations is an expression of feeling rather than logic but it is an emotion so universal that it may stand for a reason.").

[FN177]. See 2 GREGORY P. JOSEPH & STEPHEN A. SALTZBURG, EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES § 61.3, at 2 (1987) (stating that Rule 806 "is designed to minimize a principal danger against which the hearsay rule protects--the inability of the factfinder to assess the credibility of the out-of-court declarant . . .").

[FN178]. In most situations, the party's ability to take the witness stand will provide sufficient opportunity for that party to impeach her own statements. In a criminal case, however, where the declarant-party is the defendant, this response is not entirely satisfactory because under the Fifth Amendment a criminal defendant has a constitutional right not to take the witness stand. Although a rule restricting the defendant's ability to impeach the credibility of her own statements without taking the witness stand will not force the defendant to testify, it may create greater pressure on her to do so. In the event that this pressure were to become so great as to violate the criminal defendant's rights under the Fifth Amendment, then the demands of the Constitution would, of course, trump the specific requirements of Rule 806. It would thus be useful for the explanatory notes to Rule 806 to alert the trial courts to this possibility.

[FN179]. 2 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1051, at 1220 (1st ed. 1904). See generally id. § § 1048-1051, at 1216-21. It is worth noting that the declarant-party can still introduce other, contradictory evidence that undermines the admission as part of her substantive case without taking the witness stand. Also, the declarant-party can, on cross-examination or through the rule of completeness, ensure that the admission is placed in its full context.

[FN180]. See FED. R. EVID. 608(a), 806.

[FN181]. See supra notes 174-75 and accompanying text.

[FN182]. See generally 4 LOUISELL & MUELLER, supra note 5, § 501, at 1249 ("It is unlikely in the extreme that a party would seek to impeach himself.").

[FN183]. An important function of the rules of evidence is to facilitate the ease of administration of an extremely complex justice system. Where a clear rule is likely to provide the proper result in the great majority of cases, it is sensible to adopt that rule and thus obviate the need for judges to make individualized assessments amidst the hurly-burly of trial proceedings. This rationale informs many of the policy determinations embodied in the Federal Rules of Evidence, and it serves as a significant additional reason to prohibit impeachment in this context as well. See, e.g., FED. R. EVID. 404 (prohibiting use of character evidence to prove propensity); FED. R. EVID. 803(1)-(23) (providing categorical exceptions to the hearsay rule); FED. R. EVID. 804(b)(1)-(4) (same); FED. R. EVID. 902 (providing for self- authentication of certain exhibits).

[FN184]. It is possible that the sponsoring party might try to make an end run around the prohibition on impeaching the declarant of an individual or adoptive admission by seeking to admit the statement under one of the hearsay exceptions in Rule 803 or 804. For instance, the prosecutor might offer the defendant's out-of-court statement not as an individual admission, but rather as a statement against interest under Rule 804(b)(3). The structure of the rules, however, should be understood to prevent this practice. If the declarant's statement falls within the definitions in Rule 801(d)(2), then the statement is deemed not hearsay. Thus, the prohibition against admission of hearsay, contained in Rule 802, would not apply, and the exceptions to the hearsay rule, contained in Rules 803 and 804, would never come into play. In other words, where the statement is defined as not hearsay, the hearsay exceptions are not applicable because they only serve to remove from the hearsay rule statements that would otherwise fall within it.

[FN185]. See 2 STEPHAN A. SALTZBURG & MICHAEL M. MARTIN, FEDERAL RULES OF EVIDENCE MANUAL 466-67 (5th ed. 1990).

[FN186]. FED. R. EVID. 613(b).

[FN187]. 475 U.S. 387 (1986).

[FN188]. Id. at 397 (quoting FED. R. EVID. 806); see also 4 WEINSTEIN & BERGER, supra note 12, ¶ 806[01], at 806-12 to -13.

Professors Louisell and Mueller, however, suggest that this reading of Rule 806 might be unwise, because admissions by authorized spokespersons, employees, and agents under Rule 801(d)(2)(C) and (D) "usually involve declarants friendly to the party against whom their statements are offered." 4 LOUISELL & MUELLER, supra note 5, § 501, at 1249 n.12. This possibility, however, also arises when such persons are called to testify, and in both situations, Rule 611(c) gives the court leeway to deny the cross-examining lawyer the right to use leading questions. See FED. R. EVID. 611(c); id. advisory committee's note (explaining that the wording of the rule furnishes "a basis for denying the use of leading questions when the cross-examination is cross-examination in form only and not in fact").

[FN189]. See ALASKA R. EVID. 806 (the rule is modeled on Federal Rule 806, but refers in the second sentence to "his statement" and in the third sentence to "a hearsay statement or a statement defined in Rule 801(d)(2)(C), (D), or (E)"); VT. R. EVID. 806 (the rule is modeled in Federal Rule 806, but refers in the second sentence to "the statement admitted in evidence," and in the third sentence to "a statement").

[FN190]. See supra notes 69-77 and accompanying text.

[FN191]. See supra notes 107-12 and accompanying text.

[FN192]. See supra note 178.

END OF DOCUMENT

FORDHAM
University School of Law

Lincoln Center, 140 West 62nd Street, New York, NY 10023-7485

Daniel J. Capra
Philip Reed Professor of Law

Phone: 212-636-6855
e-mail:dcapra@law.fordham.edu
Fax: 212-636-6899

Memorandum To: Advisory Committee on Evidence Rules
From: Ken Broun, Consultant, and Dan Capra, Reporter
Re: Survey on Psychotherapist-Patient Privilege
Date: November 1, 2003

Attached for your review is the work prepared by Ken Broun on the psychotherapist-patient privilege. This is the first step in the survey project that was authorized by the Committee. The goal of the survey project is to prepare a publication comparable to those previously published by the Federal Judicial Center on Advisory Committee Notes and Case Law Divergence from the Evidence Rules. The Committee does not intend to propose rules of privilege for enactment.

Ken has provided the survey rule, commentary on the rule, and a note on future developments that might occur with respect to the privilege. This is the template that we plan to apply to the other privileges. Ken is beginning work on the attorney-client privilege and should have some work on that privilege available for the Committee's review before the Spring 2004 meeting.

Survey Rule:

Psychotherapist-Patient Privilege

(a) Definitions. As used in this rule:

(1) A "communication" is any expression through which a privileged person intends to convey information to another privileged person or any record containing such an expression;

(2) A "patient" is a person who consults a psychotherapist for the purpose of diagnosis or treatment of the patient's mental or emotional condition;

(3) A "psychotherapist" is a person licensed [authorized] in any domestic or foreign jurisdiction, or reasonably believed by the patient to be licensed [authorized] to engage in the diagnosis or treatment of a mental or emotional condition;

(4) A "privileged person" is a patient, psychotherapist or an agent of either who is reasonably necessary to facilitate communications between the patient and the psychotherapist or who is participating in the diagnosis or treatment of the patient under the direction of a psychotherapist;

(5) A communication is "in confidence" if, at the time and in the circumstances of the communication, the communicating person reasonably believes that no one except a privileged person will learn the contents of the communication.

(b) General Rule of Privilege.

A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a communication made in confidence between or among privileged persons for the purposes of obtaining or providing diagnosis or treatment of patient's mental or emotional condition.

(c) Who May Invoke the Privilege

A patient or a personal representative of an incompetent or deceased patient may invoke the privilege. A patient may, implicitly or explicitly, authorize a psychotherapist, the agent of either, or any person who participated in the diagnosis or treatment of the patient under the direction of a psychotherapist to invoke the privilege on behalf of the patient.

(d) Exceptions. The psychotherapist privilege does not apply to a communication

(1) relevant to an issue in proceedings to hospitalize the patient for mental or emotional illness if the psychotherapist, in the course of diagnosis or treatment, has determined that the patient is in need of hospitalization;

(2) made in the course of a court-ordered investigation or examination of the mental or emotional condition of the patient, whether a party or a witness, with respect to the particular purpose for which the examination is ordered, unless the court orders otherwise;

(3) relevant to the issue of the mental or emotional condition of the patient in any proceeding in which the patient relies upon the condition as an element of the patient's claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense;

(4) that occurs when a patient consults a psychotherapist to obtain assistance to engage in a crime or fraud or to escape detection or apprehension after the commission of a crime or fraud or to aid a third person to engage in a crime or fraud or to escape detection or apprehension after the commission of a crime or fraud. Regardless of the patient's purpose at the time of consultation, the communication is not privileged if the patient uses the physician's or psychotherapist's services to engage in or assist in committing a crime or fraud or to escape detection or apprehension after the commission of a crime or fraud;

(5) in which the patient has expressed an intent to engage in conduct likely to result in imminent death or serious bodily injury to the patient or another individual [and the disclosure of such information is necessary to prevent death or injury];

(6) relevant to an issue in a proceeding challenging the competency of the psychotherapist;

(7) relevant to a breach of duty by the psychotherapist. Such statements are admissible only to the extent reasonably necessary to prove a fact at issue involving the breach of duty; or

(8) relevant for a psychotherapist to reveal in a proceeding to resolve a dispute with a patient. Such statements are admissible only to the extent reasonably necessary to prove a fact at issue in the dispute; or

(9) that is subject to a duty to disclose under the laws of the United States.

COMMENTARY ON THE PSYCHOTHERAPIST-PATIENT PRIVILEGE SURVEY RULE

In General

The parameters of the psychotherapist-patient privilege in the federal courts effectively began to be formed with the recognition of that privilege in the 1996 Supreme Court decision in *Jaffee v. Redmond*, 518 U.S. 1 (1996). To be sure, the Proposed Federal Rules of Evidence contained such a privilege (Proposed Rule 504) and some circuits had recognized its existence prior to *Jaffee, e.g., In re Doe,* 964 F.2d 1325 (2d Cir. 1992) (qualified privilege exists); *In re Zuniga,* 714 F.2d 632, 640 (6th Cir. 1983) (privilege exists but does not apply to identity or fact and time of treatment). But Congress had refused to adopt rule 504 and, prior to *Jaffee,* some circuits refused to recognize it, *e.g. United States v. Burtrum,* 17 F.3d 1299 (10th Cir. 1994) (no psychotherapist-patient privilege in criminal child sexual abuse case); *In re Grand Jury Proceeding,* 867 F.2d 562 (9th Cir. 1989) (no psychotherapist-patient privilege in federal criminal case); *United States v. Corona,* 849 F.2d 562, 566-67 (11th Cir. 1988) (same).

The Court in *Jaffee* recognized a psychotherapist-patient privilege and applied it to confidential communications to a licensed social worker. The Court's rationale was utilitarian: the privilege serves the public interest by facilitating the process of appropriate treatment for individuals suffering from a mental or emotional problem. Communications to a psychotherapist were distinguished from those made to a physician for physical ailments where "treatment . . . can often proceed successfully on the basis of a physical examination, objective information supplied by the patient, and the results of diagnostic tests." The Court noted (518 U.S. at 10):

> Effective psychotherapy, by contrast, depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.

The Court's was influenced by the adoption of some form of psychotherapist privilege in all 50 states. Most, like the Court in *Jaffee*, extend the privilege to social workers.

The Court was careful to reject any notion that the privilege be qualified by a balancing component (518 U.S. at 17):

> Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege.

Nevertheless, by footnote, the Court noted that "there are situations in which the privilege

must give way," thus opening the door for exceptions such as those existing with regard to other privileges now recognized under federal common law. (518 U.S. at 18, n.19).

Not surprisingly, the lower federal courts dealing with the privilege have turned first to *Jaffee* for guidance as to its dimensions. Moreover, because of the limited opportunity for guidance in that decision and the short length of time that has existed for development of a body of law, the courts are often creating new law with every decision about the privilege.

The survey rule seeks to reflect the Court's description of the privilege in *Jaffee* as well as the interpretation and refinement of that rule by the lower federal courts in the relatively short time since 1996. Many potentially significant issues involving the privilege have yet to reach the federal courts. The survey rule seeks to set forth the position taken by the lower courts where such a position is clear and consistent. In some instances, such as whether a psychotherapist must in all instances be licensed, a minority view is set forth as an alternative. In other instances, as with regard to the requirement in some courts that the patient actually call the psychotherapist in question to testify or use the communications to him or her before the privilege is deemed waived, a small minority view is ignored. Where there is no federal authority on the question, the survey rule borrows from holdings in connection with other privileges, especially the more frequently litigated attorney-client privilege. The approach of looking to the attorney-client privilege for guidance in connection with the psychotherapist privilege is one that is commonly used by the courts in setting the parameters of the latter.

As is the case with the other privileges in this survey, the rule is intended to reflect existing case law or a prediction of what that case law would be like rather than to make judgments with regard to the wisdom of any of the privilege's parameters. Some policy considerations for the future are set forth in the next section.

The form and much of the language of the survey rule is the same as that used for other privileges in this survey. It is borrowed to some extent from the Proposed Federal Rules of Evidence with regard to privilege, from the latest draft of the Uniform Rules of Evidence and from other sources including the Restatement with Regard to Lawyers.

Some significant differences exist between the survey rule and the recently recast Uniform Rule 503 setting forth a Physician/Mental Health Provider privilege. Particular substantive differences are based upon federal case law and are discussed in connection with the provisions of the rule in which they exist. The survey rule also differs in form from the Uniform Rule.

The most important difference between the survey rule and Uniform Rule 503 concerns the more limited applicability of the survey rule, at least if the broader options of the Uniform Rule are selected. Uniform Rule 503 provides four options for application of the privilege: 1)psychotherapists, 2) physicians and psychotherapists, 3) physicians and mental health-providers and 4) mental-health providers. *See, generally,* Robert H. Aronson, *The Mental Health Provider Privilege in the Wake of* Jaffee v. Redmond, 54 Okla.L.Rev. 591 (2001). The survey rule applies to psychotherapists only, although the term is broadly defined so as to reach other professionals,

including social workers licensed (or optionally, authorized) to provide diagnosis or treatment of mental or emotional conditions. There is no federal authority for a privilege that applies to physicians generally, *See, e.g., Hancock v. Dodson,* 958 F.2d 1367, 1373 (6th Cir. 1992); *United States v. Moore*, 970 F.2d 48 (5th Cir. 1992); *United States v. Bercier*, 848 F.2d 917 (8th Cir. 1988). or even for one that uses the broader term "mental health provider." The dictum in the *Jaffee* case, as discussed above, would seem authoritative on the rejection of a general physician-patient privilege. Moreover, the term "mental health provider" has not been used in federal cases and may imply a broader application of the privilege than would be recognized in the federal courts, especially if the rule is limited to professionals who are licensed rather than simply authorized. See discussion in connection with Survey Rule (a)(3), below.

(a) **Definitions. As used in this rule:**

(1) A "communication" is any expression through which a privileged person intends to convey information to another privileged person or any record containing such an expression;

The primary source for this definition is the law involving attorney-client communications. *See* Survey Rule, Attorney-client Privilege. *See, e.g., United States v. Sayan,* 968 F.2d 55, 63-64 (D.C. Cir. 1992) (privilege applied only to communications not observations made by an accountant serving as the attorney's agent). There was no attempt to define communication in Proposed Federal Rule 504. Similarly, Uniform Rule 503 contains no such definition.

The Court in *Jaffee* refers to "confidential communications" and relies on the need for an "atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories and fears."(518 U.S. at 10) More specifically, the Court in *Jaffee* protected the social worker's notes as well as her recollection of the communications from the patient. *See also Jane Student 1 v. Williams*, 206 F.R.D. 306, 310 (S.D. Ala. 2002), where the court notes that the privilege is limited to communications between the patient and her psychotherapist, but that the privilege includes notes made by the psychotherapist. "It also necessarily protects information from such conversations appearing in records prepared by someone other than the psychotherapist (as long as the third person's receipt of the information does not destroy confidentiality and thus the privilege)."

As in the case of the survey rule dealing with the attorney-client privilege, this definition includes communications going from the professional (in this case, the psychotherapist) to the person seeking his or her professional assistance (in this case, the patient) as well as communications going the other way. As discussed in connection with the attorney-client survey rule, there are some federal cases dealing with the attorney-client privilege that protect communications from the attorney only to the extent they would disclose confidential client communications. *See, e.g., Potts v. Allis-Chalmers Corp.* 118 F.R.D. 597 (N.D. Ill. 1987). Other cases take a broader view that provides protection for confidential communications from the attorney to the client. *See Sprague v. Thorn Americas, Inc.* 129 F.3d 1355, 1369-70 (10th Cir. 1997). For reasons more fully discussed in

connection with the attorney-client privilege, the survey rule adopts the broader position of the *Sprague* case for both privileges.

(2) A "patient" is a person who consults a psychotherapist for the purpose of diagnosis or treatment of the patient's mental or emotional condition;

This definition is based on the language of the *Jaffee* case. Uniform Rule 503 defines patient as an individual who consults or is examined or interviewed by one of the professionals listed in that rule. The language and holding of the Court in *Jaffee* would seem to require that the patient be a person who not only consults a psychotherapist but who does so for the purpose of diagnosis or treatment of the patient's own mental or emotional condition. *See, e.g., Tesser v. Board of Education,* 154 F.Supp.2d 388 (E.D.N.Y. 2001). In *Tesser*, the court held that plaintiff's husband's consultation with his own psychiatrist about his wife's depression would be privileged only to the extent that the communications involved his own feelings and emotions. The court stated that communications must be made in the course of treatment, even if there was an expectation of privacy.

(3) A "psychotherapist" is a person licensed [authorized] in any domestic or foreign jurisdiction, or reasonably believed by the patient to be licensed [authorized] to engage in the diagnosis or treatment of a mental or emotional condition.

The language of the definition of a psychotherapist is borrowed in large measure from Uniform Rule 503. However, optional language that would expand the definition to persons authorized but not necessarily licensed is added based upon federal cases that have expanded the privilege to cover such persons. The definition also excludes language included in the Uniform Rule 503 definition of psychotherapist specifically referring to treatment for addiction to alcohol or drugs. There are no cases that specifically deal with the application of the privilege where the treatment is only for addiction to alcohol or drugs. It is possible, perhaps likely, that a federal court would conclude that such treatment comes within the licensing or authorization of a person engaging in diagnosis or treatment of a mental or emotional condition, but there is no case law that would support the addition of such specific language to the definition.

There is no question that licensed psychotherapists are included in the privilege as applied in the federal courts. The Court in *Jaffee* stated (518 U.S. at 15):

> . . . we hold that confidential communications between a *licensed* psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence. (emphasis added)

The Court goes on to extend the privilege to confidential communications made to "licensed social workers." (518 U.S. at 15). Although the definition contained in this survey rule neither uses the term "social worker" or the broader term used in Uniform Rule 503, "mental health provider,"

the language of the definition is intended to cover any licensed [or authorized] social worker engaging in the treatment of mental or emotional conditions.

The more troubling question for the federal courts has not been the application of the privilege to licensed social workers; that is clearly stated in *Jaffee.* Rather, the cases raise the issue of whether the privilege should be extended to persons who are engaged in the kind of treatment involved in *Jaffee*, but who are not licensed by any state. The Court in *Jaffee* used the term "licensed." Yet, some lower courts have applied the psychotherapist-patient privilege in instances in which the communication was made to a person who was not licensed.

In *Oleszko v. State Compensation Insurance Fund,* 243 F.3d 1154 (9th Cir.2001), the court applied the privilege to unlicensed counselors employed by an Employee Assistance Program (EAP). The court found an analogy to the licensed social worker in *Jaffee* stating (243 F.3d at1157-58):

> EAPs, like social workers, play an important role in increasing access to mental health treatment.... Growing numbers of EAPs help employees who would otherwise go untreated to get assistance. The availability of mental health treatment in the workplace helps to reduce the stigma associated with mental health problems, thus encouraging more people to seek treatment. EAPs also assist those who could not otherwise afford psychotherapy by providing and/or helping to obtain financial assistance."

The court went on to note that the EAPs work as part of a team with licensed psychologists or social workers (243 F.3d at 1158). Based upon this language, one could argue that the EAP in *Oleszko* would have come within the language of section (a)(4) of the survey rule, defining a privileged person as including "an agent of either [the patient or the psychotherapist] who is reasonably necessary to facilitate communications between the patient and the psychotherapist or who is participating in the diagnosis or treatment of the patient under the direction of a psychotherapist." Nevertheless, it is also possible that the court would have reached the same conclusion even if an agency relationship were not established or there was no showing that the EAP was working under the direction of a licensed psychotherapist.

Other cases in which the courts have used a definition of psychotherapist that went beyond licensed persons are *Greet v. Zagrocki,* 1996 WL 724933 (E.D.Pa. 1996) (privilege protects files with regard to police officer's consultation of department's Employee Assistance Program. The consultation was with regard to department's "in-house alcohol dependency program."); *United States v. Lowe,* 948 F.Supp. 97 (D.Mass. 1996) (communications to unlicensed rape crisis counselor privileged. The victim waived the privilege to a limited extent by agreeing to in camera review of records.)

Not all federal courts dealing with the question have applied as generous a definition as did the courts in *Oleszko, Greet* and *Lowe.* In *U.S. v. Schwensow,* 151 F.3d 650, 657-58 (7th Cir. 1998) statements to Alcoholics Anonymous volunteer telephone operators were not protected. The court noted that the operators did not possess credentials that might qualify as "licensed." However, in

Schwensow, there were other factors upon which the court relied that prevented the application of the privilege and might well have prevented its application even if the operators had been fully licensed. In that case, the operators did not identify themselves as therapists or counselors. They did not confer with the defendant in a fashion that resembled a psychotherapy session. There was no indication that the AA office provided counseling services. The telephone calls in question were made for the purpose of finding out the address of a detoxification center, not for help in coping with alcoholism. The court stated that the interactions did not relate to diagnosis, treatment or counseling and "under no circumstances can these communications be interpreted as 'confidential communications' entitled to protection from disclosure under Rule 501." (151 F.3d at 658).

In *Jane Student 1 v. Williams,* 206 F.R.D. 306, 310 (S.D. Ala. 2002), the court held that licensed counselors were covered by the privilege, but unlicensed counselors were not. The court specifically rejected the reasoning of *Oleszko* based in part upon the language in *Jaffee* applying the privilege to "licensed" social workers. The court also believed that there needed to be a brighter line for the boundaries of the privilege than would exist if unlicensed mental health providers were included. The court noted that all but eight states recognizing a social worker privilege limit that privilege to persons actually licensed.

See also Carman v. McDonnell Douglas Corp., 114 F.3d 790 (8th Cir. 1997) (no privilege for communications to company ombudsman despite presumed confidentiality of such communications).

The language of the definition, "reasonably believed by the patient," finds support in *Speaker ex rel. Speaker v. County of San Bernardino*, 82 F. Supp.2d 1105, 1112 (C.D. Calif. 2000) where the court stated ". . . if he reasonably believed that Dr. Mathews was a psychologist or a licensed social worker." The court supported its holding by reference to the similar holdings under the attorney-client privilege.

The definition of psychotherapist in the survey rule is intended to be broad enough to cover physicians dealing with mental or emotional health questions. *See Finley v. Johnson Oil Co.,* 199 F.R.D. 301 (S.D. Ind. 2001) (privilege applies to communications to general practitioners dealing with mental health questions).

(4) A "privileged person" is a patient, psychotherapist or an agent of either who is reasonably necessary to facilitate communications between the patient and the psychotherapist or who is participating in the diagnosis or treatment of the patient under the direction of a psychotherapist;

The language of this definition is based upon similar language in the survey rule dealing with the attorney-client privilege. The most significant language in the definition deals with the application of the privilege to agents who either facilitate communications between the patient and the psychotherapist or who participate in the diagnosis or treatment "under the direction of a psychotherapist." There is little case law involving questions of agency under the psychotherapist-

patient privilege. In *Jane Student 1 v. Williams,* 206 F.R.D. 306, 310 (S.D. Ala. 2002), the court held that notes will be privileged even if they are written by someone other than a psychotherapist, provided that confidentiality is maintained. Other authority for the language in the definition would require analogy to cases dealing with the attorney-client privilege. *See, e.g., Winchester Capital Management Co. V. Manufacturers Hanover Trust Co.,* 144 F.R.D. 170, 172 (D. Mass. 1992) (privilege extended to principal of corporate client where disclosure by attorney was reasonable and necessary); *United States v. Kovel,* 296 F.2d 918 (2d Cir. 1961) (privilege extended to accountant hired by attorney to aid in understanding the client's financial situation).

(5) A communication is "in confidence" if, at the time and in the circumstances of the communication, the communicating person reasonably believes that no one except a privileged person will learn the contents of the communication.

Again, the language of this definition tracks the definition of "in confidence" in the survey rule governing the attorney-client privilege. In the case of this definition, there is federal authority dealing with the issue in connection with the psychotherapist-patient privilege. Some of that authority pre-dates the *Jaffee* case in lower court cases where courts recognized the existence of the privilege but limited its application to communications that were truly confidential.

For example, in *In re Doe,* 711 F.2d 1187, 1193-94 (2d Cir. 1983), the court did not reach a definitive conclusion as to whether a psychotherapist-privilege existed. Instead, the court held that, even if it existed, the privilege would not apply where there were no communications of "the intensely personal nature that the psychotherapist patient privilege is designed to protect from public scrutiny." In *Doe*, the communications were from 70 patients a day who were seeking the dispensing of a controlled substance.

Similarly, *In re Zuniga,* 714 F.2d 632 (6th Cir. 1983) involved records from psychotherapists accused of defrauding Blue Cross-Blue Shield. The court recognized the existence of psychotherapist privilege but refused to protect the identity, or fact and time of his treatment, stating (714 F.2d at 640):

> In weighing these competing interests, the Court is constrained to conclude that, under the facts of this case, the balance tips in favor of disclosure. The essential element of the psychotherapist-patient privilege is its assurance to the patient that his innermost thoughts may be revealed without fear of disclosure. Mere disclosure of the patient's identity does not negate this element. Thus, the Court concludes that, as a general rule, the identity of a patient or the fact and time of his treatment does not fall within the scope of the psychotherapist-patient privilege.

See also In re Grand Jury Subpoenas Duces Tecum Date Jan. 30, 1986, 638 F.Supp. 794, 797-99 (D. Me. 1986), where the court, citing *Zuniga,* held that the psychotherapist privilege does not preclude disclosure of the identity of a patient or the fact and time of his treatment.

Post-*Jaffee* cases holding that identity of patient or dates of treatment not within the privilege include *Santelli v. Electro-Motive,* 188 F.R.D. 306 (N.D.Ill. 1999); *Vanderbilt v. Town of Chilmark,* 174 F.R.D. 225 (D. Mass. 1997); *Hucko v. City of Oak Forest,* 185 F.R.D. 526 (N.D.Ill. 1999); *Booker v. City of Boston,* 1999 WL 734644 (D. Mass. 1999).

Other issues that have arisen after *Jaffee* in connection with the confidentiality of communications involve instances in which a session with a psychotherapist was mandatory and whether, if mandatory, a report of the session was to be made to someone other than the patient. Most of the cases dealing with the issue have involved situations where, like *Jaffee*, a police officer has been ordered to undergo some kind of psychological evaluation.

Courts have held that the privilege still applies despite the mandatory nature of the psychological evaluation. *Speaker v. County of San Bernardino,* 82 F. Supp.2d 1105, 1116-17 (C.D.Calif. 2000) (fact that session is mandatory does not destroy privilege where the patient is told by his employer that the session would be confidential); *Caver v. City of Trenton,* 192 F.R.D. 154, 162 (D.N.J. 2000) (privilege applied where no confidential information disclosed by psychologist to police chief, but rather only a "yes" or "no" as to whether the officer was fit to return to duty).

The opposite result with regard to the application of the privilege has occurred where the police officer knew that the results of the sessions would be reported to his or her superiors. *See, e.g., Barrett v. Vojtas,* 182 F.R.D. 177, 181 (W.D. Pa. 1998). In *Barrett,* the court held that the privilege did not apply where a police officer was ordered to seek treatment and "more importantly" knew that the psychiatrist would report back to the police department with regard to the examination. The officer knew that a status report and recommendations would be made. The fact that he thought communications themselves would be confidential did not make the privilege applicable.

In *Kamper v. Gray,* 182 F.R.D. 597 (E.D.Mo. 1998), the court also refused to apply the privilege where a police officer knew that the results of an evaluation would be reported to his superiors. In contrast, with regard to another police officer, a voluntary professional counseling session was held to be protected.

See also Scott v. Edinburg, 101 F. Supp. 2d 1017, 1020 (N.D.Ill. 2000) (no privilege existed where the police officer knew that testing results would be reviewed by the police chief);

(b) General Rule of Privilege.

A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a communication made in confidence between or among privileged persons for the purposes of obtaining or providing diagnosis or treatment of patient's mental or emotional condition.

The language of the general rule is consistent with the language used in the other survey privileges including the attorney-client privilege. It is also consistent with Uniform Rule 503, except

that there is no specific reference to addiction to alcohol or drugs. As in the case of the definition of psychotherapist, this language is left out of the survey rule because of the absence of specific federal authority dealing with the issue.

Although some pre-*Jaffee* decisions had described a qualified psychotherapist-patient privilege, see, *e.g., In re Doe,* 964 F.2d 1325 (2d Cir. 1992), the Court in *Jaffee* was clear in its holding that the privilege should be absolute rather than qualified. Nevertheless, a few district courts cases after *Jaffee* have held the privilege to be qualified where the defendant seeks information otherwise within the privilege to assist in making out a defense in a criminal case. In *United States v. Alperin,* 128 F. Supp. 2d 1251 (N.D. Cal. 2001), the defendant sought psychiatric records of the victim in an assault case in which he had claimed self-defense. The court applied the federal privilege announced in *Jaffee,* but stated that the need for confidentiality had to be balanced against the defendant's Sixth Amendment rights to a fair trial and to confront witnesses. Although applying the privilege in a case governed by federal law, the court looked to California cases that had balanced the privilege against the rights of an accused in a criminal case. The court ordered an *in camera* review of the psychiatric records to determine the value of the evidence to the defendant. In *United States v. Hansen,* 955 F. Supp. 1225 (D. Montana 1997), the court dealt with a request for psychiatric records of a now-deceased victim. The court held that the psychiatrist could assert the privilege on behalf of the deceased patient. However, the court ordered production of the records, stating (955 F. Supp. at 1226):

> The holder of the privilege has little private interest in preventing disclosure, because he is dead. The public does have an interest in preventing disclosure since persons in need of therapy may be less likely to seek help if they fear their most personal thoughts will be revealed, even after their death . . . . However, I find that the defendant's need for the privileged material outweighs this interest.

The court did not elaborate as to whether it would have reached a different result had the patient still been alive.

In *United States v. Haworth,* 168 F.R.D. 660 (D.N.M. 1996), the court recognized the defendant's Sixth Amendment rights to information relevant to his defense, but nevertheless held that there was no right to examine records that were privileged under psychotherapist-patient privilege. However, the defendant would be permitted to cross-examine the patient in question with regard to his treatment.

On the other side of the ledger, the court in *United States v. Doyle,* 1 F. Supp.2d 1187 (D. Or. 1998), involving a sentencing hearing, held that defendant's Sixth Amendment rights did not trump the confidentiality of victim's statements to psychotherapist.

The survey rule describes a privilege that is absolute. Based upon cases such as *Alperin, Hanson* and *Haworth,* there may be instances in which the Sixth Amendment rights of the accused will cause the court to qualify that privilege. Despite this possibility, it does not seem useful to

qualify the rule. Any rule excluding evidence has the potential to be trumped by an application of the United States Constitution.

c) Who May Invoke the Privilege

A patient or a personal representative of an incompetent or deceased patient may invoke the privilege. A patient may, implicitly or explicitly, authorize a psychotherapist, the agent of either, or any person who participated in the diagnosis or treatment of the patient under the direction of a psychotherapist to invoke the privilege on behalf of the patient.

The language of this section tracks the language with regard to invocation of the privilege in the survey rule governing attorney-client privilege. Although the language differs, the substantive rule of the section is the same as Uniform Rule 503(c). The substance of the section is supported by the few federal cases that have been decided dealing with the issue in connection with the psychotherapist-patient privilege.

Examples of federal court holdings with regard to standing to invoke the psychotherapist-patient privilege are *United States v. Schlette,* 842 F.2d 1574, 1583, n. 5, *amended,* 854 F.2d 359 (9th Cir. 1988) (pre-*Jaffee;* government could not assert the psychotherapist privilege on behalf of a deceased person; only personal representative of the deceased could claim privilege); *United States v. Lowe,* 948 F.Supp. 97 (D. Mass. 1996) (rape crisis center had no standing to assert privilege on behalf of a victim).

(d) Exceptions. The psychotherapist privilege does not apply to a communication

Section (d) of the survey rule deals with exceptions to the application of the psychotherapist-patient privilege. General waiver considerations, such as the communication of information to non-privileged persons are treated under the general waiver rule. The issue of waiver by conveying information to non-privileged persons may present some unique problems in the psychotherapist context. See *In re Zuniga,* 714 F.2d 632 (6th Cir. 1983) (waiver by submitting information to insurer); *In re Pebsworth*, 705 F.2d 261 (7th Cir. 1983) (same – but with strong concurring opinion where judge would not destroy privilege, but rather view the disclosure to the insurer as the same as a disclosure to a nurse or a paralegal).

(1) relevant to an issue in proceedings to hospitalize the patient for mental or emotional illness if the psychotherapist, in the course of diagnosis or treatment, has determined that the patient is in need of hospitalization;

There are no federal cases directly dealing with this exception and no comparable situation involving other privileges covered by the survey rules. Despite this absence of authority, the situation seems to be one in which the courts would almost certainly create an exception. Authority may be gleaned from the footnote in the *Jaffee* opinion noting that there are situations in which the privilege "must give way." 518 U.S. at 18, n.19. In that footnote, the court refers to "a serious threat

of harm to the patient or to others can be averted only by means of a disclosure by the therapist." The Court's suggestion is most pertinent to the "dangerous patient" exception set forth in section (d)(5). However, it would also lend support to this subsection.

The language of the subsection tracks that of Uniform Rule 503(d)(1).

(2) made in the course of a court-ordered investigation or examination of the mental or emotional condition of the patient, whether a party or a witness, with respect to the particular purpose for which the examination is ordered, unless the court orders otherwise;

Again, there is no express federal authority for this subsection. The rationale for its inclusion in the survey rule is the same as with regard to subsection (1): the courts would almost certainly recognize it based upon footnote 19 in *Jaffee* (518 U.S. at 18, n. 19). The language of the subsection tracks that in Uniform Rule 503(d)(2).

(3) relevant to the issue of the mental or emotional condition of the patient in any proceeding in which the patient relies upon the condition as an element of the patient's claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense;

Although treated as an exception to the privilege in this survey rule, most courts dealing with the question of the application of the privilege in instances in which the patient relies on a mental or emotional condition refer to the issue as one of waiver. One could therefore argue that the issue should be treated in the survey rule governing waiver. However, although there are analogous questions in connection with other privileges (most significantly, attorney-client), the questions raised by this subsection are sufficiently unique to call for a specific provision in this survey rule dealing with the issue.

There are many cases, almost all from the district courts, dealing with whether a party has waived the psychotherapist privilege by asserting a claim emotional distress or similar damage claim. The courts have taken several approaches to the issue. A clear majority of the cases favors the rule that a party waives the claim by asserting a claim for emotional damages. The cases following this majority rule are divided into those cases that find that a mere claim in a pleading is sufficient for there to be a waiver(referred to below as the "broad" rule) and those that require some indication that the plaintiff will offer some form of expert testimony on the issue(referred to below as the "in-between" rule). A minority of cases holds that a plaintiff does not waive the privilege unless he or she introduces the testimony of the psychotherapist to whom the confidential statements were made or testifies about those statements (referred to below as the "narrow" rule).

The Broad Rule

Several courts have held that the mere pleading of emotional distress is sufficient to waive the privilege. *E.g., Sarko v. Penn-Del Directory Co.*, 170 F.R.D. 127 (E.D. Pa. 1997) (see discussion

below); *Lanning v. Southeastern Pennsylvania Transportation Authority*, 1997 WL 597905 (E.D. Pa. 1997); *EEOC; v. Danka Industries, Inc.*, 990 F.Supp. 1138 (E.D.Mo. 1997); *Sidor v. Reno*, 1998 WL 164823 (S.D.N.Y. 1998) (in *Sidor*, the plaintiff not only sought damages for emotional distress but challenged the decision of her employer to terminate her on the grounds that she was dangerous to herself and to others); *Kirchner v. Mitsui & Co.(U.S.A.), Inc.*, 184 F.R.D. 124 (M.D. Tenn. 1998); *Doe v. City of Chula Vista*, 196 F.R.D. 562 (S.D. Cal. 1999) (reversing magistrate judge opinion adopting narrow view of privilege); *Sanchez v. U.S. Airways, Inc.* 202 F.R.D. 131 (E.D. Pa. 2001). See also *Dixon v. City of Lawton, Okla.*, 898 F.2d 1443 (10th Cir. 1990) (pre-*Jaffee*).

The *Sarko* case is illustrative of the reasoning of courts taking this position. In *Sarko*, the court gave three basic reasons for finding waiver. First, it relied on pre-*Jaffee* decisions that had found waiver, citing *Topol v. Trustees of University of Pennsylvania*, 160 F.R.D. 476, 477 (E.D. Pa. 1995) and *Price v. County of San Diego*, 165 F.R.D. 614, 622 (S.D. Cal. 1996). Secondly, it noted that the *Jaffee* decision had analogized the policy considerations supporting the psychotherapist privilege to those supporting the attorney-client privilege and that the latter privilege is waived when the advice of counsel is in issue. Lastly, quoting from *Premack v. J.C.J. Ogar, Inc.*, 148 F.R.D. 140, 145 (E.D. Pa. 1993), the courted stated: ". . . we agree that allowing a plaintiff 'to hide . . . behind a claim of privilege when that condition is placed directly at issue in a case would simply be contrary to the most basic sense of fairness and justice.'" (170 F.R.D. at 130)

The In-Between Rule

Several courts have held that a party waives the privilege, not simply by filing a pleading claiming emotional distress, but by designating an expert to testify on that issue even though the expert is not the psychotherapist involved in the confidential communications.

In *Santelli v. Electro-Motive*, 188 F.R.D. 306 (N.D.Ill. 1999), the court rejected a bright line narrow test or a bright line broad test. It specifically rejected *Vanderbilt v. Town v. Chilmark*, 174 F.R.D. 225 (D. Mass. 1997), discussed below, that the privilege is waived only by introducing evidence of the communication or by calling the particular psychotherapist as a witness. The court expressed concern that this narrow view would permit the plaintiff to call a non-treating psychotherapist and prevent cross-examination based upon what she told her treating psychotherapist. However, the court said that the mere assertion of a claim for emotional distress was not sufficient. In *Santelli*, the plaintiff had expressly limited her claim to negative emotions she suffered from alleged sex discrimination and retaliation and indicated she would forego introducing evidence about emotional distress that necessitated care or treatment by a physician. Describing its view of the application of the waiver rule in this instance, the court stated (188 F.R.D. at 309):

> While we believe that a party waives her psychotherapist-patient privilege by electing to inject into a case either the fact of her treatment or any symptoms or conditions that she may have experienced, Santelli is doing neither.

Other cases with similar views are *Allen v. Cook County Sheriff's Department*, 1999 WL

168466 (N.D. Ill. 1999) (mere seeking of damages for emotional distress does not waive privilege; plaintiff would waive privilege if she put her mental condition at issue by disclosing that she intended to call her psychotherapist or another expert to establish her claim); *Hucko v. City of Oak Forest,* 185 F.R.D. 526 (N.D. Ill. 1999) (no waiver merely by asserting claim for emotional distress; distinguishes cases where plaintiff has offered or indicated any intent to offer prior consultation with psychiatrist in order to support claim; court did find waiver based upon plaintiff's assertion that the statute of limitations should be tolled because he was preoccupied with treatment and medications); *Adams v. Ardcor*, 196 F.R.D. 339 (E.D.Wis. 2000) (following Santelli and Hucko; mere inclusion of a request for damages based on emotional distress does not waive privilege, but naming a psychologist as an expert witness waived privilege as to other consultations with psychotherapists).

Another relevant authority is *Speaker v. County of San Bernardino,* 82 F. Supp.2d 1105, 1118-20 (C.D. Cal. 2000). *Speaker* involved a claim against a law enforcement officer who had shot and killed plaintiffs' deceased. The court held that the defendant police officer waived privilege as to question of perception distortion by testifying that his perception of the incident was distorted and by submitting the report of an expert that the distortion resulted from the trauma of the incident. However, court found no waiver with regard to other aspects of the defendant's consultation with a psychotherapist. The court discusses both the broad a narrow views of the privilege but states that it would have reached the same result under either rule. The patient, whether he or she is the plaintiff or defendant, must actually place his or her condition in issue in order to waive the privilege.

See also Noggle v. Marshall, 706 F.2d 1408, 1415-16 (6th Cir. 1983) (pre-*Jaffee*) (privilege waived, not merely by plea of insanity, but by the defense putting medical experts on the stand who testified that he was insane).

The Narrow Rule

The leading case setting forth the narrow view of waiver is *Vanderbilt v. Town v. Chilmark,* 174 F.R.D. 225, 228-30 (D. Mass. 1997). In *Vanderbilt,* the plaintiff sought damages for gender discrimination claiming emotional distress. The court disagreed with the broad view of waiver as set forth in *Sarko v. Penn-Del Directory Co.,* discussed above. Unlike the court in *Sarko,* the court in *Vanderbilt* rejected any argument based on pre-*Jaffee* decisions, noting that the Court in *Jaffee* had made a point of rejecting any balancing in connection with the psychotherapist privilege. The court equated a finding a waiver of the privilege because the evidence becomes relevant to a claim made by the patient with the sort of balancing, or qualified privilege, rejected in *Jaffee.* In *Sarko,* the court had analogized the situation to waivers under the attorney-client privilege where there is waiver if the client relies on advice of counsel. The court in *Sarko* argued that the case before it was not based on the advice of the psychotherapist but was rather more like a suit for attorney's fees where, the court said, there is no waiver.[1] Third, the court in *Sarko* had based its holding in part on

[1]The survey rule with regard to the attorney-client privilege in fact provides for an exception to the privilege where the evidence is relevant and reasonably necessary for an attorney

the fairness of permitting the opposing party to introduce the communications with the psychotherapist where the patient relies on his emotional condition as an element of his claim or as a basis for damages. The court in *Vanderbilt* rejected the *Sarko* analysis in this regard, finding that waiver would be justified only if the plaintiff were to introduce the substance of the conversations with the psychotherapist.

Another case taking the narrow view is *Booker v. City of Boston,* 1999 WL 734644 (D. Mass. 1999) (privilege not waived unless plaintiff makes positive use of the privileged material).

The Survey Rule

Subsection (d) (3) rejects the narrow view with regard to waiver of the privilege based upon a claim involving mental or emotional distress. Although there certainly are cases expressing the view that waiver should be limited to instances in which the plaintiff actually relies upon conversations with a psychotherapist or calls that psychotherapist as a witness, the bulk of authority does not support such a limited approach. Although a minority rule has been left as an option in the survey rule in other instances (most significantly with regard to the issue of whether a psychotherapist must be licensed or simply authorized), in this instance the narrow view seems out of step with the approach of the privilege taken by most courts and unsupported by the language in *Jaffee.*

On the other hand, the survey rule does not attempt to provide language that would cause a court to choose between the broad rule, finding a waiver of the privilege merely by raising an emotional or mental condition in the pleadings, and an "in-between" rule that would require some more affirmative step to raise the issue, such as disclosing that an expert will be called to testify to that condition. Subsection (d)(3) refers simply to cases in which a patient "relies upon the condition" as an element of a claim or defense. The case law will have to develop further to determine when the mere raising of the condition in the pleadings is sufficient to call the exception into play.

The language of this subsection closely tracks that of Uniform Rule 503(d)(3).

(4) that occurs when a patient consults a psychotherapist to obtain assistance to engage in a crime or fraud or to escape detection or apprehension after the commission of a crime or fraud or to aid a third person to engage in a crime or fraud or to escape detection or apprehension after the commission of a crime or fraud. Regardless of the patient's purpose at the time of consultation, the communication is not privileged if the patient uses the physician's or psychotherapist's services to engage in or assist in committing a crime or fraud or to escape detection or apprehension after the commission of a crime or fraud;

---

to reveal in a proceeding to resolve a dispute with a client. The applicability of the exception to disputes over fees is consistent with the general law. See Restatement of the Law Governing Lawyers, § 133.

Proposed Federal Rule 504, setting forth a psychotherapist-patient privilege, did not contain a crime-fraud exception. Uniform Rule 503(d)(4) does provide for a crime-fraud exception. Although the language of the survey rule differs from that of the Uniform rule, the general content of the exceptions are the same. The language of the survey rule closely tracks that of the similar exception in the survey attorney-client privilege.

The matter has arisen infrequently since the rejection of that rule by Congress. However, those courts that have considered the question have consistently found the existence of such an exception to the privilege as it has developed as part of the federal common law.

The leading case is *In re Grand Jury Proceedings (Gregory P. Violette)*, 183 F.3d 71 (1st Cir. 1999). In *Violette*, the defendant was charged with presenting trumped up disabilities for the purpose of obtaining credit disability insurance payments. The government sought information through grand jury subpoenas from defendant's psychiatrists; the defendant claimed privilege. The lower court had found the *Jaffee* privilege to be inapplicable because the defendant did not have a *bona fide* therapeutic purpose in consulting the psychiatrists. While not necessarily disagreeing with that analysis, the Court of Appeals preferred to deal with the situation as one in which the privilege as articulated in *Jaffee* applied, but where an exception for statements made for the purpose of facilitating a criminal act came into play. The court used precedent involving the attorney-client privilege to reach its result, especially *United States v. Jacobs*, 117 F.3d 82, 87-89 (2d Cir. 1997) The court described the exception to the attorney-client privilege as applying in cases such as *Jacobs* when the client was engaged in (or was planning) criminal or fraudulent activity when the communications took place and the communications were intended by the client to facilitate or conceal the criminal activity (183 F.2d at 75). The court applied the same policy to the psychotherapist-patient privilege. The mental health benefits of protecting such communications "pale in comparison to the normally predominant principal of utilizing all rational means for ascertaining truth." (183 F.3d at 77 (quotation marks deleted)) The court stated that the exception applies when communications "are intended directly to advance a particular criminal or fraudulent endeavor." (183 F.3d at 77) The court found that the evidence in *Violette*, consisting of the government agent's affidavit establishing that the defendant was engaged in illegal and fraudulent conduct and that he obtained assistance from the psychiatrists, was sufficient for the exception to be invoked. The court noted that the exception applied even though the doctors may have been "unwitting pawns" in the defendant's scheme (183 F.3d at 78).

A similar exception to the psychotherapist privilege was suggested in United States v. Witt, 542 F. Supp. 696 (S.D.N.Y. 1982) (pre-*Jaffee*), although there were multiple other reasons for rejecting the existence of the privilege in that case.

(5) in which the patient has expressed an intent to engage in conduct likely to result in imminent death or serious bodily injury to the patient or another individual [and the disclosure of such information is necessary to prevent death or injury];

The primary support for this exception is contained in a footnote to the *Jaffee* case, where

the Court said (518 U.S. at 18, n. 19):

> Although it would be premature to speculate about most future developments in the federal psychotherapist privilege, we do not doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist.

The language of the exception tracks that of Uniform Rule 503(d)(5), although the Uniform Rule subsection does not contain anything that is the equivalent of the bracketed language in the survey rule, which would require that the disclosure of the information be "necessary to prevent death or injury." The additional language is added based upon federal cases that provide authority for that limitation on the exception. In *United States v. Glass*, 133 F.3d 1356 (10th Cir. 1998), the court recognized the existence of a "dangerous patient" exception but treated it in such a way as to suggest the qualifying language contained in brackets. In *United States v. Hayes,* 227 F.3d 578 (6th Cir. 2000), the court rejected the exception as applied in an instance in which it could not be said that disclosure was necessary to the safety of another individual.

In *Glass*, the defendant had expressed a threat to his psychotherapist to kill President Clinton and his wife. A psychotherapist had prescribed outpatient mental health treatment for him while the defendant was residing at his father's home. An outpatient nurse informed local law enforcement when the defendant left his father's home. The Secret Service contacted the psychotherapist who disclosed defendant's threats. The court noted the *Jaffee* footnote and stated that it would recognize the existence of an exception to the privilege that would apply to a threat that was serious when uttered and where disclosure was the only means of averting harm. However, the court was unable to decide the application of the privilege on the record before it. It stated (133 F.3d at 1359):

> . . . on the record before us, we have no basis upon which we can discern how ten days after communicating with his psychotherapist, Mr. Glass' statement was transformed into a serious threat of a harm which could only be averted by disclosure.

The court remanded for inquiry into the psychotherapist's and Secret Services's view as to the seriousness of the threat.

In *Hayes*, the court dealt with threats to federal officers and a claim of privilege based upon the psychotherapist-patient privilege. The court distinguished between the ethical duty of a psychotherapist to disclose threats to prevent harm to others and a required disclosure at a court hearing after the threat had passed. The court found the footnote in *Jaffee* to relate to the former situation, but not the latter. There is a strong dissent in *Hayes* to the effect that once the psychotherapist has informed the patient of the need to disclose threats for the protection of others, the privilege no longer attaches.

The court recognized the existence of the dangerous patient exception in *United States v. Chase*, 301 F.3d 1019, *reh'g en banc granted,* 314 F.3d 1031 (9th Cir. 2002) under circumstances

in which there was no necessity and therefore in which the exception would apply without the language bracketed in subsection (d) (5). In *Chase*, defendant was charged with threats to federal officers. The threats were relayed to federal authorities by defendant's psychiatrist. The court interpreted the *Glass* case as recognizing a dangerous patient exception if the threat was serious when it was uttered and its disclosure was the only means of averting harm when the disclosure was made. The court adopted the exception as articulated in *Glass,* but stated it applies even though the threat was not immediate and even though there were alternate means of providing protection to the threatened persons. The court viewed the critical issue as whether the psychotherapist reasonably viewed the disclosure as necessary and as the only effective way of averting harm at the time it was made.

There is little doubt that even the court in *Hayes* would recognize an exception to the rule in a proceeding conducted at a time when there is still a danger to the threatened person. The court specifically refers to involuntary hospitalization proceedings, thus providing additional support for the exception set forth in subsection (d)(1). The critical issue, however, is whether the privilege exists after the time of danger has passed. The federal courts have simply not reached a definitive answer to that question. Therefore, the bracketed alternative language is provided in this survey rule.

(6) relevant to an issue in a proceeding challenging the competency of the psychotherapist;

(7) relevant to a breach of duty by the psychotherapist. Such statements are admissible only to the extent reasonably necessary to prove a fact at issue involving the breach of duty; or

(8) relevant for a psychotherapist to reveal in a proceeding to resolve a dispute with a patient. Such statements are admissible only to the extent reasonably necessary to prove a fact at issue in the dispute; or

Subsections (d)(6)(7) and (8) have no federal case authority nor was anything comparable contained in Proposed Rule 504. The subsections are based upon similar exceptions contained in the survey rule governing the attorney-client privilege. Subsections (6) and (7) track similar exceptions in Uniform Rule 503.

(9) that is subject to a duty to disclose under the laws of the United States.

Uniform Rule 503 provides that there is an exception to the privilege where there is a duty to disclose under "[statutory law]." This exception is borrowed from that provision, but limited to disclosures required under federal law. There is no federal case law on the subject. There is nothing that would lead to the conclusion that a duty to disclose under state law would be recognized by the federal courts.

Future Developments with regard to the Psychotherapist-Patient Privilege

The most significant possible development in connection with the psychotherapist-patient privilege not suggested in the survey rule and commentary is the expansion of the rule to communications on matters concerning physical as well as mental or emotional health made to physicians generally.

A. The current state of federal law with regard to a general physician-patient privilege

The Court in *Jaffee v. Redmond,* 518 U.S. 1 (1996), was careful to distinguish such communications from those made to psychotherapists. Where statements are made to a physician for physical ailments "treatment . . . can often proceed successfully on the basis of a physical examination, objective information supplied by the patient and the results of diagnostic tests." *Id.* at 11. On the other hand, psychotherapy "depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories and fears."[1]

The federal courts have been unanimous in their rejection of the existence of a general physician-patient privilege, at least in recent years.[2] Examples from among the several dozen cases at all levels and in virtually all circuits noting the absence of such a privilege in the federal courts are *Hancock v. Dodson*, 958 F.2d 1367 (6th Cir. 1992); *United State v. Moore*, 970 F.2d 48 (5th Cir. 1992); *United States v. Bercier*, 848 F.2d 917 (8th Cir. 1988).

B. Some possible reasons for recognition of a general physician-patient privilege

1. Existence of a general physician-patient privilege in forty-one states.

In *Jaffee*, the Court noted that all states have some form of psychotherapist-privilege.

---

[1]Jaffee, 518 at 11. *See also* Wei v. Bodner, 127 F.R.D. 91, 97 (D.N.J. 1989). In *Wei,* the court draws similar conclusions, stating:

> The relationship between a psychotherapist and her patient is substantially different from that between a doctor and her patient. Patients must confide their most intimate dreams, hopes, fears, and other personal information to their therapists. Without full disclosure there is little hope that the therapy can be successful. While there are other medical situations in which confidentiality may be equally important, courts have recognized the special relationships that psychotherapists have with their patients in according these communications legal confidentiality in some situations.

(citation omitted).

[2]Wright and Graham take the position that the federal authority rejecting the privilege is not totally clear. *See* WRIGHT & GRAHAM, FEDERAL PRACTICE & PROCEDURE, § 5522, p. 68.

The Court noted in this regard:

> That it is appropriate for the federal courts to recognize a psychotherapist privilege under Rule 501 is confirmed by the fact that all 50 States and the District of Columbia have enacted into law some form of psychotherapist privilege. We have previously observed that the policy decisions of the States bear on the question whether federal courts should recognize a new privilege or amend the coverage of an existing one. Because state legislatures are fully aware of the need to protect the integrity of the factfinding functions of their courts, the existence of a consensus among the States indicates that "reason and experience" support recognition of the privilege. In addition, given the importance of the patient's understanding that her communication with her therapist will not be publicly disclosed, any State's promise of confidentiality would have little value if the patient were aware that the privilege would not be honored in a federal court. Denial of the federal privilege therefore would frustrate the purposes of the state legislation that was enacted to foster these confidential communications.

Id. at 12-13 (citation omitted)

In reaching its decision in *Jaffee,* the court set forth a privilege that applied not only to licensed psychologists and psychiatrists but licensed social worker as well. The Court noted that all but eight states applied their psychotherapist privilege to these professionals as well. *Id.* at 16-17

The significance of numbers of states could apply equally in the case of a general physician-patient privilege. Forty-one states, the District of Columbia, and several United States territories have such a privilege.[3] All but North Carolina and Virginia provide for an absolute

---

[3] ALASKA R. EVID. 504; Ariz. Rev. Stat. § 12-2235 (2001); Ark. R. Evid. 503; CAL. EVID. CODE § 994 (West 2002); COLO. REV. STAT. § 13-90-107(d); CONN. GEN. STAT. ANN. § 52-146o (2001); DEL. R. EVID. 503; D.C. CODE § 14-307 (2001); GA. CODE ANN. § 24-9-40 (1995); GUAM CODE ANN. § 503 (2003); HAW. R. EVID. 504; IDAHO R. EVID. 503; 735 ILL. COMP. STAT. 5/8-802 (West 2001); IND. CODE ANN. § 34-46-1 (2001); IOWA CODE ANN. § 622.10(3)(c) (West 2001); KAN. STAT. ANN. § 60-427 (2000); LA. CODE EVID. ANN. art. 510 (West 2001); ME. R. EVID. 503; MICH. COMP. LAWS. ANN. § 600.2157 (West 2001); MINN. STAT. § 595.02 (2001); MISS R. EVID. 503; MO. ANN. STAT. § 491.060(5) (West 2001); MONT. CODE ANN. § 26-1-805 (West 2001); NEB. REV. STAT. § 27-504 (Michie 2001); NEV. REV. STAT. ANN. § 49.225 (Michie 2001); N.H. REV. STAT. ANN. § 329:26 (2001); N.J. REV. STAT. ANN. § 2A:84A-22.2 (West 2001); N.M. R. EVID. 11-504; N.Y.C.P.L.R. 4504 (McKinney 2001); N.C. GEN. STAT. § 8-53 (2001); N.D. R. EVID. 503; OHIO REV. CODE ANN. § 2317.02 (Anderson 2001); OKLA. STAT. ANN. tit. 12, § 2503 (West 2001); OR. REV. STAT. § 40.235 (2001); 42 PA. CONS. STAT. ANN. § 5929 (West 2001); P.R. R. EVID. 26; S.D. CODIFIED LAWS § 19-13-7 (Michie 2001); TEX. R. EVID. 509;UTAH R. EVID. 506; VT. R. EVID. 503; VA. CODE ANN. § 8.01-399 (Michie 2001); 5 V.I. CODE ANN. § 855 (1997); WASH. REV. CODE ANN. § 5.60.060(a)(4) (West 2001); WIS. STAT. ANN. § 905.04 (West 2001); WYO. STAT. ANN. § 1-12-101(a)(i) (Michie 2001).

privilege.[4] The percentage of state law protecting such communications is extremely close to that involving communications to licensed social workers.[5]

2. The Court's dicta in *Jaffee* is of questionable validity

The Court's distinction between statements made for purposes of diagnosis or treatment of physical as opposed to mental or emotional problems may not withstand scrutiny. The medical literature is replete with statements concerning the need for physicians to communicate freely with their patients and the importance of adequate information from patients. E.g., PATIENT'S PAGE, 282(24) JAMA 2422 (1999) (authors recommend to patients that they be prepared to be "completely honest about your lifestyle, including diet, alcohol sex, and drugs"); ZELDA DI BIASI, ET AL, INFLUENCE OF CONTEXT EFFECTS ON HEALTH OUTCOMES: A SYSTEMATIC REVIEW, 357 THE LANCET 757 (2001) (emphasizing the need for emotional as well as physical care in the treatment of physical ailments). The Ethics Manual of the American College of Physicians states: "At the beginning of a patient-physician relationship, the physician must understand the patient's complaints, underlying feelings goals and expectations." Simply as a matter of common sense, a physician must rely on the patient's statement of past medical history, of recent symptoms and on statements of subjective feelings, e.g., pain.

However, the weakness of the Court's comment in *Jaffee* does not necessarily mean that there is a policy justification for the recognition of a general physician-patient privilege. There may be other good and sufficient reasons for the limitation of the privilege to the purview of psychotherapy.

C. Legal Scholarship

Many of the great evidence scholars of the past expressed an opinion with regard to the physician-patient privilege. Almost all of their comments were negative. Up to the time of the proposal of the Federal Rules of Evidence, there was virtually unanimous agreement that the protection of communications between physicians and their patients was not sufficiently important either to the freedom of communications between patient and physician or to society as a whole to justify the potential loss of valuable information to the judicial process.

---

[4] *See* N.C. GEN. STAT. § 8-53 (2001); VA. CODE ANN. § 8.01-399 (michie 2001). Courts in Colorado and New Hampshire has interpreted its statute to grant a qualified privilege. *See State v. Elwell*, 367 A.2d 1002 (N.H. 1989).

[5]Uniform Rule of Evidence 503 provides an option for the application of the privilege not only to psychotherapists or "mental health providers" but to physicians generally. The parameters of the privilege are similar to the survey rule treated here.

In large measure, a scholar's receptivity to the privilege has depended upon the scholar's view of the theory of privilege – utilitarian, privacy or otherwise. John Henry Wigmore, the nation's most revered evidence scholar, took a purely utilitarian view of privileges. He set forth four canons which he said must be satisfied by every privilege for communications:

> (1) The communication must originate in a *confidence* that they will not be disclosed.
>
> (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered.*
>
> (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

WIGMORE ON EVIDENCE, § 2285 at 527 (McNaughton rev. 1961) (emphasis from original).

Wigmore believed that the physician-patient privilege met none of these criteria, except (3). *Id.* §2380a, at 829-30. He argued that, in only a few instances – venereal disease and criminal abortion – does the patient attempt to reserve any secrecy. Most of one's ailments are immediately disclosed and discussed. Although offering no empirical data for his assumptions, he found none to be necessary, noting that these "facts are well enough known." *Id.* at 829. In response to canon (2), he states that "even where the disclosure to the physician is actually confidential, it would nonetheless be made though no privilege existed." Although conceding that the relation between physician and patient ought to be fostered as provided in canon (3), he emphatically denied that the injury to that relation is greater than the injury to justice. He stated:

> The injury is decidedly in the contrary direction. Indeed, the facts of litigation today are such that the answer can hardly be seriously doubted.
>
> * * *
>
> The injury to justice by the repression of the facts of corporal injury and disease is much greater than any injury which might be done by disclosure. And furthermore, the few topics – such as venereal disease and abortion – upon which secrecy might be seriously desired by the patient come into litigation ordinarily in such issues (as when they constitute cause for a bill of divorce or a charge of crime) that for these very facts common sense and common justice demand that the desire for secrecy shall not be listened to.

Id. at 830.

Wigmore dismissed the argument that to reject a physician-patient privilege, while recognizing an attorney-client privilege, was to favor the legal profession over the medical profession. Although only grudgingly supportive of an attorney-client privilege, he noted that

"the absence of the privilege would convert the attorney habitually and inevitably into a mere informer for the benefit of the opponent, while the physician, being called upon only rarely to make disclosures, is not consciously affected in his relation with the patient." *Id.* at 831.

Wigmore further argued that ninety-nine per cent of the litigation in which the privilege is invoked consists of three classes of cases – actions on life insurance policies where the deceased's misrepresentation of his health are involved, actions for personal injury and testamentary actions where the testator's mental capacity is disputed. He found the need for the medical testimony in these cases great and finds no reason for the party to conceal the facts in those situations.

He concluded his diatribe against the privilege by suggesting that the real support for the privilege seems to be "mainly the weight of professional medical opinion pressing upon the legislature."

Another evidence luminary of the past, Edmund M. Morgan, expressed similar sentiments. EDMUND M. MORGAN, SUGGESTED REMEDY FOR OBSTRUCTIONS TO EXPERT TESTIMONY BY RULE OF EVIDENCE, 10 U. Chi. L. Rev. 285 (1942). Morgan also argued against a physician-patient privilege on utilitarian grounds, stating:

> Ordinarily a patient does not object to a dignified disclosure of his physical condition on a proper occasion, unless he is suffering from a diseases ordinarily considered loathsome or disgraceful. Physicians are usually required to report such a disease to public authority and thus to make its existence a matter of public record. Certainly the typical citizen would much rather take a chance on having such matter brought out by the physician in a lawsuit than to endure the certainty that it would be recorded in a public office open to the eyes of subordinate clerks and employees, if not to the public. And this would be doubly true if he knew the truth that in such a lawsuit he could himself be made a witness and required to answer all pertinent questions as to his symptoms, objective and subjective, past and present. Consequently, the assumption that patients are deterred from full disclosure by reason of their desires for secrecy in future litigation has little or no basis in reason.

Id. at 290-291.

The classic text on the physician patient privilege is CLINTON DEWITT, PRIVILEGED COMMUNICATIONS BETWEEN PHYSICIAN AND PATIENT (1958). In that text, the author purports to set forth a complete exposition of the law involving the privilege, but he is no advocate for it – at least in its absolute form. He finds that the "principal reasons advanced in support of the privilege are not convincing." *Id.* at 34. First, he rejects the notion that a person will hesitate to confide in a physician unless he has assurance that his confidences cannot later be revealed. DeWitt notes that the basis fallacy in that theory is that the patient knows all about the privilege and its protections. He finds such an assumption unwarranted. He adds that "only a relatively

small number of patients would shy at consulting a physician even though they knew that he might later be required to disclose their state of health or the nature and effect of their injuries in a court of law. Ordinarily, bodily injuries and disease are attended with neither humiliation nor disgrace." *Id.* at 35. In the exceptional case, venereal disease, the physician may be required to disclose. *Id.*

Dewitt also finds that there is no evidence that the rejection of the privilege would cause an injury to the physician-patient relationship that is greater than the injury to the cause of justice. He fears the suppression of relevant and important evidence. He argues that in the vast majority of reported cases in which the privilege has been invoked, the primary purpose was to use the privilege as a procedural device to win a lawsuit rather than to protect the privacy of the patient or to prevent the disclosure of matters that would humiliate or disgrace the patient.

Dewitt notes with approval the trend to require disclosure of much information that, in the past, might have been protected by the privilege such as the requirement of listing cause of death on death certificates the disclosure of venereal disease under some circumstances. He concludes by noting:

> It is high time to abolish the physican-patient privilege, but this may not be possible within a reasonable length of time. Perhaps the best solution is to amend the statute along the lines of that of North Carolina [which has a qualified privilege that may be waived by the court if "necessary to a proper administration of justice"]. Honest patients will be protected, the dishonest ones exposed.

Id. at 39

Other notable scholars were of a point of view similar to that expressed by Wigmore, Morgan and Dewitt. *See, e.g.*, ZECHARIAH CHAFEE, JR., PRIVILEGED COMMUNICATIONS: IS JUSTICE SERVED OR OBSTRUCTED BY CLOSING THE DOCTOR'S MOUTH ON THE WITNESS STAND?, 52 Yale L.J. 607 (1943); W.A. PURRINGTON, AN ABUSED PRIVILEGE, 6 Colum. L. Rev. 388 (1906).

This seeming unanimity of animosity to the privilege was undoubtedly a major factor in the elimination of the privilege in the Proposed Federal Rules in 1969. In rejecting a general physician-patient privilege, the Advisory committee noted:

> The rules contain no provision for a general physician-patient privilege. While many states have by statute created the privilege, the exceptions which have been found necessary in order to obtain information required by the public interest or to avoid fraud are so numerous as to leave little if any basis for the privilege.

Advisory Committee's Note to Rule 504 (dealing with the Psychotherapist-Patient Privilege).

Ironically, despite the scholarly authority to the contrary, the elimination of the privilege

in the Proposed Rules provoked other scholars to leap to its defense. The emphasis among these scholars is the protection that the privilege gives to the privacy of the individual – the patient – rather than any claim of a beneficial utilitarian effect as sought by Wigmore and the other pre-Rules writers.

One of these scholars, CHARLES L. BLACK, THE MARITAL AND PHYSICIAN PRIVILEGES – A REPRINT OF A LETTER TO A CONGRESSMAN, 1975 Duke L. J. 454, points to the proposed rules as giving "major aid and comfort to that diminishment of human privacy which is one of the greater evils of our time." *Id.* at 47. Black is concerned about the elimination of both the marital communications privilege and the general physician-patient privilege. With regard to the latter, he states:

> If a man, consulting a heart specialist, reveals in the course of his case-history interview, that he has had gonorrhea, then the cardiologist *must* divulge this in court, whenever and wherever any litigant needs the revelation. If a man under therapy for psychoneurosis reveals that his having had gonorrhea has filled him with guilt, *that* communication is protected. This is preposterous. It is a case of the tail ceasing to wag the dog, and continuing to wag in place after the dog has gone away. Psychotherapy is privileged, and ought to be amply privileged, exactly because it is a kind of medicine, and a human being ought to be able to consult *any* kind of a doctor without by that act, or by the necessities of communication consequent on that act, rendering himself vulnerable to being stripped to and below the skin in public. There is no ground whatever for singling out psychotherapy for special treatment. Any patient has to reveal his condition, verbally or otherwise, in order to be treated effectively. Moreover, for what it is worth, most competent doctors of all sorts very often concern themselves with emotional conditions.

Id. at 51.

Other legal writers expressed concern over the Proposed Rules and the elimination of privileges such as those for marital and physician-patient communications. *See, e.g.,* THOMAS G. KRATTENMAKER, TESTIMONIAL PRIVILEGES IN FEDERAL COURTS: AN ALTERNATIVE TO THE PROPOSED FEDERAL RULES OF EVIDENCE, 62 Geo. L. J. 61 (1973).

Some prominent text writers have also supported the existence of evidentiary privileges, including the physician-patient privilege, based upon their impact on personal privacy. EDWARD J. IMWINKELRIED, THE NEW WIGMORE, § 6.2.6(a) agrees with Wigmore insofar as he believes that the physician-patient privilege fails to meet the instrumental or utilitarian tests for privilege . He notes that "It is doubtful that the patient needs any additional inducement to speak freely, especially because in many cases the thought of a lawsuit has not yet crossed the patient's mind." *Id.* at 495. Yet, he finds the privilege supportable on "humanistic" grounds:

> The recognition of the privilege advances the value of autonomy privacy. Whatever the content of the person's life plan, physical and mental health aid the person in pursuing

> the plan. The patient may require a psychotherapist's assistance to preserve the patient's cognitive and volitional ability to formulate the plan. By the same token, the patient often needs a physician's assistance to help preserve the person's physical capacity to carry out the person's life plan. That assistance can entail counselling the person about even unorthodox types of medical treatment. The creation of a private enclave for the physician-patient consultations enables the patient to make more informed, independent choices among his or her medical options.

Id. at 498-99

Imwinkelried raises the possibility that there is a constitutional right to informational privacy in the context of physician-patient communications, but admits that such constitutional protection is sharply disputed. *Id.* at 500. Nevertheless he argues:

> Yet, even if there is no constitutional right to informational privacy in this area, there is undeniably enhanced constitutional protection for decisional or autonomy medical privacy even outside the family realm. Lower courts have interpreted the Supreme Court precedents as conferring a measure of constitutional protection on the independence of certain decisions about medical treatment. It is unnecessary to argue that medical information is so intensely private that there is a constitutional right to informational privacy and that the Constitution compels the recognition of a privilege. So long as the patient has a constitutional interest in decisional or autonomy privacy – that is , the independence of important medical decisions – the recognition of a privilege is an appropriate means to the end of promoting that interest. The creation of a private enclave for the consultation increases the probability that as a result of the conference, the patient will make an intelligent, independent choice.

Id. at 500-01

Imwinkelried balances the various considerations involving the privilege by citing the North Carolina, N.C. Gen. Stat. §8-53 (2001), and Virginia, Va. Code Ann. § 63.1-248.3 (Michie 2001), providing for qualified rather than absolute privileges.

The authors of WRIGHT & GRAHAM, FEDERAL PRACTICE AND PROCEDURE, §5522 articulate their support for a general physician-patient privilege with an argument different from Imwinkelried's, but akin to it. Those authors express concern over the vulnerability of the patient, rather than on his or her right to privacy. They note, "exploiting the vulnerability of those who are disabled from illness or injury is contrary to basic human values." *Id.* at 84. They further note:

> There are several things to be noted about this version of the non-instrumental justification for the privilege. First, it does not depend upon the patient's (self)interest in privacy nor consult his or her feeling about having the physician disclosure; instead it considers the interests of the rest of us in the kind of community we have constructed for

ourselves.
Id. at 86.

Wright and Graham go on at great length to castigate the legislatures and the courts for their protection of psychotherapist communications as distinguished from other communications for medical purposes. *Id.* at 89. They find the singling out of such communications as a product of intense lobbying by mental health professionals rather than the recognition of a meaningfully separate category of case. *Id.* at 94.

D. What difference would it make?

A question that can and must be asked with regard to a possible expansion of the privilege to communications with physicians generally is: In what instances, if any, would its existence make a real difference in the evidence that it is admissible in court?

Looking at the cases in which the federal courts have refused to find the existence of a physician-patient privilege as examples, one can find many instances in which the recognition of the privilege would have made no difference at all. If one were to assume that any physician-patient privilege would have the same parameters of the recognized psychotherapist-patient privilege, the information sought would either fall within a well-recognized exception to the privilege or outside its scope entirely.

Many of the cases in which parties have sought recognition of a general physician-patient privilege are instances in which the patient's condition is an element of his claim or defense. *See, e.g., Boddie v. Cranson,* 1999 U.S. App. Lexis 8742 (6th Cir.) (prisoner's claim for damages for exposure to tuberculosis); *Mann v. Univ. of Cincinnati,* 114 F.3d 1188 (6th Cir. 1997) (sexual harassment claim); *Patterson v. Caterpillar, Inc.,* 70 F.3d 503 (7th Cir. 1995) (claim for disability payments under ERISA; also no privilege where physician did not testify to confidential communications); *Sneed v. Jones,* 991 F.2d 791 (4th Cir. 1993) (prisoner claim for mistreatment including allegations of physical abuse and improper medical treatment); *Hancock v. Dodson,* 928 F.2d 1367 (6th Cir. 1992) (claim for injuries under § 1983 civil rights action; even if state physician-patient privilege applied there was a waiver where medical records released without claiming privilege); *Lovato v. Burlington Northern and Santa Fe Ry. Co.,* 200 F.R.D. 448 (D. Colo. 2001) (claim for injuries under Federal Employers' Liability Act); *Martin v. Cottrell*, 2000 WL 33177232 (E.D.N.C.) (personal injury action in admiralty for accident on navigable waters); *Hingle v. Board of Adminn. of Tulane Educ.l Fund,* 1995 WL 731696 (E.D. La.) (slip and fall case with federal claims under Family and Medical Leave Act, Americans With Disabilities Act and ERISA as well as supplemental state claims); *Reigel v. Kaiser Foundation Health Plan of North Carolina*, 1994 WL 660635 (E.D.N.C.) (ADA claim; pre-*Jaffee* case involving psychiatric records); *Koster v. Chase Manhattan Bank,* 1984 WL 833 (S.D.N.Y.) (Civil Rights Act and Equal Pay Act claims with pendent state claims for sexual harassment; records of gynecologist

properly discoverable as going to plaintiff's claim for damages).

In other instances, the only information that seems to be requested is the identity of the patient and billing information, matters that would not be confidential under the psychotherapist-patient privilege recognized by the federal courts. *See, e.g, United States v. Moore,* 970 F.2d 48 (5th Cir. 1992). In other instances, the government has sought information with regard to patients where the communications concerned the dispensing of drugs – a criminal transaction likely to come within the crime-fraud exception to the psychotherapist patient privilege. *See, e.g., In re Grand Jury Proceedings*, 801 F.2d 1164 (9th Cir. 1986) (grand jury investigation into illegal dispensation of anabolic steroids and other drugs without legitimate medical purpose or prescription); *United States v. Witt*, 542 F. Supp. 696 (S.D.N.Y. 1982) (investigation of clinic allegedly distributing quaaludes).

However, there are cases in which the existence of a general physician-patient privilege might have made a difference.

One category of case in which the recognition of the privilege would conceivably make a difference has arisen with some frequency in the federal courts. A party, often the government or a *qui tam* plaintiff, has sought patient information in connection with the investigation of or charges against a physician. At least some of the information sought would be outside the purview of any likely privilege. As noted above, mere requests for patient identity or even billing information is unlikely to involve communications of the type protected by the existing psychotherapist-patient privilege. However, often the information sought is somewhat broader, seeking diagnosis or drug prescription data. Such information would, at least indirectly, implicate patient communications and arguably be protected by a general physician-patient privilege. Many states would apply their privileges to such records. *See, e.g., Henry v. Lewis,* 478 N.Y.S. 2d 263 (A.D. 1984); *In re Powell*, 746 N.E.2d 274 (Ill. App. 2001).

The federal courts dealing with such cases have followed a consistent pattern. The existence of a common law physician-patient is rejected. The appropriateness of the dissemination of the information is instead analyzed as a question of a question of the patient's privacy. Most recently the issue has been treated as one involving the provisions of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and its implementing regulations.

The defining case in dealing with this question is the United States Supreme Court decision in *Whalen v. Roe,* 429 U.S. 589 (1976). Although in *Whalen* the question arose in a slightly different fact pattern from that described above, the Court's treatment of the issue has set the tone for future lower court decisions dealing with the more usual circumstances. In *Whalen,* the plaintiff challenged the constitutionality of a state statute creating a data bank of the names and addresses of persons obtaining certain drugs by medical prescriptions. The Court noted the absence of a common law physician-patient privilege. *Id.* at 602, n. 28. However, it treated the claims as raising a legitimate question of protecting the privacy rights of the patients whose data

was sought. The Court upheld the statute, finding that the privacy rights were sufficiently protected under the circumstances.

Other pre-HIPAA cases dealing with the issue in a similar way include: *United States v. Burzynski,* 819 F.2d 1301 (5th Cir. 1987) (action against doctor for shipment of anti-cancer drugs not approved by the FDA; court applies privacy considerations but not privilege to the information sought); *General Motors Corp. v. Director of NIOSH,* 636 F.2d 163 (6th Cir. 1980) (Director of National Institute for Occupational Safety and Health sought General Motors' employee records to determine cause of certain skin diseases incident among workers; court recognizes absence of attorney-client privilege but considers matter under *Whalen* finding sufficient assurances against public disclosure); *United States ex rel. Roberts v. QHG of Indiana, Inc.,* 1998 WL 1756728 (N.D. Ind.) (*qui tam* action against physician allegedly keeping infants in Neonatal Intensive Care Unit long than necessary in order to increase billings to Medicaid and other insurers; plaintiffs sought patient information; court recognizes that there is no federal physician-patient privilege and considers questions of patient privacy and limits identifying information on records); *Wei v. Bodner,* 127 F.R.D. 91 (D.N.J. 1989) (anti-trust action brought be anesthesiologist against hospital; no physician-patient privilege; privacy interests could be protected by limiting the information sought); *United States v. Allis-Chalmers Corp.,* 498 F. Supp. 1027 (E.D. Wis. 1980) (no physician-patient privilege; patients' privacy interests adequately protected by limitations on the use and dissemination of the information). See also *United States v. Perryman,* 2001 U.S. App. LEXIS 13962 (6th Cir.) which involved revocation of a prisoner's supervised release. The court refused to apply physician-patient privilege to preclude admission of tests showing defendant had testified positive for drugs.

The HIPAA regulatory scheme recognizes patients' privacy interests but contemplates the disclosure of protected health information in the course of a judicial or administrative proceeding. See 45 C.F.R. § 164.512(e) or for law enforcement purposes, 45 C.F.R. § 164.512(f). Courts asked to consider the question have found no hesitancy in finding that HIPAA does not codify a general federal physician-patient privilege. Those same courts have, in light of the language of the regulations, also found no limitation on the disclosure of the information in court or grand jury proceedings. See, *e.g., Lovato v. Burlington Northern and Santa Fe Railway Co.,* 200 F.R.D. 448 (D. Colo. 2001); *United States v. The Louisiana Clinic,* 2002 WL 31819130 (E.D. La.) (noting the absence of a federal physician-patient privilege while interpreting HIPAA regulations); *In re Grand Jury Subpoena,* 197 F. Supp. 512 (E.D. Va. 2002) (no federal physician-patient privilege; HIPAA regulations do not protect patient's privacy interests in the face of a legitimate law enforcement inquiry).

The application of a general physician-patient privilege to these kinds of cases might well make a difference. An argument can be constructed that the information sought is necessarily reflective of communications between doctor and patient. If privilege protection is to be given to such communications, arguably it would protect this kind of information. The pros and cons of such a decision are discussed in the next section.

In some instances refusal to recognize the existence of a general physician-patient treatment has occurred when similar communications to a psychotherapist would have been protected. In these cases, if all that is sought are test results, the considerations would seem more akin to the privacy concerns discussed in connection with the general patient information now said to be subject to privacy rather than privilege treatment. However, if actual communications are involved, the policies closely track those involved in psychotherapist-patient privilege.

One such case is *Gilbreath v. Guadalupe Hospital Foundation, Inc.*, 5 F.3d 785 (5th Cir. 1993), arising from a personnel claim brought by plaintiff for improper dismissal from his job. The dismissal was based in large part on an incident in which plaintiff was charged with shooting his wife and son. In the course of the personnel hearing, plaintiff's employer sought the medical records relating to the treatment of the wife and son. The court upheld enforcement of the subpoena requiring production of the records finding, *inter alia,* no physician-patient privilege protection under federal law. Assuming that the records reflected communications between the patients and their physicians, similar records with regard to their psychiatric treatment would have been privileged under *Jaffee.*

Fisher v. City of Cincinnati, 753 F. Supp. 692 (S.D. Ohio 1990) is a case even closer to the *Jaffee* facts. In *Jaffee,* the Court found that the psychotherapist-patient privilege absolutely protected communications between a police officer and her psychotherapist concerning the incident that was the subject of plaintiff's § 1983 action. In *Fisher,* plaintiff brought a § 1983 action against the city arising from injuries sustained in an automobile collision with an off-duty police officer. He sought medical records relating the officer's treatment, particularly the results of a blood-alcohol test. Again assuming that the records contained communications between the police officer and his physician, there would seem to be little to distinguish the case from the treatment received by the police officer in *Jaffee* – other than the now crucial difference that the communications involved physical rather than mental questions.

In *United States v. Donley,* 878 F.2d 735, 737, n. 1 (3d Cir. 1989), the court makes only passing reference to its rejection of a general physician-patient privilege. Defendant had sought to prevent admission of statements he had made to the physician treating him for a self-inflicted gunshot wound. Assuming that the statements did not go to the defendant's mental condition raised as a defense, the court would have seemed to be bound to protect these same statements if made to a psychiatrist treating defendant after his attempted suicide. It would seem equally likely that the defendant/patient would seek the confidence of its treating physician as he would a psychiatrist under the same circumstances.

In *United States v. Bercier,* 848 F.2d 917 (8th Cir. 1988), defendant was prosecuted for involuntary manslaughter by driving a motor vehicle while intoxicated. A key contested issue in the case is whether defendant was in fact the driver of the vehicle. He objected to the introduction of statements he had made to the emergency room physician after the accident

admitting that he had been driving and had hit the steering wheel with his chest. The same statements made to a psychotherapist would have been excluded under *Jaffee.*

Again, the merits of extending the privilege to communications of this kind are discussed in the next section.

E. Do the policies expressed in *Jaffee* suggest the extension of the privilege to communications between a patient and physicians generally?

There are cases in which the existence of a privilege for communications to physicians generally, like that extended to communications with psychotherapists under *Jaffee,* would make a difference in the outcome. Do the policies expressed in *Jaffee* suggest the extension of the privilege to at least some of these situations?

The courts might dispose of cases in which the disclosure of patient communications is indirect differently from cases in which the patient's actual words are sought. These are cases such as those discussed above where records of patient treatment are sought, usually in the course of an investigation of the physician. As noted, the extension of a general physician-patient privilege to these records would likely make a difference in result.

The courts might determine that, even if there is a recognition of a privilege applicable to communications to general physicians, cases in which patient records are only incidental to the investigation of a physician should be treated as outside that absolute privilege. *Jaffee* involved the disclosure of the actual communications of the patient to her psychotherapist. The potential of such disclosure might well have a chilling effect on the patient's willingness to communicate fully. In cases in which the patient records are relevant only in the course of an investigation of a physician, any disclosure is indirect and the chilling effect of potential disclosure more remote. Patient privacy is implicated and thus the concerns raised by Imwinkelried, Wright and Graham are present, but such considerations can be taken into account without the application of the absolute privilege recognized in *Jaffee.* An absolute privilege, such as that applicable to psychotherapist-patient communications, may well limit the disclosure of valuable information in the judicial process without a concomitant benefit to the patient The treatment of the issue by the courts under the present state of the law seems appropriately to focus on those privacy concerns. Access to the records is limited both in the nature of the information and in its dissemination based on such privacy concerns. Similarly, Congress and the federal regulators have spoken on the issue and have provided some protection through the HIPAA regulatory scheme, leaving to the courts considerable room for disclosure as necessary to the judicial process. The case can be made, consistent with the policies applied in *Jaffee,* for treatment of these kinds of cases by providing qualified rather than absolute protection. The courts may elect, based upon the policies of HIPAA, to give more protection than is now commonly given, but the protection arguably would be less than absolute.

The same considerations apply to other instances where only the results of tests or similar information is sought, even where the patient is directly involved in the litigation. Although the actual interest of the patient is involved, the policy that would call for a qualified rather than an absolute privilege would seem to be the same. For example, in *Fisher v. City of Cincinnati, supra,* the court might well find that the policies of *Jaffee* are not implicated if the request was limited to the results of a blood-alcohol test rather than the patient's communications concerning that test. The party's privacy rights are not implicated to the same extent as they would be where the substance of his *communications* are sought. The results of objective tests in cases like *Gilbreath v. Guadalupe Hospital Foundation, Inc.,* should be treated the same, under qualified but not absolute protection. These are instances in which the dicta in *Jaffee* noting the difference between statements to general physicians and statements to psychotherapists (see text accompanying note 1, *supra),* would seem to have the most applicability. There is less need for an atmosphere of confidence and trust where all that is involved are diagnostic tests.

On the other hand, where actual communications are sought, such as in cases like *United States v. Donley* and *United States v. Bercier, supra,* the policies behind the recognition of an absolute privilege would seem to be the same as those articulated in *Jaffee.* For example, *Jaffee* involved statements made by a police officer to a social worker acting as a psychotherapist. Assume that the same statements were made to the officer's physician trying to figure out whether stress was causing her back pain. The same need for a full explanation of the stress, including its cause and severity, would exist. The same reluctance on the part of the patient to make that full disclosure if she felt it could be disclosed by the physician in the course of litigation would also seem to exist. The fact that it was a general practitioner or orthopedic surgeon looking at a physical ailment, rather than a psychotherapist seeking to treat a mental illness, would seem to make little difference with regard to these issues. Courts in the future may be asked to consider whether there is any less reason to encourage and protect the confidentiality of such communications than in the case of communications to a psychotherapist.

A careful articulation of the privilege by the federal courts or by Congress should take the policy considerations articulated in *Jaffee* fully into account. The articulation of such a privilege may provide reasonable limits to its application, such as in the exceptions outlined in the survey rule. It should also result in a limitation of the privilege to instances in which what is sought to be disclosed are the direct communications between doctor and patient. But the careful articulation of the privilege might also result in its extension to statements made to medical professionals, other than psychotherapists, under circumstances in which the policies protecting those communications are equally existent.