ADVISORY COMMITTEE
ON
EVIDENCE RULES

Scottsdale, AZ
April 28, 2005

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

April 7, 2005
Projects

ADVISORY COMMITTEE ON EVIDENCE RULES

			Start Date	End Date
Jerry E. Smith Chair	C	Fifth Circuit	Member: 2002 Chair: 2002	-------- 2005
Ronald L. Buckwalter	D	Pennsylvania (Eastern)	2000	2006
John S. Davis*	DOJ	Washington, DC	2001	Open
Thomas W. Hillier II	FPD	Washington (Western)	2000	2006
Robert L. Hinkle	D	Florida (Northern)	2002	2005
Andrew D. Hurwitz	JUST	Arizona	2004	2007
Patricia Lee Refo	ESQ	Arizona	2000	2006
Thomas B. Russell**	D	Kentucky (Western)	2000	2006
William W. Taylor III	ESQ	Washington, DC	2004	2007
David G. Trager**	D	New York (Eastern)	2000	2006
Daniel J. Capra Reporter	ACAD	New York	1996	Open

Principal Staff: John K. Rabiej (202) 502-1820

* Ex-officio
** Ex-officio, non-voting members' terms coincide with terms on Civil & Criminal Rules

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April 7, 2005
Projects

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ADVISORY COMMITTEE ON EVIDENCE RULES

AGENDA FOR COMMITTEE MEETING
Scottsdale, Arizona
June 28, 2005

I. Opening Remarks of the Chair

Including approval of the minutes of the January 2005 meeting, and a discussion of the joint project of the Advisory Committees concerning time periods. The draft minutes of the January 2005 meeting are included in this agenda book.

II. Final Consideration of Proposed Amendments to the Evidence Rules

At this meeting, the Committee will consider whether to refer the proposed amendments to four Evidence Rules to the Standing Committee with a recommendation that they be referred to the Judicial Conference for approval.

A. Rule 404(a)

The proposed amendment to Rule 404(a) would clarify that circumstantial proof of character evidence is inadmissible in civil cases. The agenda book contains a Reporter's memorandum that discusses the public comment received on the proposed amendment, and sets forth the proposed amendment in final form.

B. Rule 408

The proposed amendment to Rule 408 would 1) provide that statements and conduct during settlement negotiations are admissible in criminal cases, 2) exclude offers and acceptances in civil compromises from admissibility in criminal cases, 3) limit the impeachment exception to the Rule, 4) provide that evidence of compromise is inadmissible in a civil case even where proffered by the party who made the offer of compromise, and 5) restructure the Rule to make it easier to read and apply. The agenda book contains a Reporter's memorandum that discusses the negative public comment received on one aspect of the proposed amendment, and sets forth alternatives for the Committee's final action on the Rule.

C. Rule 606(b)

The proposed amendment to Rule 606(b) would recognize a limited exception to the exclusion of juror proof. Such proof would be permitted to prove that a clerical mistake was made in the reporting of the verdict. The agenda book contains a Reporter's memorandum that discusses the public comment received, and sets forth alternatives for the Committee's final action on the Rule.

D. Rule 609(a)

The proposed amendment to Rule 609(a) would narrow the automatic admissibility provision of Rule 609(a)(2) to convictions that readily can be determined to be those for crimes of dishonesty or false statement. The agenda book contains a Reporter's memorandum that discusses the negative public comment received, and sets forth alternatives for the Committee's final action on the Rule.

II. Privileges

The agenda book includes Ken Broun's draft of the commentary on the crime-fraud exception to the attorney-client privilege, and a memorandum concerning the possible proposal of a statute to govern inadvertent waiver.

IV. New Business

Advisory Committee on Evidence Rules

Minutes of the Meeting of January 15th, 2005

San Francisco, California

The Advisory Committee on the Federal Rules of Evidence (the "Committee") met on January 15th 2005 in San Francisco, California.

The following members of the Committee were present:

Hon. Jerry E. Smith, Chair
Hon. Robert L. Hinkel
Hon. Andrew D. Hurwitz
Thomas W. Hillier, Esq.
Patricia Refo, Esq.
William W. Taylor III, Esq.
John S. Davis, Esq., Department of Justice

Also present were:

Hon. David F. Levi, Chair of the Standing Committee on Rules of Practice and Procedure
Hon. Thomas W. Thrash, Jr., Liaison from the Standing Committee on Rules of Practice and Procedure
Hon. Christopher M. Klein, Liaison from the Bankruptcy Rules Committee
Hon. Thomas B. Russell, Liaison from the Civil Rules Committee
Hon. David Trager, Liaison from the Criminal Rules Committee
Hon. Jeffrey L. Amestoy, former member of the Evidence Rules Committee
David S. Maring, Esq., former member of the Evidence Rules Committee
Professor Daniel Coquillette, Reporter to the Standing Committee
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., Liaison from Federal Judicial Center
Professor Daniel J. Capra, Reporter to the Evidence Rules Committee
Professor Kenneth S. Broun, Consultant to the Evidence Rules Committee
Brook D. Coleman, Esq., law clerk to Judge Levi

Opening Business

Judge Smith noted that this meeting was the Fall meeting of the Evidence Rules Committee. The meeting was delayed in order to be held with hearings that were scheduled on the proposed amendments to the Evidence Rules. However, no member of the public asked to testify, and so the hearing was cancelled. Judge Smith emphasized that for purposes of committee continuity, it is important to hold two meetings per year.

Judge Smith then introduced and welcomed the two new members of the Committee: Justice Hurwitz of the Arizona Supreme Court and William Taylor, Esq. a partner at Zuckerman Spader in Washington, D.C.

Judge Smith noted that this was the last meeting for two departing members: Chief Judge Jeffrey Amestoy and David Maring. He expressed the gratitude of the Committee for their excellent service.

Judge Smith asked for approval of the minutes of the April 2004 Committee meeting. The minutes were approved.

Proposed Amendments to the Evidence Rules That Have Been Issued for Public Comment

The Standing Committee has issued for public comment four proposed amendments to the Evidence Rules—Rules 404(a), 408, 606(b), and 609. To date only four comments have been received, but it was noted that most of the comments come in at the end of the comment period, which in this case is March 15, 2005. Judge Smith noted that the package of amendments were all addressed to resolving longstanding conflicts in the federal courts about the meaning and application of the respective rules.

The Committee proceeded to discuss, as a preliminary matter, the merits of the proposed amendments. Most of the discussion focused on Rule 408, particularly the portion of the amendment providing that statements made in civil settlement discussions would not be barred from admission in a subsequent criminal case. Committee members noted that in most cases this provision would not raise a concern, because a lawyer for a civil defendant would not allow that defendant to make a statement that could be used as an admission of guilt in a subsequent criminal case. But several members of the Committee expressed concern that the proposal could be a trap for civil defendants who were not represented by counsel. Special concern was expressed for situations such as court-required mediation of a civil dispute; arguably it would be unfair to require a party to participate in court-appointed mediation (e.g., for a domestic dispute) and then use the party's statements against

it as admissions of guilt in a related criminal case. While statements made in mediation might not present a major issue in the federal system, members noted that it could present a concern in the state systems, and that states often adopt the amendments that are made to the Federal Rules.

One Committee member suggested that the proposed amendment might be changed to allow for admissibility in criminal cases only when the statement was made in the course of settling charges from a regulatory agency, such as the SEC, while barring admissibility if the civil litigation is a private matter.

The Committee member from the Justice Department stressed that the Department supported the proposed amendment as it is written. He stressed that it was important, because of the need to search for truth in criminal cases, to admit a defendant's statements acknowledging criminal culpability; that such statements may be made in either private or public civil litigation; and that such statements are probative of a defendant's guilt even when they are made in the course of settling a private dispute. Judge Smith asked the DOJ representative whether barring compromise statements in a criminal case would make it difficult or impossible for the Department to prove a subsequent criminal case. The Department representative responded that he would look into the practical burdens that would arise if Rule 408 barred statements made in civil compromise from admission in a subsequent criminal case, and that he would report back to the Committee at the next meeting.

Based on the discussion, the Reporter stated that he would provide the following alternatives for the Committee to consider at the next meeting:

1. Language that would allow admission in criminal cases only where the statement is made in an attempt to settle a civil dispute with the government.

2. Language in the Committee Note that would refer to the possibility of a mediation privilege as protecting statements made in the course of a voluntary or mandatory mediation proceeding.

3. Language in the Committee Note to the effect that Rule 403 might justify exclusion in a criminal case of a defendant's statement made in a civil settlement, if that statement was made without the presence or advice of counsel.

As a final point, it was noted that all Committee members agreed that it was necessary to amend Rule 408, as the courts are in conflict about whether statements made in civil settlements are admissible in subsequent criminal cases.

Rule 1101

When the Supreme Court decided *Blakely v. Washington,* it raised the possibility that certain facts ordinarily found by the judge at a sentencing proceeding would have to be found instead by the jury. That holding consequently created the possibility that it might be necessary to amend Evidence Rule 1101, because Rule 1101 provides that the Federal Rules of Evidence are not applicable in sentencing proceedings. If a jury were required to determine "sentencing facts", it could be argued that the Rules of Evidence should be applicable to such proceedings. Accordingly, the Reporter prepared a memorandum to assist the Committee in determining whether an amendment to Rule 1101 should be proposed.

But three days before the Committee met, the Supreme Court decided *United States v. Booker*. In *Booker,* the Court held that the Federal Sentencing Guidelines are now advisory, rather than mandatory. Because the Guidelines are advisory, it did not violate the Constitution for a judge to sentence on the basis of facts not found by the jury. Thus the *Booker* decision obviated any immediate or critical need to amend Rule 1101.

The Committee recognized that Rule 1101 could be amended to "clean up" some of the text and to codify some case law holding that the Federal Rules are inapplicable to certain proceedings not currently mentioned in the Rule (such as supervised release revocation proceedings). But the Committee noted that none of the problems that would be addressed by an amendment were serious enough to warrant the costs of an amendment. Accordingly, the Committee agreed unanimously to take no action on an amendment to Evidence Rule 1101. It directed the Reporter to report on *Blakely/Booker* developments at future meetings.

Rule 803(8)

The Evidence Rules Committee considered a proposal by the Center for Regulatory Effectiveness to amend Evidence Rule 803(8), the hearsay exception for public reports. The Center proposed that the Rule be amended to require the trial court to consider whether the public report comports with information standards promulgated by Congress; the proposal would also require courts to exclude public reports if the government investigation was incomplete, speculative, or biased.

The Reporter prepared a memorandum for the Committee, in which he concluded that 1) trial courts are already permitted to take account of all of the factors suggested by the Center; 2) amendment of the Rule would be inconsistent with the Committee's policy that amendments to the Evidence Rules should be packaged, rather than proposed seriatim; 3) courts do not appear to be having substantial problems in applying Rule 803(8) in civil cases, and any minor problems that have arisen would not be solved by the Committee's proposed amendment; and 4) the Committee

has decided to defer any amendment to the hearsay exceptions until the impact of *Crawford v. Washington* can be assessed.

The Committee decided unanimously to take no action on the Center's proposed amendment. A representative of the Center attending the meeting suggested that the Committee's no-action decision should be issued for public comment. Committee members noted that inaction on a rule is ordinarily not a reason to invite public comment. The only time that Committee inaction was published occurred when the Evidence Rules Committee was reconstituted, and conducted a full-scale review of the Evidence Rules, deciding not to take any action to amend a large number of rules. The Committee unanimously rejected the suggestion that its inaction on Rule 803(8) should be issued for public comment. The Center's representative also suggested that an amendment to the existing Committee Note to Rule 803(8) might suffice. But Committee members observed that the Notes are tantamount to legislative history and that a Note cannot be changed or abrogated independently from an amendment to a rule.

Crawford v. Washington

The Reporter prepared a report for the Committee on case law developments after *Crawford v. Washington*. The Court in *Crawford* held that if hearsay is "testimonial", its admission against the defendant violates the right to confrontation unless the declarant is available and subject to cross-examination. The Court rejected its previous reliability-based confrontation test, at least as it applied to "testimonial" hearsay. The Court in *Crawford* declined to define the term "testimonial" and also declined to establish a test for the admissibility of hearsay that is not "testimonial."

Crawford raises questions about the constitutionality as-applied of some of the hearsay exceptions in the Federal Rules of Evidence. The Evidence Rules Committee has therefore resolved to monitor federal case law developments after *Crawford*, in order to determine whether and when it might be necessary to propose amendments that would be necessary to bring a hearsay exception into compliance with constitutional requirements. The Reporter prepared a memorandum for the Committee on post-*Crawford* case law, and these case law developments were discussed by the Committee at its meeting. It was noted that *Crawford* may prevent the authentication of business records under Evidence Rules 902(11) and (12), as those rules permit a party to prepare an affidavit for purposes of the litigation and to submit it in lieu of in-court testimony of a foundation witness. Such an affidavit appears to be testimonial under *Crawford*—thus it may become necessary to amend, or abrogate, Evidence Rules 902(11) and (12). Similarly, Rule 803(10) might be constitutionally infirm, as it permits the absence of a public record to be proved through an affidavit prepared by the person who searched the records. Such an affidavit would be prepared for purposes of litigation and thus would seem to be "testimonial" under *Crawford*.

The Committee unanimously agreed that it was too soon to propose any amendments to the hearsay rules to comply with *Crawford*, as the lower courts have not yet had enough time to resolve

the open questions left for them by the Supreme Court. The Committee directed the Reporter to keep it informed of post-*Crawford* developments at future Committee meetings.

Privileges

Professor Ken Broun, the consultant to the Evidence Rules Committee on the privileges project, reported on the status of the project. The goal of the privileges project is to prepare a document for publication. There is no intent to propose the codification of the federal law of privilege. For each privilege, the project will draft 1) a survey rule, equivalent to a restatement of the federal law of privilege; 2) commentary on the federal case law bearing on the respective privilege; and 3) a section addressing future developments and special issues such as circuit splits. The Committee has already reviewed the project's work on the medical privilege, which has been completed. The attorney/client privilege survey rule and case law commentary has been drafted and amended based on comments from the Committee's most recent review of the rule.

Professor Broun has been working on the future developments section for the attorney-client privilege. One of the issues that will receive attention is the procedure and standards that apply for determining the crime/fraud exception. A Committee member asked Professor Broun whether there is a problem in applying the crime-fraud exception in situations where the client is seeking legal advice to determine whether a prospective course of conduct is lawful, and is told by the lawyer that it is not. Professor Broun agreed to research the question and report back to the Committee.

Professor Broun informed the Committee that he will complete a section on waiver for the next meeting. Committee members noted a number of problems with the current law governing the waiver of privilege. In complex litigation the lawyers spend significant amounts of time and effort to preserve the privilege, even when many of the documents are of no concern to the producing party. The reason is that if a privileged document is produced, there is a risk that a court will find a subject matter waiver that will apply not only to the instant case but to other cases as well. An enormous amount of expense is put into document production in order to protect waiver. Moreover, the fear of waiver leads to extravagant claims of privilege. Members observed that if there was a way to produce documents in discovery without risking subject matter waiver, the discovery process could be streamlined.

Judge Levi observed that if the Committee believes that the current waiver law is leading to substantial problems and unjustifiable expense, it might think about suggesting to Congress that it consider enacting a statute on the subject, and the Committee might provide suggested language for such a statute. Professor Broun agreed to prepare a memorandum on the costs of preparing a privilege log and the implications of the current waiver rules as applied in complex civil litigations. That memorandum will include a draft statute on the subject of waiver. The Committee agreed to review the memorandum at the next meeting and consider whether to take action on the subject of

waiver of attorney-client privilege. Judge Smith expressed his thanks to Professor Broun for all of his hard work on the privilege project.

Joint Project on Overlapping Civil and Evidence Rules

Judge Smith announced that the Evidence and Civil Rules Committee had agreed to undertake a joint project that would determine whether amendments should be proposed for situations in which rules governing the admissibility of evidence are found in both the Civil Rules and the Evidence Rules. This overlap results from the fact that some rules concerning admissibility were enacted into the Civil Rules before the body of Evidence Rules became law. The most serious problem lies in the relationship between Evidence Rule 804(b)(1) and Civil Rule 32. Both rules provide for the admissibility of deposition testimony, but the standards and conditions for admissibility are not the same. This can lead to confusion and a trap for the unwary. The Evidence Rules Committee has taken the position that rules governing the admissibility of evidence at trial ordinarily should be located in the Evidence Rules. The ultimate result of the project may be the proposal of amendments to the Civil Rules, the Evidence Rules, or both.

E-Government Rule

The Reporter reported to the Committee on the status of a project to enact a set of rules protecting private information found in court filings. The enactment of privacy rules was mandated by Congress in the E-Government Act. Under the auspices of a subcommittee of the Standing Committee, the Advisory Committees on Appellate, Bankruptcy, Civil and Criminal Rules are working on a rule that will be as uniform as possible for each set of Rules. The current proposal would 1) impose a redaction requirement for certain private information; 2) provide an exemption from the redaction requirement for certain records as to which the cost of redaction would outweigh the privacy gains; 3) provide that filings in social security and immigration appeals would not be available to non-parties over the internet; and 4) provide for the possibility of filing under seal to protect privacy and security interests.

The Reporter noted that the proposed E-Government Rules govern filing and not admissibility; as such, they do not raise any question that would be addressed in the Evidence Rules.

New Projects

Privacy of Witnesses

The Department of Justice representative suggested that the Committee might consider whether an amendment should be proposed that would protect the privacy interests of witnesses who testify in a federal court. He suggested that Rule 611(a) authorizes a trial court to protect a witness from "harassment" and that it might be useful to specify that the court could intervene to protect the witness from unnecessary disclosure of sensitive or embarrassing information. The Reporter agreed to research the question in order to assist the Committee in determining whether 1) existing case law protects the privacy of witnesses, and 2) an amendment to protect such interests is necessary.

Electronic Evidence

The Reporter asked for permission from the Committee to prepare a proposal for its consideration that would make it clear that the Evidence Rules cover evidence presented in electronic form. The proposal would be to add a new Rule 1104 providing that the references throughout the Evidence Rules to terms such as "document", "paper" and "writing" cover not only hardcopy but also "electronically stored information." The Committee agreed unanimously that such an amendment was worthy of consideration, as it would be useful to accommodate technological advancements in the presentation of evidence.

Next Meeting

The next meeting of the Evidence Rules Committee is scheduled for Thursday, April 28, 2005 in Scottsdale.

The meeting was adjourned Saturday, January 15, 2005.

Respectfully submitted,

Daniel J. Capra
Reporter

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 13-14, 2005
San Francisco, California
Draft Minutes

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ATTENDANCE

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in San Francisco, California, on Thursday and Friday, January 13 and 14, 2005. The following members were present:

Judge David F. Levi, Chair
David J. Beck, Esquire
Charles J. Cooper, Esquire
Judge Sidney A. Fitzwater
Judge Harris L Hartz
Dean Mary Kay Kane
John G. Kester, Esquire
Judge Mark R. Kravitz
Associate Attorney General Robert D. McCallum
Judge J. Garvan Murtha
Judge Thomas W. Thrash, Jr.
Justice Charles Talley Wells

Member David M. Bernick was unable to participate in the meeting.

Providing support to the committee were: Professor Daniel R. Coquillette, reporter to the committee; Peter G. McCabe, secretary to the committee and Assistant Director of the Administrative Office of the U.S. Courts; John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office; James N. Ishida and Robert P. Deyling, senior attorneys in the Office of Judges Programs of the Administrative Office; Brooke D. Coleman, law clerk to Judge Levi; Joe Cecil of the Research Division of the Federal Judicial Center; and Joseph F. Spaniol, Jr. and Professor Geoffrey C. Hazard, Jr., consultants to the committee.

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Samuel A. Alito, Jr., Chair
Professor Patrick J. Schiltz, Reporter
Advisory Committee on Bankruptcy Rules —
Judge A. Thomas Small for Thomas S. Zilly, Chair
Professor Jeffrey W. Morris, Reporter
Advisory Committee on Civil Rules —
Judge Lee H. Rosenthal, Chair
Professor Edward H. Cooper, Reporter
Advisory Committee on Criminal Rules —
Judge Susan C. Bucklew, Chair
Professor David A. Schlueter, Reporter
Professor Sara Sun Beale, Consultant
Advisory Committee on Evidence Rules —
Judge Jerry E. Smith, Chair
Professor Daniel J. Capra, Reporter

Patrick F. McCartan, former member of the committee, and John S. Davis, Associate Deputy Attorney General, also participated in the meeting. Associate Deputy Attorney General Christopher A. Wray made a presentation on behalf of the Department of Justice on the second day of the meeting. Attorneys Elizabeth J. Cabraser and Melvyn R. Goldman participated in a panel discussion on the second day. Professor R. Joseph Kimble participated by telephone in the committee's discussion of the report of the Advisory Committee on Civil Rules.

INTRODUCTORY REMARKS

Judge Levi reported with regret that the term of committee member Patrick McCartan had expired. He noted that Mr. McCartan had made many major contributions to the work of the committee over the course of the past six years, and he presented him with a framed certificate of appreciation signed by the Chief Justice. Mr. McCartan expressed his appreciation for the honor, and he emphasized that serving on the committee had been one of the highlights and great privileges of his professional career.

Judge Levi welcomed and introduced Mr. Kester as a new member of the Standing Committee and Professor Beale as the next reporter to the Advisory Committee on Criminal Rules. He added that the Standing Committee would honor Professor Schlueter at its next meeting for his long and distinguished service as reporter to the criminal rules committee over the past 17 years.

Judge Levi noted with particular sadness the recent death of Judge H. Brent McKnight, whom he praised as an outstanding member of the Advisory Committee on Civil Rules and a wonderful human being. He pointed out that Judge McKnight had been responsible for heading the committee's efforts in producing new Admiralty Rule G, which brings together in one place the key procedures governing civil forfeiture actions.

Judge Levi also reported that John Rabiej had recently been honored by election to membership in the American Law Institute.

He noted that the major team effort to restyle the civil rules for public comment was nearing an end, and a complete package of restyled rules would soon be ready for publication. He described the contributions of the many participants as incredible, and he said that special thanks were due to the members of the Style Subcommittee (Judge Murtha, Dean Kane, and Judge Thrash), the chair of the Advisory Committee on Civil Rules (Judge Rosenthal), the chairs of the two subcommittees of the civil rules committee (Judges Kelly and Russell), the committee reporters and consultants (Professors Kimble, Cooper, Marcus, and Rowe and Mr. Spaniol), and the staff (Messrs. McCabe, Rabiej, and Deyling).

Judge Levi reported that two important decisions had helped to assure the success of the project. First, he said, the committee had decided to avoid making any substantive changes in the rules and to use a high standard to make sure that changes affect only style, and not substance. Second, he noted, it had been agreed that the Style Subcommittee would have the final word on matters of pure style, but the civil rules committee would have the final word as to whether a particular change is substantive or affects substance. He pointed out that some members of the bar may be concerned when they see changes in familiar language, but, he emphasized, the advisory committee believes that no changes have been made to the substance of the rules. He predicted that

the reformatting, reorganization, modernization, and sheer readability of the rules will be a very pleasant surprise for users.

Judge Levi reported that the Judicial Conference at its September 2004 session had approved all the recommendations of the committee without discussion. He also briefly described some of the proposed amendments that had been published for comment in August 2004, noting that they will be presented to the committee for final approval at its next meeting. He reported that the Advisory Committee on Civil Rules had just conducted the first of three public hearings on the proposed electronic discovery rules amendments and pointed out that there had been a huge amount of public interest.

Judge Levi also mentioned two potential future projects under consideration by the advisory committees. The first would address the way that time is described in the different federal rules. It would take a broad look at all the various time provisions to make sure that they are realistic and internally consistent. The second potential project would address certain overlaps and conflicts between the civil rules and the evidence rules.

Judge Levi reported that the civil and evidence advisory committees had reviewed the Supreme Court's decision in *Blakely v. Washington,* 542 U.S. ___, 124 S.Ct. 2531 (2004), invalidating a state court sentence because it had violated the defendant's Sixth Amendment right to jury trial in that aggravating factors enhancing the defendant's sentence had been found by the court, and not found by a jury or admitted by the defendant. He said that the advisory committees had been considering the need to amend the federal rules if the Supreme Court were to invalidate the federal sentencing system and to require fact-finding by juries.

On January 12, 2005 — the day before the committee meeting — the Supreme Court issued its decision in *United States v. Booker and United States v. Fanfan,* ___ U.S. ___, 125 S. Ct. 738 (2005). Copies were provided to the members, and they offered their initial personal reactions to the opinions. They agreed that the Court had retained the federal sentencing guidelines in place, but had made them advisory in nature, rather than mandatory. Judge Levi noted that the result was very satisfactory to the judiciary and mirrored the proposed recommendations of a special five-judge *Blakely/Booker/Fanfan* working group, comprised of the chair and two members of the Criminal Law Committee, himself, and Judge Robert Hinkle of the evidence rules committee.

Professor Capra pointed out that he had served as the reporter for the special working group and had conducted research for it. He noted that his review of all district-court decisions following *Blakely* had revealed that federal district judges were in fact continuing to adhere to the federal guidelines, had imposed sentences within the prescribed ranges of the guidelines in about 90% of the cases, and were carefully explaining their reasons for departures. He added that research had shown that appellate

review had worked effectively in those state-court systems that use advisory sentencing guidelines. He concluded that the advisory-guidelines system left by *Booker/Fanfan* would be workable, but he questioned whether Congress would leave it in place for the long run.

Professor Capra noted that, in light of *Booker/Fanfan,* there was no need to change FED. R. EVID. 1101 to make the evidence rules applicable in sentencing, or to make other changes in the evidence rules generally. Judge Bucklew said that the Advisory Committee on Criminal Rules would consider the need for changes in the criminal rules at its next meeting, but it did not appear at first glance that major changes would be needed. Judge Levi added that the Criminal Law Committee would take the lead for the Judicial Conference in developing substantive positions and legislative options.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held on June 17-18, 2004.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej reported that the Judicial Conference at its September 2004 session had approved the committee's proposed victim allocution amendments to FED. R. CRIM. P. 32 (sentencing and judgment). He noted, though, that the committee had been aware of pending legislation that would provide a broader array of rights to victims than the proposed rule. As soon as the legislation was enacted, he said, the amendments were withdrawn by pre-arrangement. Mr. Rabiej noted that it is the responsibility of the Department of Justice under the legislation to alert victims as to the times and places of various court proceedings. He added that the Advisory Committee on Criminal Rules was examining the legislation to determine whether any other changes were needed in the criminal rules.

Judge Levi pointed out that the legislation contains an extraordinary appellate provision under which victims may seek mandamus on an expedited basis to enforce their rights and receive a determination by a single appellate judge within 72 hours. It was pointed out by the participants that the provision is inconsistent with existing statutes and rules. Mr. Rabiej said that Congressional staff had been alerted to the deficiencies of the provision, but they had not corrected them.

Mr. Rabiej reported that legislation enacted in the wake of 9/11 had amended FED. R. CRIM. P. 6 directly to permit grand jury information to be shared with foreign officials.

But, he said, the statutory provision had been superseded by the restyled body of criminal rules. He explained that the Administrative Office had advised Congressional staff of the supersession problem and had drafted an amendment to correct it. But, he said, the language actually used by Congressional staff was not fully consistent with the restyled rules.

Mr. Rabiej reported that legislation had passed the House of Representatives in the last Congress that would amend FED. R. CIV. P. 11 (pleas) to require a court to impose sanctions for every violation of the rule. The bill, however, died because the Senate did not act on it. He noted, moreover, that similar legislation had been introduced in the last several Congresses and had been opposed by the judiciary. He added that the legislation was likely to be reintroduced again in the 109th Congress, and the committee had asked the Federal Judicial Center to conduct a new, follow-up survey of federal judges on the operation of the current rule.

Mr. Rabiej reported that legislation had been introduced to amend FED. R. CRIM. P. 11 to require a judge to make specific findings that a sentence imposed pursuant to a plea agreement reflects the "seriousness of the actual offense behavior." He said that the Administrative Office had written to the House Judiciary Committee opposing the provision, and it had been deleted during a mark-up session.

Mr. Rabiej noted that the Sunshine in Litigation Act of 2003, among other things, would regulate confidentiality provisions in settlement agreements. He reported that the Federal Judicial Center had conducted an exhaustive study of all sealed settlement cases in the federal courts and had concluded that sealed settlements are rare and do not present a problem. He said that the Center's report had been sent to Senator Kohl, sponsor of the legislation.

Mr. Rabiej reported on a technical problem with the portion of the federal rules website that allows the public to submit comments or request a hearing directly through the website. He noted that the system had worked well in the past, but for some reason it stopped receiving comments and requests in late 2004. As a result, he said, a notice had been placed on the site informing the public of the defect and extending the comment period.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Cecil pointed out that the agenda book for the committee meeting contained a status report on the educational and research projects undertaken by the Federal Judicial Center. (Agenda Item 4)

He reported briefly on research requested by the Advisory Committee on Appellate Rules. He described the Center's work in evaluating the possible impact of

permitting citation of unpublished appellate opinions in the courts of appeals under proposed FED. R. APP. P. 32.1. He noted that the Center was conducting both a study of actual cases and a survey of judges and attorneys.

Judge Alito noted that the study was quite sophisticated and was aimed at ascertaining whether a policy that permits citation of unpublished opinions increases the time of judges and leads to a decrease in the number of precedential opinions. He also pointed out that the Administrative Office was conducting a statistical survey of median disposition times and any other pertinent events that might show workload impact, such as the number of cases decided by summary decisions. Up to this point, he said, there was no sign that there had been any changes in disposition times or in the number of summary dispositions in the circuits permitting citation of unpublished opinions.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Alito and Professor Schiltz presented the report of the advisory committee, as set forth in Judge Alito's memorandum and attachment of December 13, 2004. (Agenda Item 5)

Judge Alito reported that the advisory committee was not seeking approval of any amendments. But, he said, it was continuing to consider various proposed amendments to the appellate rules that would eventually be presented to the Standing Committee as a package, rather than in piecemeal fashion.

Informational Items

FED. R. APP. P. 4(a)(1)(B) and FED. R. APP. P. 40(a)(1)

He noted that the advisory committee at its last meeting had approved amendments to FED. R. APP. P. 4(a)(1)(B) (appeal of right — when taken) and FED. R. APP. P. 40(a)(1) (petition for panel rehearing). They would make it clear that the additional time the government is given to file an appeal or a petition for panel rehearing applies in cases in which an officer or employee of the United States is sued either in an individual capacity or an official capacity for acts or omissions occurring in connection with duties performed on behalf of the United States. He explained that additional time is given the Department of Justice to accommodate its internal review procedures.

FED. R. APP. P. 28 and 32

Judge Alito reported that complaints had been received from the bar regarding the many variations among local circuit rules as to requirements for briefs. As a result, he

said, the advisory committee had asked the Federal Judicial Center to conduct a comprehensive study of local briefing requirements. He noted that the Center's report was excellent, and it documented that there is a great deal of local rulemaking in this area and considerable diversity in practice among the circuits.

The report, he said, showed that some of the local-rule requirements contradict FED. R. APP. P. 28 (briefs). But, he observed, achieving complete uniformity would be very difficult, particularly since the circuits feel very strongly about their local rules on this topic. He added, though, that the advisory committee would try to promote more uniformity by proposing some discrete changes in Rule 28 from time to time, by encouraging improvements in local rules, and by trying to make it easier for lawyers to ascertain the local requirements.

Professor Schiltz pointed out that the local briefing requirements are scattered among local rules, internal operating procedures, manuals, and other sources. He said that the advisory committee would pursue getting these various materials posted on the Internet, and it would try to pinpoint certain changes for potential inclusion in the national rules.

One member complained that local rule requirements for briefs appear to be proliferating, change frequently, are generally confusing, and can be a snare for attorneys. Other participants added that many of the variations are not justified, and some urged the rules committees to be more active in promoting national uniformity. Others pointed out, however, that the Rules Enabling Act specifically authorizes local rulemaking, and it is no simple task to determine whether a particular local provision is actually in conflict with the national rules.

Professor Coquillette pointed out that the 1988 amendments to the Rules Enabling Act vested oversight of local appellate court rules in the Judicial Conference and gave it authority to abrogate local circuit court rules that conflict with the national rules. He suggested that the Advisory Committee on Appellate Rules might be asked to take another look at whether, as a matter of policy, it would be appropriate to preempt local rulemaking by the individual courts of appeals in certain, specific areas, while leaving other areas open to local procedural variations.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Small and Professor Morris presented the report of the advisory committee, as set forth in Judge Zilly's memorandum and attachments of December 1, 2004. (Agenda Item 6)

Amendments for Publication

FED. R. BANKR. P. 1014

Judge Small reported that the advisory committee had approved for publication in August 2005 a proposed amendment to FED. R. BANKR. P. 1014 (dismissal and change of venue) recommended by the joint Venue Subcommittee of the Advisory Committee on Bankruptcy Rules and the Bankruptcy Administration Committee. The problem, he said, is that large cases are often filed in the wrong district. The proposed amendment would explicitly allow a court on its own motion to initiate a change of venue. He pointed out that most bankruptcy judges believe that they have that authority now, but some do not. Professor Morris added that the committee note to the proposed amendment attempts to make it clear that the rule does not grant any new authority to a court, but merely recognizes existing authority and provides a requirement for notice and a hearing.

The committee without objection approved the proposed amendment for publication by voice vote.

FED. R. BANKR. P. 3007

Judge Small reported that the last sentence of current FED. R. BANKR. P. 3007(a) (objections to claims) states that if an objection to a claim is joined with a demand for relief of the kind specified in Rule 7001, it "becomes" an adversary proceeding. He pointed out that there are serious problems with this language, including problems of issue preclusion. He said that the proposed amendment would eliminate the problematic sentence and make it clear in a new subdivision (b) that a party asking for relief of the type that requires an adversary proceeding must actually file an adversary proceeding. The party could no longer simply include the demand for relief in its objection to claim.

Professor Morris pointed out that an adversary proceeding generally asks for positive relief, unlike an objection to a claim. In addition, he said, an adversary proceeding requires the filing of a complaint and service of a summons, but an objection to claim does not. Finally, he observed, a court can always consolidate matters for processing.

The committee without objection approved the proposed amendment for publication by voice vote.

creditors. FED. R. BANKR. P. 9036 (notice by electronic transmission), as amended, would eliminate the requirement that the sender of an electronic notice obtain confirmation that the notice has been received. He pointed out that many Internet providers do not provide for confirmation of receipt. Thus, many entities are unable to take advantage of electronic noticing. The revised rule, he said, would encourage creditors to sign up for centralized noticing, particularly electronic noticing. In addition to the benefits accruing to creditors themselves, the change would save considerable mailing and administrative expenses for the courts.

He said that the proposed amendments would be expedited by having the Advisory Committee on Bankruptcy Rules vote on them by e-mail ballot right after the end of the public comment period. The Standing Committee in turn would poll its members by e-mail in time to present the amendments to the Judicial Conference at its March 2005 meeting. If the Conference approves them, the amendments would be transmitted immediately to the Supreme Court, which could act on them by May 1, 2005. The rules could then take effect by operation of law on December 1, 2005 — one year sooner than usual.

One member expressed some concern about the problem of a creditor not receiving a notice, and he asked the advisory committee to consider adding a provision to the rule at a later date that would address the issue.

FED. R. BANKR. P. 4002(b)

Judge Small reported that the advisory committee had published proposed amendments to FED. R. BANKR. P. 4002(b) (duties of the debtor) that would require the debtor to bring certain documents to the § 341 meeting of creditors. He said that the advisory committee would present the amendments for final approval at the June 2005 Standing Committee meeting.

Judge Small explained that the Executive Office for United States Trustees had initiated the proposal. In its proposal, the Executive Office would have required the debtor to bring a great many documents to the § 341 meeting. But, he pointed out, the recommendation had attracted substantial opposition from consumer bankruptcy attorneys, and more than 80 negative comments had been received by the advisory committee before the matter was even on its formal agenda.

He noted that a special subcommittee had been appointed to review the proposal, and it had conducted a conference with interested parties and made recommendations to the full committee. The full advisory committee then studied the proposal and approved a shortened list of required documents for the debtor to bring to the meeting, *i.e.*, picture

identification, a pay stub or other evidence of current income, the most recent federal income tax return, and statements of depository and investment accounts.

He added that the committee had received a detailed comment from a bankruptcy judge who recommended expanding the list of documents. He noted that the judge had asked to testify at the hearing, but withdrew his request and stood on his written statement when informed that the hearing had been cancelled for lack of other witnesses.

Finally, Judge Small reported that the advisory committee would consider additional rules proposals from the Venue Subcommittee, and it would seek permission to publish them at the June 2005 Standing Committee meeting.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Rosenthal and Professor Cooper presented the report of the advisory committee, as set forth in Judge Rosenthal's memorandum and attachments of December 17, 2004. (Agenda Item 7)

Amendments for Final Approval

FED. R. CIV. P. 5.1 and 24(c)

Judge Rosenthal reported that the advisory committee was recommending final approval of proposed new FED. R. CIV. P. 5.1 (constitutional challenge to a statute) . She noted that the rule had been published in August 2003, and it had attracted little comment and no criticism. The advisory committee, she said, further polished the rule at its last meeting, and the revisions made since publication did not require republication.

She explained that both 28 U.S.C. § 2403 and FED. R. CIV. P. 24(c) (intervention) require a court to certify to the Attorney General of the United States, or the attorney general of a state, when the constitutionality of a federal or state statute affecting the public interest is drawn into question and the pertinent government is not a party to the proceeding. But, she pointed out, the requirement has often been ignored, largely because court employees are simply unaware of it.

She said that the proposed new rule had been initiated by the Department of Justice, which had recommended two principal rule changes. First, the Department suggested that the existing certification requirement be moved from Rule 24(c) and placed in a new Rule 5.1, immediately following FED. R. CIV. P. 5 (service) to emphasize its importance. Second, the notice to the attorney general should be strengthened by adding to the requirement of court certification a new requirement that the party who challenges the constitutionality of a statute also notify the appropriate attorney general.

She noted that some concern had been expressed in the advisory committee over the new notice requirement placed on parties challenging a statute. But, she added, the Department of Justice had convinced the committee that notice by the court alone has been insufficient to protect the government's interests. Moreover, experience in the several states imposing the same notice requirement has shown that no undue burdens are placed on the challenging party.

Judge Rosenthal pointed out that, as published, the rule would have required the court to set a time not less than 60 days for the government to intervene. Following the comment period, though, the advisory committee modified the provision to state that unless the court sets a later time, the attorney general may intervene within 60 days after notice is filed or the court certifies the challenge, whichever is earlier. The court, moreover, may extend the time on its own motion.

In addition, the committee moved language up from the committee note to the text of the rule to make it clear that before the time to intervene expires, the court may reject the constitutional challenge, but it may not enter a final judgment holding the statute unconstitutional. Thus, the court can reject unsound challenges quickly, grant interlocutory relief, continue pretrial activities, and conduct other proceedings to avoid delay.

Judge Rosenthal explained that the rule also provides for service on the attorney general by certified or registered mail or by electronic notice to an address designated by the attorney general. She said that no such addresses are currently in place, but they would likely be established by the Department of Justice in the near future. Finally, she pointed out, the rule clarifies that if a party fails to give notice, it does not forfeit a challenge to a constitutional right.

One member noted that the new rule is broader than the statute and the current rule, which govern challenges only to statutes "affecting the public interest." Judge Rosenthal replied that the advisory committee had deliberately broadened the scope of the reporting requirement to make sure that notice is given in every case in which a challenge is made to a statute. She noted that the expansion tracked the language of the counterpart provision in the appellate rules, FED. R. APP. P. 44.

One member expressed concern that the rule did not provide for a sanction against a party who fails to notify the attorney general. It was pointed out, though, that judges have adequate authority under the rules to deal with non-compliance. In addition, it was noted that a party challenging the constitutionality of a statute cannot effectively obtain the relief requested until the government enters the case. Another member expressed concern as to the internal consistency of the language of the proposed rule and asked the advisory committee to take another look at it before it is published.

Judge Small added that the new rule had implications for the bankruptcy rules because the current FED. R. CIV. P. 24 is incorporated in adversary proceedings by virtue of FED. R. BANKR. P. 7024. He said that the bankruptcy advisory committee would consider the matter at its next meeting and make appropriate recommendations to the Standing Committee in June 2005.

The committee approved the proposed new rule and proposed amendment for final approval by voice vote with two objections.

Proposed Style Revisions for Publication

Judge Rosenthal reported that the advisory committee was recommending that Rule 23 and Rules 64-86 be added to the list of restyled rules previously approved for publication by the Standing Committee. She explained that the advisory committee had made a number of further style changes in the rules previously approved for publication, consistent with the directions of the Standing Committee to continue polishing the document and to pick up minor errors and inconsistencies.

She added that three more non-controversial "style-substance" amendments would be included as part of the publication package, along with the "style-substance" amendments previously approved for publication by the Standing Committee. She pointed out that the package would also include a memorandum prepared by Professor Kimble explaining the key style conventions adopted by the committee. That document would give readers an appropriate context by which to judge the revisions.

Accordingly, she asked the Standing Committee to approve the entire package of restyled civil rules for publication, subject to final review for typographical errors, formatting, cross-references, and the like. She suggested that if members had any additional suggestions, they would be considered by the advisory committee during the public comment period.

Judge Rosenthal reported that the committee would schedule public hearings before the end of the comment period. She added that Professor Cooper had written an excellent law review article on the style project that deserved attention — *Restyling the Civil Rules: Clarity Without Change,* 79 NOTRE DAME L. REV. 1761 (Oct. 2004)

The committee without objection approved the proposed style package for publication by voice vote.

Informational Items

Judge Rosenthal reported that proposed class action fairness act legislation would be re-introduced in the new Congress, be considered by the Senate early in February

2005, and proceed directly to the Senate floor without a hearing. The bill would then be taken up by the House Judiciary Committee.

She reported that on January 12, 2005, the day before the Standing Committee meeting, the advisory committee had conducted the first of three public hearings on the proposed electronic-discovery amendments. She noted that many of the participants in the Standing Committee meeting had attended the hearing, and a full transcript would be made public. She said that the committee continues to receive a heavy volume of written comments on the proposed amendments, and many more comments were expected before the February 15, 2005, comment deadline.

Judge Rosenthal noted that the advisory committee would meet in April 2005 to consider all the comments and testimony. At that time, she said, the committee would decide whether to proceed with the published changes, whether to republish any amendments, and whether to send proposals on to the Standing Committee for final approval.

She noted that the advisory committee had set forth in the agenda book the various future projects that it was considering, including: (1) a suggestion by the Department of Justice that the committee clarify how indicative court rulings should be handled; (2) a proposal to amend FED. R. CIV. P. 48 to deal with jury polling; and (3) a suggestion to improve the practice of taking depositions under FED. R. CIV. P. 30(b)(6). The committee, she said, had also been asked to consider possible changes in the pleading rules and the summary judgment rule. She pointed out that the committee had deferred action on these various substantive matters until completion of the style project.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Bucklew and Professor Schlueter presented the report of the advisory committee, as set forth in Judge Bucklew's memorandum and attachment of December 2, 2004. (Agenda Item 8)

Informational Items

Judge Bucklew reported that the advisory committee had no action items to present to the Standing Committee. She noted that amendments to five criminal rules had been published for public comment in August 2004 and explained that they were noncontroversial and had attracted only one comment.

Three of the five amendments, she said, would allow the government to transmit documents to the court by "reliable electronic means" — FED. R. CRIM. P. 5(c)(3) (initial appearance); FED. R. CRIM. P. 32.1(a) (revocation or modification of probation or

supervised release); and FED. R. CRIM. P. 41(d) and (e) (search and seizure). The proposed amendment to FED. R. CRIM. P. 40 (arrest for failing to appear in another district) would fill a gap in the rule and allow a magistrate judge to set conditions of release for a person who fails to appear. The proposed amendment to FED. R. CRIM. P. 58 (petty offenses and other misdemeanors) would eliminate a conflict with FED. R. CRIM. P. 5.1 (preliminary hearing) and clarify the advice that a magistrate judge must give at an initial appearance in a petty offense or misdemeanor case.

Judge Bucklew reported that the advisory committee had a number of important matters on the agenda for its April 2005 meeting. Among other things, the members would consider a proposed new FED. R. CRIM. P. 49.1 (privacy in court filings) to implement the E-Government Act's requirement that federal rules be promulgated to meet privacy and security concerns raised by posting court files on the Internet. She said that the advisory committee should be able to forward a rule to the Standing Committee in June 2005 for publication.

Judge Bucklew reported that the advisory committee at its last two meetings had discussed a proposal from the American College of Trial Lawyers for rule amendments to address problems that the college perceives with implementation of the government's duties under *Brady v. Maryland* to turn over exculpatory evidence to the defendant. She said that one proposal under consideration would call for the government to provide information to the defendant 14 days before trial. But, she cautioned, the Department of Justice was likely to oppose any amendment codifying *Brady*. Professor Schlueter added that discussions are sensitive and on-going, and it was very unlikely that any proposal would be submitted to the Standing Committee in June 2005.

Judge Bucklew reported that the advisory committee was looking closely at the *Booker/Fanfan* case to determine what changes might be needed in the criminal rules. She also pointed out that the committee would look again at FED. R. CRIM. P. 6 (grand jury) to see whether additional changes are needed in light of the recent 9/11 statute. She added that the committee would also look at FED. R. CRIM. P. 11 (arraignment and plea) to consider the need for an amendment to require a judge to make a finding on the record that a plea agreement recognizes the seriousness of the defendant's behavior.

She reported that the advisory committee had approved proposed amendments to FED. R. CRIM. P. 41 (search and seizure) to provide procedures for tracking device warrants, noting that magistrate judges have said clearly that they would like additional guidance in this area. She explained that the Standing Committee had approved the proposed rule at its June 2003 meeting and had forwarded it to the Judicial Conference. But the amendments were later deferred and have been in limbo ever since. She said that the advisory committee would like to know their status and whether the committee should

proceed further. She noted that a recent poll of the magistrate judges had shown that there was still strong support for the amendments.

Judge Levi explained that the amendments had been deferred after the September 2003 Judicial Conference meeting at the request of the deputy attorney general. Assistant Attorney General McCallum reported that the Department of Justice's Criminal Division was looking into the matter and would present its definitive view to the committee soon. Judge Bucklew added that the advisory committee could take up the matter at its April 2005 meeting.

FED. R. CRIM. P. 29

Judge Bucklew reported that the advisory committee at its last two meetings had considered the Department of Justice's proposal to amend FED. R. CRIM. P. 29 (motion for judgment of acquittal) to require a judge to defer ruling on a motion to acquit until after the jury returns a verdict. The committee, she said, failed to approve the proposal, but the members stood ready to reconsider the issue. She pointed out that they had read the supplemental materials submitted by the Department to the Standing Committee.

Mr. Wray presented the government's position and emphasized the importance of the matter to the Department. He explained that Rule 29 authorizes a judge to grant a verdict of acquittal either before or after the return of a jury verdict. The main problem, he said, is that the Double Jeopardy Clause of the Constitution precludes an appeal by the government when a trial judge grants an acquittal before return of a verdict. He explained that the committee note to the 1994 revision of Rule 29 encouraged judges to await the jury's verdict before ruling on an acquittal motion. He noted, too, that the Supreme Court has stated that it is preferable for trial judges to await the jury's verdict before granting an acquittal.

Mr. Wray pointed out that the proposal to amend Rule 29 was fully supported by the leadership of the Department of Justice, but the impetus for the change was coming from the ground up — from front-line prosecutors. He stressed that a pre-verdict acquittal is an anomaly under the rules. It may be the only action of a trial judge that is both dispositive and unappealable. Moreover, he said, a pre-verdict acquittal overrules the conscience of the community, as expressed through the action of a jury of citizens. And it may result in significant injustice in a given case.

Mr. Wray suggested that the advisory committee may not have been aware of the extent of the problem, and he acknowledged that the Department may not have been as persuasive as it could have been. But, he said, the supplemental materials submitted by the Department make the case for a change. He noted, for example, that the numbers alone are significant, even though statistics in this area are inherently imperfect and

underinclusive. He pointed out that over a four-year period, there had been 259 Rule 29 judgments of acquittal. Of that total, 72% had been granted before the jury returned a verdict — not the preferred method under Rule 29. About 70% of these pre-verdict acquittals had disposed entirely of the prosecution, rather than just certain counts in a multi-count case.

He suggested that it cannot be determined whether these cases had been decided correctly because appellate review had been precluded by the trial judges' actions. But, he said, there is strong reason to suspect that a significant number of the pre-verdict acquittals had been erroneous and would have been reversed on appeal. He noted that the Department appeals about 60% to 70% of post-verdict acquittals, and about one published opinion a month reverses a trial judge's post-verdict action. He added that there is no reason to suppose that pre-verdict acquittals are less likely to be erroneous because they are often entered in the heat of trial.

Mr. Wray explained that the standards for granting an acquittal are stringent. The trial judge must assess the evidence in the light most favorable to the government and resolve all inferences and credibility questions in favor of the government. Then, an acquittal should be granted only if no rational trier of fact could find the defendant guilty beyond a reasonable doubt. Obviously, he argued, that is not the standard that some judges had used. He proceeded to describe the facts of some specific cases in which the Department believed that district judges had committed serious error by granting an acquittal before verdict.

He emphasized that the problem had to be fixed, but he added that there may be more than one way to address the problem by rule. He explained that the Department was not asking the Standing Committee to choose one particular solution, but was merely telling the committee that the status quo is unacceptable and should be remedied by the advisory committee. He suggested that providing the government an appellate remedy would be a modest response to an immodest problem.

He referred to Judge Levi's proposal made at the last advisory committee meeting to allow a judge to enter a pre-verdict judgment of acquittal, but only on condition that the defendant waive double jeopardy protection and permit an appeal by the government. He noted that this particular solution would allow judges to cull out individual defendants and counts in appropriate cases and protect the rights of both the defendant and the government. He said that Department attorneys had considered the proposal and found that, on balance, it was a good one. He added in response to a question that the defendant's waiver of double jeopardy protection appeared to be constitutional.

Judge Bucklew reported that the advisory committee would be pleased to take another look at the matter, and she suggested that part of the committee's problem with

the proposal had been a lack of persuasive information. Judge Levi said that the advisory committee, not the Standing Committee, is the right body to draft a proposed rule. He suggested, moreover, that it would be inappropriate for the Standing Committee to tell the advisory committee that a rule should be published or to ask it to draft a particular rule. Rather, he said, the advisory committee, as the body with the relevant expertise, should be asked to consider the best formulation for a rule that would address the problems identified by the Department of Justice and then to make a separate recommendation as to whether that rule should be published for public comment. At its next meeting, then, the Standing Committee would have all the information it needs to make appropriate decisions on the matter.

He noted that the Advisory Committee on Criminal Rules had been very interested in the Department's proposal to defer acquittals until after verdict, and it had at first voted to proceed with an amendment to Rule 29. But, he added, the committee became concerned about deferring verdicts in hung-jury, multiple-count, and multiple-defendant cases. He said that the hung-jury problem had inspired his alternate suggestion that a pre-verdict acquittal might be conditioned on the defendant's waiver of double jeopardy rights. In essence, the proposal would offer the defendant a choice. If a defendant wants the judge to consider a pre-verdict acquittal, he or she must be willing to preserve the government's right to appeal. He noted that the advisory committee's reporter, Professor Schlueter, had reduced the proposal to text form, and it appears workable.

One member said that the waiver proposal looked very promising and should be pursued by the advisory committee. He added that the Standing Committee should express its sense that the advisory committee should seriously considering bringing forward a rule. Another member emphasized the advisory committee should document the analysis behind its recommendations and its reasons for chosing one alternative over another.

In light of the committee discussion, Judge Levi restated his suggestion and recommended that the advisory committee be asked to: (1) consider an amendment of Rule 29 as a serious topic that deserves further consideration; (2) formulate the best way to deal with the problems identified by the Department of Justice and draft the best rule and committee note; and (3) recommend to the Standing Committee whether that rule and note should be published for public comment. The advisory committee, he said, could then consider the matter at its spring meeting, and the Standing Committee would have all the information it needs to consider the proposal at its June 2005 meeting.

The Department of Justice representatives agreed to this course of action, and they expressed their commitment to resolving the matter through the rulemaking process.

The committee by voice vote without objection approved Judge Levi's proposal to the advisory committee.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Smith and Professor Capra presented the report of the advisory committee, as set forth in Judge Smith's memorandum and attachment of December 10, 2004. (Agenda Item 9)

Informational Items

Judge Smith reported that the advisory committee had not held a separate autumn meeting, but had decided, instead, to conduct a meeting immediately following the Standing Committee meeting. He noted that proposed amendments to four evidence rules had been published for comment.

He said that the advisory committee had been surprised by the lack of public comment to date on the proposed amendments to FED. R. EVID. 408 (compromise and offers to compromise). Among other things, the use of statements and conduct during civil settlement negotiations would not be barred when offered in a later criminal case. He pointed out that the Department of Justice had asked for a broader rule, but the committee was proposing a compromise rule that allows use of comments made at settlement negotiations, but not the settlement itself.

He reported that the proposed change to FED. R. EVID. 609(a)(2) (impeachment by evidence of conviction of a crime) deals with the automatic impeachment of a witness by evidence that he or she has been convicted of a crime of "dishonesty or false statement." He explained that the amendment permits the mandatory admission of evidence of conviction only when it "readily can be determined" that the crime of conviction was one of dishonesty or false statement, such as by the elements of the crime or by clear information set forth in the indictment or other key document.

Judge Smith said that the proposed amendment to FED. R. EVID. 606(b) (competency of a juror as a witness) would make it clear that testimony by a juror may be used only to prove that the verdict reported by the jury was the result of a clerical mistake. The amendment, thus, rejects some case law that interprets the current rule to allow jurors to be polled as to whether the jury understood the instructions.

Judge Smith noted that a preliminary reading of the *Booker/Fanfan* case shows that the advisory committee will not have to make any changes in the Federal Rules of Evidence. But, he added, the committee will have to wait to see what Congress does in

the wake of the case. He added that the advisory committee had also decided not to proceed on any rules issues that may be impacted by the Supreme Court's decision in *Crawford v. Washington,* 541 U.S. 36 (2004), barring the use of "testimonial" hearsay against a criminal defendant in the absence of cross-examination. The committee, instead, will monitor case law development under *Crawford.*

Professor Capra said that a suggestion had been received recommending an amendment to FED. R. EVID. 803(8) (hearsay exception for public reports) to ensure that federal statutory standards are incorporated into the admissibility requirements of the rule. He noted that public records are considered presumptively trustworthy, and the courts do not seem to be having any difficulty in applying Rule 803(8). He added that the advisory committee would consider the suggestion at its January 2005 meeting.

REPORT OF THE TECHNOLOGY SUBCOMMITTEE

Judge Fitzwater reported that the Technology Subcommittee had met in January 2004 and had prepared a template for the advisory committees to use in drafting rules to implement the E-Government Act of 2002. The statute requires that federal rules be issued to address the privacy and security concerns raised by posting court files on the Internet. He pointed out that the subcommittee had revised the template to incorporate views expressed by the advisory committees and some suggestions by the Department of Justice. Professor Capra added that working from a single template fosters the mandate of the E-Government Act that the federal rules be as uniform as possible.

Professor Capra reported that the goal was to have rules amendments presented by the advisory committees to the Standing Committee at its June 2005 meeting, so that they could be published in August 2005. He explained that the basic decisions reflected in the template had been derived from the extensive work of the Court Administration and Case Management Committee, which had conducted several public hearings and had determined that the best policy for the Judicial Conference to adopt was a general rule that "public is public," *i.e.,* that all case papers publicly available at the courthouse should also be made available on the Internet. But, he cautioned, certain specific categories of sensitive personal information would have to be redacted.

He noted that the Court Administration and Case Management Committee had spent a great of time discussing which sensitive information should be redacted. The Technology Subcommittee and the advisory committees, he said, had made a few additions to the policy to implement some requirements of the E-Government Act and to meet some concerns of the Department of Justice. He explained that the resulting template is necessarily complex, and it categorizes four different kinds of document filings: (1) documents that must be redacted; (2) documents exempt from the redaction

requirement, such as administrative agency records; (3) social security and immigration appeals, for which public access will be restricted to the courthouse; and (4) documents filed under seal. He noted that the template states that a court by order in a case may limit or prohibit remote electronic access to a particular document in order to protect against disclosure of private or sensitive information.

Professor Schiltz reported that the proposal to be considered by the Advisory Committee on Appellate Rules states that documents in the appellate courts should be treated in the same manner that they are treated in the court below.

PROPOSED TRANSNATIONAL PROCEDURES

Dean Kane led a panel discussion of the American Law Institute's transnational procedure project with Professor Hazard and distinguished San Francisco attorneys Elizabeth Cabraser and Melvyn Goldman. Dean Kane noted that Professor Hazard was the only American co-reporter on a project that developed a set of procedural rules drawn from both civil-law and common-law systems for use in handling commercial contests. The results of the project, she said, had been approved recently by the Institute. She asked Professor Hazard first to describe some provisions in the proposed rules, and then she asked Ms. Cabraser and Mr. Goldman to respond.

Professor Hazard noted at the outset that the transnational project had been started about 10 years ago with intense consultation by lawyers from many parts of the world. It was conceived as a procedure for commercial cases involving sophisticated lawyers and clients. But, he said, the rules could also be used in other categories of cases. And, he added, they are generally compatible with the American system and with jury trials. They include provisions dealing with notice, the right of participation, judicial management of proceedings, and full consultation by advocates.

Four of the ideas embraced in the rules, he said, could potentially be adapted for use in the federal court system: (1) more focused discovery; (2) fact pleading; (3) written statements of witnesses in lieu of oral testimony for direct examination; and (4) motions demanding proof.

1. With regard to discovery, Professor Hazard pointed out that the U.S. has the broadest discovery system in the world. In general, a party must — on demand and at its own expense — turn over to a requesting party any evidence it has that may lead to admissible evidence. Elsewhere in the world, on the other hand, discovery requests must be more specific. A producing party's obligation, moreover, extends only to relevant evidence. Other countries, he noted, are

mindful of the problem of relevant evidence residing in the hands of an opposing party, but release of that type of evidence is usually governed by substantive law.

He said that the present federal rule dealing with document discovery had been adopted in contemplation of the exchange of a dozen or so documents, before the use of copying machines and computers. He questioned whether the sheer quantity of documents today makes a difference that calls for a rule change. He added that one interesting consequence of the enormous discrepancy between U.S. and foreign document production rules is that some foreign companies initiate litigation in the United States just to get broad discovery that they can use in a dispute back home.

2. Professor Hazard pointed out that the federal rules authorize notice pleading. But other countries and many U.S. states require a complainant to set forth specific facts at the outset. He suggested that most good plaintiff's lawyers already use fact pleading, even in the federal courts, because they want the court to understand their case from the outset. He explained that the proposed transnational rules require the complaint to set forth the relevant facts in reasonable detail and to describe with sufficient specification the available evidence to be offered in support of the allegations.

3. Professor Hazard explained that the transnational rules provide that in a nonjury trial a written statement by a witness is a necessary predicate to the testimony of that witness. This is contrary to U.S. procedure, where direct testimony is taken orally. Under the transnational rules, the first submission is a written statement prepared by the lawyer setting out what the testimony of a particular witness is going to be. Then an examination of the witness follows — either by the judge in civil law countries, or by the lawyers in common law countries. Thus, the oral testimony of the witness is essentially cross-examination.

4. Fourth, the transnational rules provide for a motion demanding proof, a sort of streamlined version of a summary judgment motion. Typically, he said, a summary judgment motion is made by a defendant arguing that the plaintiff lacks proof as to key elements of the case. The movant has to attach details to show that there is considerable proof that a particular issue is not subject to proof by the opposing party. Instead, he said, why not have a motion demanding proof? That way, the movant does not have the full burden of establishing that there cannot be proof on a particular issue.

Ms. Cabraser said that the federal and state procedural rules work very well in many cases, but they do not work well in others, nor do they always provide protection

for litigants against bad practices. Parties, she said, can make litigation unjustifiably expensive and combative.

She suggested that the proposed transnational rules may work very well in commercial disputes, which usually involve litigation among equals. But, she added, much litigation in the American courts is among parties who are not equal. For example, she said, most countries do not have the highly developed tort law of the U.S., nor do they provide the same level of access for ordinary citizens. The courts of the U.S. follow a different national ethos and provide regulation through the litigation process.

With regard to the cost of producing documents, she said, the system should not place most of the cost of production on the plaintiffs. Judges, she pointed out, have authority to assess costs against requesting parties in appropriate cases.

She said that in her own individual cases, the same defendant has produced the same documents several times in past cases. But she must ask for them again in each new case, thereby adding costs to the defendant and running up transactional costs. She suggested that it might helpful if there were a rule or protocol in the complex litigation manual enabling a defendant to identify documents previously discovered and placing the burden on the plaintiff to get them.

With regard to fact pleading, she said that plaintiffs should be required to set forth the facts in a clear manner. It helps both the pleader and the court, and it avoids the need for status conferences to find out what the case is about. She noted that she personally provides the same level of detail in federal complaints that she does in her state court complaints

She suggested that a motion demanding proof could work in both sophisticated and simple cases, especially where there are a limited number of documents. She said that summary judgment had become unmanageable in complex cases, and it leads to production of a huge volume of documents. She suggested that the concept of a motion demanding proof should be tried.

Mr. Goldman said that discovery, especially electronic discovery, is completely out of hand. He noted that civil cases are rarely tried, yet the parties in the end have to bear the cost of wasteful discovery.

He pointed out that effective case managament is the appropriate reform. He said that a judge should take over a case from the first conference and identify the claims, defenses, issues, and evidence on both sides. The judge, he said, will learn quickly what discovery is needed and will tailor it to the circumstances of the particular case. Staged discovery, for example, would be particularly appropriate.

But, he said, early hands-on case management does not take place in the courts where he practices today, except with a handful of trial judges. Instead, he said, the normal practice is to have pro forma case management conferences with pro form orders. He suggested that if there were effective case management, there would be far less discovery and abuse.

He pointed out that judicial case management is clearly contemplated in the federal rules and in the new transnational rules. But it is not happening for a number of reasons. Not all trial judges, he suggested, are suited by temperament to case management. Judges, moreover, see that the vast majority of their cases settle, and they may conclude that hands-on case management is not a good use of their time. And most court systems lack sufficient flexibility to permit judges who are good at case management to take over cases that need management.

As for fact pleading, he asked whether it is designed to provide information to the other side or to serve as a means for filtering out cases that do not belong in the system. The latter, he said, is a laudable goal, but courts rarely dismiss cases for lack of sufficient facts, except in securities cases. He suggested that fact pleading is a gate-keeping mechanism that might work, and it should be explored. But, he added, even under the current rules, good case management is critical, as a judge can ask the parties to plead with more particularity.

Mr. Goldman said that the proposed motion for proof is a fascinating idea, but he doubted that it will come to pass. He said that appropriate use of summary judgment is a way to elicit the proof that parties have in a case. He noted that trial judges have a great deal of flexibility, and he has seen judges ask parties to file a motion for summary judgment. He noted, too, that Rule 56(f) gives a judge discretion to authorize discovery in connection with summary judgment.

Mr. Goldman said that the use of written statements for expert witnesses is an excellent idea and should be the rule. But he did not believe that it would be appropriate for non-expert witnesses. A trial judge, he said, wants to assess the credibility of the witness on direct examination, as well as on cross examination. Judges have a good ear for listening to evidence in person, and they will interject from time to time when they want clarification. But they may not receive the same education from reading written statements.

Professor Hazard noted that in civil law countries, the judge is in control from the moment a case is filed. The new English rules, too, place heavy emphasis on case management. He noted also that the Judicial Panel on Multi-District Litigation has authority to assign a case to a particular judge, and it regularly assigns cases to

particularly competent judges. He said that the notion of randomly assigning cases is deeply embedded in the federal court system, but it needs to be reexamined.

Participants suggested that consideration might be given to developing different subsets of rules to deal with different kinds of cases. But both Ms. Cabraser and Mr. Goldman responded that early, effective case management, rather than different rules, is the appropriate answer. The judge, they said, can determine at the first pretrial conference how much time and effort are required in each case.

Ms. Cabraser added that every case should have an early case management conference, without all the requirements of FED. R. CIV. P. 26. A judge should sit with the parties and shape the rules for each individual case. Over time, she said, protocols would develop as to the appropriate procedures to apply in different types of cases. Cases, she said, could be handled without even referring to Rule 26, and discovery disputes would be averted. The judge should have inquisitory powers and broad discretion to make the parties act appropriately. This approach might mean more work for judges at the outset of a case, but it would save them considerable time in the long run, as there would be fewer discovery problems and disputes.

NEXT COMMITTEE MEETING

The next committee meeting was scheduled for Wednesday and Thursday, June 15-16, 2005, in Boston, Massachusetts.

Respectfully submitted,

Peter G. McCabe
Secretary

Amendment for Final Approval

FED. R. BANKR. P. 7007.1

Judge Small reported that the proposed amendment to FED. R. BANKR. P. 7007.1 (corporate ownership statement) would correct an oversight in the rule. The rule, which took effect on December 1, 2003, currently states says that a party must file the required corporate ownership statement with its "first pleading." But, he said, the rule does not go far enough. The time for filing the statement should be when the party files its first paper in a case — whether or not it is a "pleading." Accordingly, the proposed revised language would be broadened to specify that the statement must be filed with a party's "first appearance, pleading, motion, response, or other request addressed to the court."

Judge Small pointed out that the advisory committee was asking the Standing Committee to approve the change without publication because it is a technical amendment comporting with the original intention of the drafters of the rule. Professor Morris added that the proposed amendment would make the rule almost identical to the counterpart provision in the civil rules, FED. R. CIV. P. 7.1.

Judge Levi pointed out that the proposed amendment did not require immediate implementation, and he suggested that it might be better to provide an opportunity for the public to comment on it. The committee concurred.

The committee without objection approved the proposed amendment for publication by voice vote.

Informational Items

FED. R. BANKR. P. 2002(g), 9001(9), and 9036

Judge Small reported that several proposed amendments to the bankruptcy rules had been published in August 2004, with a comment deadline of February 15, 2005. He noted that three of the amendments could have positive budget effects for the courts and should be processed on an expedited basis. He pointed out that the proposals had been studied at length, were not controversial, and had received no public comments following publication.

Judge Small explained that the proposed amendment to FED. R. BANKR. P. 2002(g) (addressing notices) would permit a creditor to make arrangements with a "notice provider" to receive all its court notices, either electronically or by mail, at an address specified by the creditor. Proposed FED. R. BANKR. P. 9001(9) (definitions) would define a "notice provider" as any entity approved by the Administrative Office to give notice to

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Proposal to amend Rule 404(a): Final Committee Action
Date: April 2, 2005

At its Spring 2004 meeting the Evidence Rules Committee approved an amendment to Rule 404(a), and the Standing Committee released the proposal for public comment. The amendment explicitly would prohibit the circumstantial use of character evidence in civil cases. At this Committee meeting, the Committee must decide whether to recommend to the Standing Committee that the proposed amendment to Rule 404(a) be referred to the Judicial Conference for its approval. If no objections are rendered through the rest of the rulemaking process, the proposed amendment would become effective on December 1, 2006.

This memorandum is in four parts. Part one sets forth the existing Rule, and the proposed amendment to the Rule and Committee Note. Part two sets forth the rationale for the amendment and summarizes the Committee's work on the amendment to this point. Part three addresses the public comment on the proposal. Part four sets out, in final form, the proposed amendment for final Committee consideration.

I. The Proposed Amendment to Rule 404(a)

A. Current Rule

Rule 404(a) currently provides as follows:

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

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

(1) Character of accused. — Evidence 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 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;

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

* * * * *

The relevant portion of the Advisory Committee's Note to Rule 404(a) provides as follows:

Subdivision (a). This subdivision deals with the basic question whether character evidence should be admitted. * * *

* * * Character evidence is susceptible of being used for the purpose of suggesting an inference that the person acted on the occasion in question consistently with his character. This use of character is often described as "circumstantial." Illustrations are: evidence of a violent disposition to prove that the person was the aggressor in an affray, or evidence of honesty in disproof of a charge of theft. This circumstantial use of character evidence raises questions of relevancy as well as questions of allowable methods of proof.

In most jurisdictions today, the circumstantial use of character is rejected but with important exceptions: (1) an accused may introduce pertinent evidence of good character (often misleadingly described as "putting his character in issue"), in which event the prosecution may rebut with evidence of bad character; (2) an accused may introduce pertinent evidence of the character of the victim, as in support of a claim of self-defense to a charge of homicide or consent in a case of rape, and the prosecution may introduce similar evidence in rebuttal of the character evidence, or, in a homicide case, to rebut a claim that deceased was the first aggressor, however proved; and (3) the character of a witness may be gone into as bearing on his credibility. McCormick §§ 155-161. This pattern is incorporated in the rule. While its basis lies more in history and experience than in logic, an underlying justification can fairly be found in terms of the relative presence and absence of prejudice in the various situations. Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutgers L. Rev. 574, 584 (1956); McCormick § 157. In any event, the criminal rule is so deeply imbedded in our jurisprudence as to assume almost constitutional proportions and to override doubts of the basic relevancy of the evidence.

* * * * *

The argument is made that circumstantial use of character ought to be allowed in civil cases to the same extent as in criminal cases, i.e., evidence of good (nonprejudicial) character would be admissible in the first instance, subject to rebuttal by evidence of bad character. Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutgers L. Rev. 574, 581-583 (1956); Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Art. VI. Extrinsic Policies Affecting Admissibility), Cal. Law Revision Comm'n, Rep., Rec. & Studies, 657-658 (1964). Uniform Rule 47 goes farther, in that it assumes that character evidence in general satisfies the conditions of relevancy, except as provided in Uniform Rule 48. The difficulty with expanding the use of character evidence in civil cases is set forth by the California Law Revision Commission in its ultimate rejection of Uniform Rule 47, *id.*, 615:

> Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened.

Much of the force of the position of those favoring greater use of character evidence in civil cases is dissipated by their support of Uniform Rule 48 which excludes the evidence in negligence cases, where it could be expected to achieve its maximum usefulness. Moreover, expanding concepts of "character," which seem of necessity to extend into such areas as psychiatric evaluation and psychological testing, coupled with expanded admissibility, would open up such vistas of mental examinations as caused the Court concern in Schlagenhauf v. Holder, 379 U.S. 104, 85 S. Ct. 234, 13 L. Ed. 2d 152 (1964). It is believed that those espousing change have not met the burden of persuasion.

B. Proposed Amendment

The proposed amendment would prohibit the circumstantial use of character evidence in civil cases. It provides as follows:

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

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

(1) Character of accused.— ~~Evidence~~ In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

*New material is underlined; matter to be omitted is lined through.

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

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

* * * * *

Committee Note

The Rule has been amended to clarify that in a civil case evidence of a person's character is never admissible to prove that the person acted in conformity with the character trait. The amendment resolves the longstanding 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.

II. Rationale for the Proposed Amendment

The Committee's discussions and determinations, over the course of two years of meetings, can be summarized as follows:

1) An amendment is appropriate because the circuits are split over whether character evidence can be offered to prove conduct in a civil case. (See the discussion of the conflicting case law, below). 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 was thought 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 Rule 404(a), 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"

was thought necessary by the drafters 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. But these considerations are not operative in civil litigation. In civil cases, the substantial problems raised by character evidence were considered by this 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 by definition 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."

Longstanding Conflict in the Case Law

The two exceptions to the exclusion of circumstantial character evidence at issue–allowing the "accused" to admit character evidence and allowing the "prosecution" to "rebut the same"– seem on their face to be limited to criminal cases. The Advisory Committee Note to the Rule, excerpted above, indicates that the Rule is intended to prohibit the circumstantial use of character evidence in civil cases, and that the limited exceptions in subdivisions (1) and (2) can only be invoked in criminal cases.

However, both the Fifth and the Tenth Circuits have long held that character evidence can be offered circumstantially when the defendant in a civil case is accused of an action that is tantamount to a crime. There is no indication that the Supreme Court will resolve this conflict in the near future. The cases can be summarized as follows:

Case Law Holding That Circumstantial Use of Character Evidence Is Permitted In a Civil Case Involving Quasi-Criminal Conduct.

1. Carson v. Polley, 689 F.2d 562, 576 (5th Cir. 1982): This was a police brutality case, in which the officers claimed self-defense, and the plaintiff sought to rebut the claim with evidence that the officers were bad-tempered. The Court declared that circumstantial use of character evidence was

not absolutely precluded in civil cases. Relying on prior Fifth Circuit case law, the court declared as follows:

> We have held that 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. See *Crumpton v. Confederation Life Ins. Co.*, 672 F.2d 1248, 1253 (5th Cir. 1982).

The circumstances under which quasi-criminal conduct warrants the introduction of character evidence in a civil suit under Rule 404(a) may not always be easy to draw. Cf. *Croce v. Bromley Corp.*, 623 F.2d 1084 (5th Cir. 1980) (allowing evidence of character traits in a civil negligence suit in order to present the case fairly to the jury). Here, however, we believe that the assault and battery with which the defendants in this suit are charged falls "close to one of a criminal nature." Therefore, we apply the character evidence exceptions of Rule 404(a).

The court ultimately found, however, that the evidence of the defendants' bad tempers could not be admitted under Rule 404(a)(1), because the defendants never opened the door to this character evidence. Thus, the court construed the plaintiff to be the "prosecution" within the meaning of Rule 404(a)(1). *See also Crumpton v. Confederation Life Ins. Co.*, 672 F.2d 1248, 1253 (5th Cir.1982) ("While Rule 404(a) generally applies to criminal cases, the unusual circumstances here place the case very close to one of a criminal nature. The focus of the civil suit on the insurance policy was the issue of rape, and the resulting trial was in most respects similar to a criminal case for rape. Had there been a criminal case against Crumpton, evidence of his character that was pertinent would have been admissible. We do not view the notes of the Advisory Committee as contravening this interpretation.").

2. Bolton v. Tesoro Petroleum Corp., 871 F.2d 1266, 1278 (5th Cir. 1989). Investors in a petroleum company brought a class action alleging securities fraud and violations of RICO. The defendant called former President Ford, who testified to his high regard for the CEO of the corporation. The court found no error in admitting this character testimony under Rule 404(a)(1). It declared as follows:

> Rule 404(a)(1) allows evidence of relevant character traits of an "accused" individual. Such evidence can be admissible in a civil trial raising quasi-criminal allegations against a defendant. In this case, appellants promised during opening argument to show the jury the "sinister dark side of [the CEO]." During trial, [the CEO] was accused of obstructing justice, defrauding the government, perjury, and criminal bribery. It was not "plain error" to admit character evidence on his behalf.

Tesoro indicates that the "quasi-criminal" extension by the Fifth Circuit is not limited to cases in which physical violence is at issue. Anytime the plaintiff accuses the defendant of activity that can be characterized as criminal, Fifth Circuit law appears to indicate that the defendant can bring in evidence of his good character and, by logical extension, evidence of the victim's (whoever

that is) bad character. And the plaintiff can rebut with character evidence if the defendant opens the door.

3. Perrin v. Anderson, 784 F.2d 1040, 1044-5 (10th Cir. 1986). This was a civil rights action in which the plaintiff alleged that his father was shot to death by police officers. The officers claimed self-defense, and sought to introduce evidence that the decedent had a violent temper, especially around police officers. The court held that Rule 404(a)(2) would permit proof of the victim's character for violence, even though this was a civil case. The court reasoned as follows:

> In a case of this kind, the civil defendant, like the criminal defendant, stands in a position of great peril. A verdict against the defendants in this case would be tantamount to finding that they killed Perrin without cause. The resulting stigma warrants giving them the same opportunity to present a defense that a criminal defendant could present. Accordingly we hold that defendants were entitled to present evidence of Perrin's character from which the jury could infer that Perrin was the aggressor. The self-defense claim raised in this case is not functionally different from a self-defense claim raised in a criminal case.

Ultimately, however, the character evidence was found improperly admitted under Rule 405, because it was specific act evidence. Rule 405 provides that if character evidence is offered to prove conduct, the only permissible forms are opinion and reputation. (The court held, however, that the specific act evidence was properly admitted as habit.)

Case Law Holding That Circumstantial Use of Character Evidence Is Never Permitted In a Civil Case

Case law from other circuits rejects the view of the Fifth and Tenth Circuits and holds that character evidence, when offered to prove conduct, is never admissible in a civil case. Those cases can be summarized as follows:

Ginter v. Northwestern Mut. Life Ins. Co., 576 F.Supp. 627, 629-30 (D. Ky.1984): This was an insurance claim, where the insurer argued that the plaintiff defrauded the insurer in preparing the application. The plaintiff proffered character evidence of his honesty, but the court excluded the evidence, reasoning that the exceptions in Rule 404(a)(1) and (2) were not applicable in civil cases. The court reasoned that the text implicitly limited these exceptions to criminal cases, because the exceptions are left for the "accused" and for the "prosecution" in rebuttal. The court analyzed the reasoning of the Fifth Circuit in the *Crumpton* decision, *supra*, and found it wanting:

> With respect, this court must disagree with the *Crumpton* decision. 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]. After an extensive review of the various points of view on this issue, the Advisory Committee expressly stated, "[i]t is believed that those espousing change (from the view of excluding character evidence in civil cases) have not met the burden of persuasion." This language leads to the inevitable conclusion that the use in Rule 404(a) of terms applicable only to criminal cases was not accidental. * * * This court believes that the language of the rule, as originally drafted by the Advisory Committee and ultimately approved by Congress, has the effect of a statute in excluding the proffered evidence here, even though the case may be considered as analogous to a criminal prosecution. * * * The court regards itself as not having any discretion in this matter by reason of the explicit language of the rule.

Continental Cas. Co. v. Howard, 775 F.2d 876, 879, n.1 (7th Cir. 1985) (in a suit for recovery on a fire insurance policy where the insurance company claimed that the plaintiff committed arson, it was proper for the court to exclude evidence of the plaintiff's good character).

Blake v. Cich, 79 F.R.D. 398 (D..Minn.1978), was a civil rights action in which the officers alleged that the plaintiffs attacked them. Plaintiffs offered evidence of peaceful character–but the court found that this circumstantial use of character evidence was not permissible in a civil case.

SEC v. Morelli, 1993 WL 603275 (S.D.N.Y.): The SEC contended that the defendants had engaged in illegal trading, and the defendants wanted to proffer evidence of their good character. The court granted a motion *in limine* to exclude such evidence. The Court rejected the Fifth and Tenth Circuit approach in the following passage:

> In declining to follow the approach of the Fifth and Tenth Circuits set out in *Carson v. Polley*, 689 F.2d 562 (5th Cir.1982) and *Perrin v. Anderson,* 784 F.2d 1040 (10th Cir.1986), the Court finds that despite the allegations in this case of what could constitute criminal conduct, character evidence under Fed.R.Evid. 404(a)(1) is not appropriate in this civil action. By its use of the term "accused" in subdivision (a), Rule 404 expressly rejects the use of character evidence in civil cases to prove a person acted "in conformity therewith on a particular occasion." *See Ginter v. Northwestern Mutual Life Ins. Co.,* 576 F.Supp. 627 (E.D.Ky.1984); Fed.R.Evid. 404 advisory committee's note; Jack B. Weinstein & Margaret A. Berger, 2 Weinstein's Evidence ¶ 404[03] (1993) ("Weinstein").

SEC v. Towers Financial Corp., 966 F.Supp. 203 (S.D.N.Y. 1997): The SEC alleged that the defendants engaged in securities fraud. One defendant wanted to call character witnesses on his behalf. Magistrate Judge Peck undertook an extensive analysis of Rule 404 and the case law, and concluded that character evidence is not admissible to prove conduct in a civil case. Judge Peck

relied on the "plain meaning" of the Rule and on the Advisory Committee Note. Judge Peck's analysis proceeds as follows:

> The Commission argues that one cannot be an "accused" outside of a criminal action, the present proceeding is a civil action, and, therefore, the accused's character exception does not apply. Brater argues for a more flexible definition of "accused" that includes a defendant in a "quasi-criminal" civil proceeding, such as this SEC action.

Black's Law Dictionary defines "accused" as "the generic name for the defendant in a criminal case." Blacks Law Dictionary, at 23 (6th ed.). Webster's defines "the accused" as "the person or persons formally charged with the commission of a crime." Webster's New World Dictionary, at 9 (3d College Edition). Use of the word "prosecution" in Rule 404(a)(1) also strongly suggests that the exception is meant to be limited to criminal cases. Thus, the plain meaning of Rule 404(a)(1)'s language limits the exception to criminal cases, making it unavailable in this civil case.

Dupard v. Kringle, 1996 U.S. App. LEXIS 3365 (9th Cir.): In an excessive force case, the trial court permitted the defendants to prove that no complaint of using excessive force against a prisoner had ever been lodged against them. The Ninth Circuit held that this was improper use of character evidence in a civil case. It rejected the defendant's argument for an exception:

> The defense argues that the testimony falls within an exception provided by Rule 404(a)(1). Rule 404(a)(1), which permits character evidence offered by an "accused," does not apply to defendants in civil cases. While some circuits allow in such evidence when a civil rights defendant is accused of quasi-criminal conduct, we do not. See *Gates v. Rivera,* 993 F.2d 697, 700 (9th Cir. 1993) (in civil rights case, police officer defendant who shot a suspect should not have been allowed to testify that in his sixteen and one-half years as a police officer, he had not shot anyone). Thus, Rule 404(a)(1) does not provide an exception that makes testimony regarding the marshals' work records admissible.

Similarly, evidence of the plaintiff's character for violence was inadmissible. If the exception in Rule 404(a)(1) is not applicable in civil cases, it follows that the exception in Rule 404(a)(2) is not applicable either. As the court put it:

> The defense next argues that evidence of Dupard's aggressiveness was admissible as evidence of a pertinent trait of the victim under Rule 404(a)(2). However, if the marshals are not "the accused" under Rule 404(a)(1), then Dupard is not a "victim" of crime under Rule 404(a)(2).

United States v. Wright, 363 F.3d 237, 247 (3d Cir. 2004): This was a criminal case, but the Court's construction of Rule 404(a)(1) and (2) is in accord with the majority view of the

inapplicability of the Rule in civil cases. The defendant wanted to introduce of the good character of his alleged coconspirator, Plant; he argued that it was relevant to show that Plant was less likely to be involved in criminal activity, and therefore that it was less likely that there was a criminal conspiracy between the defendant and Plant. But the court found this evidence properly excluded, because circumstantial evidence of character under Rule 404(a)(1) is limited to the character of an "accused." The court elaborated as follows:

> The term "accused" is usually used to denote a defendant in a criminal case, see, e.g., Black's Law Dictionary 23 (6th ed. 1990) (defining "accused" as "the generic name for the defendant in a criminal case"), and the Federal Rules of Evidence generally conform to this usage. See Fed. R.Evid. 104(d), 608(b), 609(a), 803(22), 804(b)(3). In Rule 412, where the term is used in a broader sense, the Advisory Committee Note so states.

In Rule 404(a)(1), the term "accused" appears clearly to have been used in the conventional sense to denote a criminal defendant.

Summary of Case Law

The majority of cases hold that the exceptions for character evidence provided in Rule 404(a)(1) and (2) are applicable in criminal cases only, because "accused" means criminal defendant and "prosecution" means just that. Those cases also rely on the Advisory Committee Note, which specifically considers and rejects the possibility of permitting character evidence in a civil case. The minority view, of the Fifth and Tenth Circuits, is based on the argument that a civil party charged with criminal activity is essentially in the same position as a criminal defendant, perhaps needing evidence of character to shield himself from the stigma of what amounts to a charge of criminal activity.

III. Public Comment

The Committee received six public comments on the proposed amendment to Rule 404(a).

Favorable Comments:

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

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

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

Suggestions and Criticisms

Three comments involved suggestions or criticisms concerning the proposed amendment. Responses and observations from the Reporter are included after each comment.

Reference to Character "In Issue"

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

Response: This is a suggestion previously rejected by the Committee—that the Rule should be amended to provide that character is admissible whenever it is "in issue." The Committee determined that such an amendment was unnecessary because the Rule prohibits character evidence only when it is offered "for the purpose of proving action in conformity therewith." In other words, only the circumstantial use of character evidence is prohibited. If character is in issue (e.g., in a defamation case), then it is simply not covered by Rule 404(a) and its admissibility is governed by general principles of relevance and Rule 403, and by Rule 405 as to form.

Federal courts have routinely found character evidence to be admissible when character is "in issue" so there appears to be no need to amend Rule 404(a) to specify that it is not applicable in these situations. Examples of "character in issue cases include. *Schafer v. Time, Inc.*, 142 F.3d 1361 (11th Cir. 1998) (where the plaintiff's character is an element of the claim, admissibility of character evidence is governed by Rules 401 and 403, not Rule 404(a): "Rule 404 forbids the use of character evidence to prove 'action in conformity therewith on a particular occasion,' or as the Advisory Committee's notes describe it, the 'circumstantial' use of character evidence. Rule 404 does not bar the admission of character evidence when character or a particular character trait is actually at issue. Rule 404 permits the character evidence in dispute here, and Rule 405 governs the acceptable methods for introducing it."); *Van Houten-Maynard v. ANR Pipeline Co.*, 1995 WL 311367 (N.D. Ill.) (relying on the original Advisory Committee Note to Rule 404(a) to conclude that the Rule does

not apply where character is "in issue".); *In re Air Crash in Bali,* 684 F.2d 1301 (9th Cir. 1982) (aircraft pilot's training records were admissible under Rules 401 and 403 to show that the employer had notice of the pilot's incompetence and should not have allowed him to fly; the cause of action put the pilot's character in issue); *United States v. Mendoza-Prado,* 314 F.3d 1099 (9th Cir. 2002) (evidence of the defendant's criminal disposition was properly admitted because the defendant claimed entrapment; admissibility of character evidence in entrapment cases is governed by Rules 403 and 405 (as to form)).

In sum, the case law appears uniform in finding that Rule 404(a) does not bar evidence of a person's character when that character is an element of the claim, charge, or defense. It therefore seems unnecessary to amend the Rule to make it more explicit.

Opposing the Amendment on Policy Grounds

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

Response: Professor Reed is the member of the public who made the previous suggestion concerning "character in issue" that was rejected by the Committee two years ago. He files a nine page paper intended to support his position, but it doesn't actually say why the proposed amendment would "do more harm than good." He appears to advocate a full-scale revision of Rules 404, 405 and 406. He does not present the case for why such a full-scale amendment is necessary. He certainly has not met the threshold of necessity used by this Committee for justifying such a drastic amendment.

Professor Reed's proposal for a full-scale rewrite of the rules on character and habit suffers from at least the following infirmities:

1) It would change Rule 406 from a habit rule to a general rule on character; this would create significant disruption for lawyers researching the rules. For example, a lawyer who wanted to research the cases on habit evidence would have to look in one place for cases before the amendment and another place for cases after it. There is no justification for this fundamental change.

2) It fails to recognize that Rule 405 governs only the proper *form* of character evidence, presuming it is admissible under some other rule. Thus, there is no "cognitive dissonance" between Rule 404(a) and Rule 405. For example, evidence of character, when it is in issue, is not covered by Rule 404, but it is admissible under Rule 403 and Rule 405 would govern admissibility as to form. There is nothing at all problematic about the way that the rules work together.

3) It would equate character and habit evidence, thus changing both the common-law and all of the case law under the Federal Rules. Again there is no apparent purpose for this change.

4) It would purport to define the term "character," again for no real purpose, and with the danger of possible misdescription or underinclusiveness that would conflict with existing case law.

It would seem that Professor Reed's proposal for a full-scale revision of Rules 404-406 is both unnecessary and unwise, and that he has not shown that the proposed amendment to Rule 404(a) would "do more harm than good." But one question remains. What if the proposal is adopted by the states? Will it, as Professor Reed asserts, result in the unintentional creation of a "rule that bars character evidence in civil actions where character evidence is routinely admitted, e.g., child custody cases"? There are two responses to this assertion.

First, the Federal Rules are drafted with Federal Courts in mind. While it is true that the Federal Rules have served as a model for the states, the states have not hesitated to reject or alter an a Federal Rule that would create problems if engrafted onto a state procedure. The most obvious example is Federal Rule 501, which has not been adopted by the states because it refers to laws of privilege as being determined by federal common law, while most state privilege laws are statutory and if based in common law it is the law of the state.

States have also established hearsay exceptions not found in the Federal Rules to meet particular state and local problems. For example, Nevada has a special hearsay exception for proving up records of gambling casinos. And many states have rules providing stricter guidelines on expert testimony in malpractice cases (e.g., prohibiting expert testimony if the witness is a doctor from outside the state). States have also generally gone their own way on rape shield laws. And only one state has used Federal Rules 413-415 as a model for state evidence rules.

So it is clear that states can take care of themselves when the circumstances warrant. But that is not to say that Federal drafters should be completely unconcerned with state interests. If there is a risk that a Federal rule will not work at the state level, that risk should at least be a consideration.

In this case, however, there appears to be no risk that the amendment to Rule 404(a) will result in a problem in the states. Professor Reed cites no state law practice, no state law cases to support the proposition that circumstantial use of character evidence is widely used in state civil cases. The only example he gives is child custody cases. But in those cases, the character of a parent or putative parent is indeed in issue. The character of the parent is an important factor in determining the appropriate custody for the child. So these cases do not even involve the problem treated by the Federal amendment, i.e., proof of how a person acted during a disputed event by proving that person's character trait.

In sum, there appears to be no reason to alter the proposed amendment to Rule 404(a) in order to account for Professor Reed's objections.

Possible Effect on Rule 404(b)

Professor Peter Nicolas, (04-EV-010) contends that the amendment "might result in some confusion" as it might be construed to mean that Rule 404(b) applies only in criminal cases. Professor Nicolas argues that what is said about the "accused", the "prosecution" and a "criminal case" in the amended Rule 404(a)(1), and in the Committee Note, could be used to interpret the term "accused", "prosecution" and "criminal case" in Rule 404(b) — which "might lead one to conclude that the use of such words in Rule 404(b) implies its applicability only in criminal cases."

Rule 404(b) provides as follows:

> (b) Other crimes, wrongs, or acts.—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. It may, how-ever, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the *accused*, the *prosecution* in a *criminal case* shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Of course, Rule 404(b) clearly applies to civil as well as criminal cases. See the cases collected in the Federal Rules of Evidence Manual ¶ 404.03[02][l] (citing more than 100 reported cases in the circuit courts in which Rule 404(b) was applied in civil cases). The references to the "accused", the "prosecution" and a "criminal case" were added in 1991, when the Rule was amended to provide a notice requirement when the prosecution intended to use Rule 404(b) evidence against the criminal defendant. This notice requirement was intended to apply *only* in criminal cases and only to the prosecution. See the 1991 Committee Note. The amendment is clearly not intended to limit the Rule *itself* to civil cases. No court has read the notice requirement that way; since 1991, courts have routinely applied the admissibility requirements (but not the notice requirement) of Rule 404(b) to civil cases.

It seems a very big stretch to think that an amendment to a different subsection of the Rule would do what a direct amendment to the Rule did not, i.e., limit the scope of Rule 404(b) to criminal cases. Limiting one subsection of a Rule to criminal cases has never been construed to limit or affect in any way a different subsection of the same rule. For example, the preclusion of admissibility of law enforcement reports in criminal cases (see Rule 803(8)) has had no effect on the use of public reports in civil cases. Under Rule 412, the rules of admissibility differ in civil and criminal cases, and courts have had no problem with that difference. Another example is Rule 704(b)

which limits ultimate issue testimony in criminal cases; but this has rightly been given no effect in civil cases.

Professor Nicolas therefore seems to overstate — or make up — any risk that the proposed amendment to Rule 404(a) would create a question about the scope of Rule 404(b). If the Committee believes there is a risk, however, it would seem clearly sufficient to address the question in the Committee Note. That portion of the Committee Note could read something like the following:

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

IV. Proposed Amendment and Committee Note

The proposed amendment to Rule 404(a) and the Committee Note are set forth beginning on the next page. The proposal is formatted in accordance with Administrative Office guidelines.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE*

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

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

(1) Character of accused.— ~~Evidence~~ In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

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

*New material is underlined; matter to be omitted is lined through.

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;

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

* * * * *

Committee Note

The Rule has been amended to clarify that in a civil case evidence of a person's character is never admissible to prove that the person acted in conformity with the character trait. The amendment resolves the longstanding 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.

CHANGES MADE AFTER PUBLICATION AND COMMENTS

No changes were made from the proposal as released for public comment.

SUMMARY OF PUBLIC COMMENTS

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

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

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subject to the more stringent limitations of Fed.R.Evid. 412 regarding the use of character evidence of a victim."

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

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

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Proposal to amend Rule 408: Final Committee Action
Date: April 2, 2005

At its Spring 2004 meeting the Evidence Rules Committee approved an amendment to Rule Rule 408–the Rule prohibiting admission of settlements and statements made in settlement when offered to prove the validity or amount of a claim. The Standing Committee released the proposal for public comment. At this Committee meeting, the Committee must decide whether to recommend to the Standing Committee that the proposed amendment to Rule 408 be referred to the Judicial Conference for its approval. If no objections are rendered through the rest of the rulemaking process, the proposed amendment would become effective on December 1, 2006.

The 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 proof of settlement offers when it is the party who made the offer that wants the evidence admitted. Each of these questions has long been the subject of conflicting interpretations among the courts.

This memorandum is in four parts. Part one sets forth the existing Rule, and the proposed amendment to the Rule and Committee Note. Part two sets forth the rationale for the amendment and summarizes the Committee's work on the amendment as well as the relevant case law. Part three addresses the public comment on the proposal, as well as comments made by the Style Subcommittee. Part four sets out, in final form, the proposed amendment for final Committee consideration, as well as a drafting alternative that responds to the public comment.

I. The Proposed Amendment to Rule 408

The Existing 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.

The proposed amendment released for public comment is as follows:

PROPOSED AMENDMENT TO THE FEDERAL RULES OF EVIDENCE*

Rule 408. Compromise and Offers to Compromise

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

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

*New material is underlined; matter to be omitted is lined through.

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

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

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

Committee Note

Rule 408 has been amended to settle some questions in the courts about the scope of the Rule, and to make it easier to read. First, the amendment clarifies that Rule 408 does not protect against the use

of statements and conduct during civil settlement negotiations when offered in a criminal case. *See, e.g., United States v. Prewitt*, 34 F.3d 436, 439 (7th Cir. 1994) (statements made in civil settlement negotiations are not barred in subsequent criminal prosecutions, given the "public interest in the prosecution of crime"). Statements made in civil compromise negotiations may be excluded in criminal cases where the circumstances so warrant under Rule 403. But there is no absolute exclusion imposed by Rule 408.

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

The amendment retains the language of the original rule that bars compromise evidence only when offered as evidence of the "validity", "invalidity", or "amount" of the disputed claim. The intent is to retain the extensive case law finding Rule 408 inapplicable when

compromise evidence is offered for a purpose other than to prove the validity, invalidity, or amount of a disputed claim. *See, e.g., Athey v. Farmers Ins. Exchange,* 234 F.3d 357 (8th Cir. 2000) (evidence of settlement offer by insurer was properly admitted to prove insurer's bad faith); *Coakley & Williams v. Structural Concrete Equip.*, 973 F.2d 349 (4th Cir. 1992) (evidence of settlement is not precluded by Rule 408 where offered to prove a party's intent with respect to the scope of a release); *Cates v. Morgan Portable Bldg. Corp.*, 708 F.2d 683 (7th Cir. 1985) (Rule 408 does not bar evidence of a settlement when offered to prove a breach of the settlement agreement, as the purpose of the evidence is to prove the fact of settlement as opposed to the validity or amount of the underlying claim); *Uforma/Shelby Bus. Forms, Inc. v. NLRB,* 111 F.3d 1284 (6th Cir. 1997) (threats made in settlement negotiations were admissible; Rule 408 is inapplicable when the claim is based upon a wrong that is committed during the course of settlement negotiations). Nor does the amendment affect the case law providing that Rule 408 is inapplicable when evidence of the compromise is offered to prove notice. *See, e.g., United States v. Austin*, 54 F.3d 394 (7th Cir. 1995) (no error to admit evidence of the defendant's settlement with the FTC, because it was offered to prove that the defendant was on notice that subsequent similar conduct was wrongful); *Spell v. McDaniel*, 824 F.2d 1380 (4th Cir. 1987) (in a civil rights action alleging that an officer used excessive force, a prior settlement by the City of another brutality claim was properly admitted to prove that the City was on notice of aggressive behavior by police officers).

The amendment prohibits the use of statements made in settlement negotiations when offered to impeach by prior inconsistent statement or through contradiction. Such broad impeachment would tend to swallow the exclusionary rule and would impair the public

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

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

The sentence of the Rule referring to evidence "otherwise discoverable" has been deleted as superfluous. See, e.g., Advisory

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

II. Rationale for Amendment and Committee Deliberations

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

1) Some courts hold that evidence of compromise is admissible against the settling party in subsequent criminal litigation. These courts rely on policy analysis and conclude 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. These courts reason 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 might discourage a party from settling a parallel civil case.

2) Some courts hold that statements made in settlement negotiations can be admitted to impeach a party-witness 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. Those 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.

At its Fall 2002 meeting, the Committee began its discussion on whether Rule 408 should be amended. The Committee agreed unanimously that Rule 408 should be amended to rectify the longstanding conflicts in the case law, discussed above. Conflicting case law in the context of Rule 408 was considered particularly problematic because the Rule is relied on by parties who enter into settlement negotiations. If the protections of the Rule vary from court to court, this lack of uniformity and predictability can upset the very policy of the Rule, which is to encourage settlement negotiations and civil compromise.

Admissibility in Criminal Cases

In initial discussions, 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 was argued to present a trap for the unwary. 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.

In subsequent meetings, after discussion within the Department, the DOJ representative informed the Committee that the Department strongly favored a rule that would permit civil compromise evidence to be used in criminal cases. The Department's position was based on several rationales: 1) lawyers in the Civil Division did not believe that such a rule would create any major disincentive against settling civil matters brought by the government; 2) if statements made in compromise negotiations were inadmissible in criminal cases, this would make it difficult for the government to prosecute fraud where the statements made during civil compromise are acts of, or evidence of, fraud; and 3) the government would also find it difficult to prove scienter where the basis of scienter is that the defendant was made aware of and indeed admitted the wrongfulness of his conduct by entering into a civil compromise. In essence, the DOJ adopted the rationale of the case law holding that the current Rule 408 is inapplicable in criminal cases, i.e., the interest in admitting relevant evidence in a criminal case outweighs any interest in encouraging settlement in parallel civil litigation.

Over the course of discussions at two further meetings, the Committee came tentatively to agree with the Justice Department's position–partly in recognition of its merits and partly in recognition of the fact that Rule 408 is in dire need of amendment one way or another, and the chances of amending a rule over the DOJ's strong objection are sometimes not good. At the Fall 2003 meeting, the Committee voted to propose an amendment to Rule 408 that would make the Rule inapplicable in criminal proceedings.

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

Committee members noted that the DOJ's concerns about admissibility of compromise evidence were almost if not completely limited to statements of fault made in compromise

negotiations; such direct statements of criminality are arguably more probative of criminal liability than the settlement agreement itself. These Committee members recognized that if Rule 408 were inapplicable to settlements, a particular settlement might nonetheless be excluded in a criminal case under Rule 403. But these members concluded that any protection under Rule 403 was too unpredictable for civil defendants to rely upon.

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

The Scope of the Impeachment Exception

At various meetings, Committee members discussed whether Rule 408 should permit impeachment by way of prior inconsistent statement and contradiction. Committee members unanimously 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. Such a provision is necessary, because the circuits have long been divided on the point, and differing results on the question are not justifiable. The Reporter noted that a provision limiting impeachment exists in several state versions of Rule 408.

Compromise Evidence Proffered By The Party That Made The Statement Or Offer

At various meetings, the Committee discussed whether compromise evidence should be admissible in favor of the party who made the statement or offer of settlement. The Committee unanimously 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. Even inferential evidence that a party entered into compromise negotiations is entitled to protection under the policy of the Rule. 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, if a party could admit its own offer or statement in compromise it 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 make "window-dressing" offers in an attempt to generate evidence for its own 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 have long been divided on the point, and differing results on the question are not justifiable.

Research On Other Rule 408 Issues: "Matter In Dispute"

In the course of its deliberations on Rule 408, the Committee directed the Reporter to research whether courts were having problems in determining when a matter is "in dispute" under the terms of the Rule. The Reporter determined that while the courts use different terminology, there is essentially a common definition for the "trigger" for application of Rule 408—the Rule is triggered when the parties have rejected each other's claims for performance. When this point is reached depends upon the circumstances of each case, 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.

Because there is no real conflict in the decisions about the meaning of a "dispute" under Rule 408, the Committee determined that there was no reason to propose a change in language, and moreover that any change would not result in more clarity or improvement, as the triggering mechanism of Rule 408 is inherently dependent on the circumstances of each case.

Research On Other Rule 408 Issues: "Otherwise Discoverable"

In the course of its deliberations on Rule 408, the Committee directed the Reporter to research whether the courts are having problems in determining the meaning and application of the

sentence in Rule 408 providing 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 Reporter surveyed courts, commentators, and rules in the states, and concluded that the "otherwise discoverable" sentence is superfluous. It was added to the Rule to emphasize that pre-existing records were not immunized simply because they were presented to the adversary in the course of compromise negotiations. But such a pretextual use of compromise negotiations has never been permitted by the courts. At its Fall 2003 meeting the Committee voted to drop the "otherwise discoverable" sentence from the text of the revised Rule 408, with an explanation for such a change to be placed in the Committee Note.

Restructuring the Rule

In working on an amendment to Rule 408 over the course of several meetings, it became apparent to the Committee that the existing Rule is poorly structured and that changes to the text could best be done by restructuring the Rule itself. 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 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. (This structural problem is alleviated by the Committee's decision to delete the sentence). Most importantly, the fourth sentence is arguably 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.

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

Validity or amount of the claim

At several meetings, Committee members noted that many of the hard questions of Rule 408's applicability involved whether compromise evidence is offered for a purpose other than to

prove the validity or amount of the civil claim. For example, if compromise evidence can be offered in criminal cases to prove that the compromise itself was illegal, or to prove that the defendant by settling was made aware of the wrongfulness of his conduct, on the ground that the purpose for this kind of evidence was to prove something other than the validity or amount of the underlying claim, then much of the Department's concerns over Rule 408 protection would be answered.

Committee members noted, however, that it would be problematic to change the language in the text of the Rule concerning the "validity", "invalidity", or "amount" of the claim, as this language has been subject to extensive case law and it is by no means certain that an amendment would provide language that was any more clear than the current text. The Committee therefore directed the Reporter to add a paragraph to the Committee Note to clarify that there was no intent to change the existing law on whether compromise evidence is offered for a purpose other than to prove the validity, invalidity, or amount of the claim.

Case Law and Commentary Bearing On the Proposed Textual Changes In Rule 408

A. Use of Compromise Evidence in a Subsequent Criminal Case

The basic factual scenario for the use of compromise evidence in a criminal case is illustrated by the facts of *United States v. Prewitt,* 34 F.3d 436, 439 (7th Cir. 1994). Prewitt was engaged in shady securities activity that led to a civil investigation by a state securities office, and ultimately to a civil suit brought by the government for securities fraud. In an attempt to settle that suit, Prewitt admitted that he knew that his conduct was wrongful. Then he was charged in a criminal indictment for mail fraud. The statements he made to the civil authorities were used against him in the subsequent criminal trial as an admission of guilt on the mail fraud charge.

The question for a court in a case like *Prewitt* is whether the protections of Rule 408 apply in a subsequent criminal case. The court in *Prewitt* found no error in admitting Prewitt's statements to the civil authorities. It held that Rule 408 is completely inapplicable to criminal cases. It reasoned as follows:

> Nothing in Rule 408 specifically prohibits the receipt of evidence in criminal proceedings concerning the admissions and statements made at a conference to settle claims of private parties. *United States v. Gonzalez*, 748 F.2d 74, 78 (2d Cir.1984). The public interest in the prosecution of crime is greater than the public interest in the settlement of civil disputes. Id. Rule 408 should not be applied to criminal cases.

Majority Rule

Prewitt represents the (narrow) majority view, that Rule 408 is inapplicable in criminal cases – though several circuits have not had cause to decide the issue at this point. The cases reaching the same result as *Prewitt* (though not necessarily using the same rationale) include:

1. United States v. Gonzalez, 748 F.2d 74, 78 (2d Cir. 1984): The defendant was charged and convicted of wire fraud and mail fraud in connection with his solicitation of a loan from a Spanish bank. The trial court allowed testimony from an attorney for the bank that the defendant in settlement negotiations had admitted his knowledge of the existence of false and forged documents. The trial judge also allowed into evidence a confession of judgment executed by the defendant, stating that the defendant was "personally liable for the full amount of the debt owing to [the Spanish bank]." The court relied on a policy argument to hold that Rule 408 is inapplicable in criminal proceedings, even if the statements and offers are made in the course of a civil settlement:

> Rule 408 is premised on the idea that encouraging settlement of civil claims justifies excluding otherwise probative evidence from civil lawsuits. Fed.R.Evid. 408 advisory committee note. However, encouraging settlement does not justify excluding probative and otherwise admissible evidence in criminal prosecutions. The public interest in the disclosure and prosecution of crime is surely greater than the public interest in the settlement of civil disputes. It follows that since nothing in the Rule specifically prohibits receiving in evidence the admissions and statements made at a conference to settle claims of private parties, they are admissible in any criminal proceeding.

2. Manko v United States, 87 F.3d 50, 54-5 (2d Cir. 1996)*:* The defendant was convicted of tax fraud related to interest expense deductions arising from sham transactions. In this case, it was the defendant who sought to introduce evidence that the Internal Revenue Service ("IRS") and the defendant had settled civil tax claims that were based on the same facts and theory as the criminal charges. This evidence, the defendant claimed, was an admission by the IRS that the defendant was at least partially justified in deducting the losses that were claimed to be fraudulent in the criminal trial. However, the trial judge did not let the defendant present this evidence on the ground that it was precluded under Rule 408. The Second Circuit concluded that the district court erred by excluding the IRS settlement under Rule 408, holding again that Rule 408 does not apply to criminal proceedings.

The *Manko* court explicitly stated that it was balancing the policy goals of the criminal and civil justice systems to determine whether Rule 408 should apply to criminal proceedings. It concluded that 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."

3. United States v. Logan, 250 F.3d 350, 367 (6th Cir. 2001): The defendant was subject to parallel civil and criminal investigations arising from his actions in obtaining grants from HUD. He

settled the action brought by HUD. This settlement was offered in the criminal case in which he was charged with fraud. The Court found the evidence of compromise properly admitted. It relied on the Second and Seventh Circuit cases discussed above to hold that Rule 408 is not applicable in criminal cases:

> We find that the cases that exist in the Second and Seventh Circuits are correct in concluding that the plain language of Rule 408 makes it inapplicable in the criminal context. Although this conclusion 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. Based upon the foregoing, we 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.

Minority View

What follows is a description of the cases that have adopted the view that Rule 408 is applicable to criminal cases:

1. *United States v. Hays,* 872 F.2d 582, 589 (5th Cir. 1989): The defendants were charged with bank fraud. They had settled civil claims brought by the bank. The Court found it reversible error to admit the defendants' civil settlement in the criminal case. The Court reasoned as follows:

> As the appellants correctly contend in brief, and as the framers of Rule 408 clearly contemplated, the potential impact of evidence regarding a settlement agreement with regard to a determination of liability is profound. 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.

2. United States v. Bailey, 327 F.3d 1131 (10th Cir. 2003): In the defendant's criminal trial for wire fraud, the government offered evidence of civil settlements entered into by the defendant. The civil cases involved parallel charges. The court found this to be error. It concluded

> 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; 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.

3. *United States. v. Skeddle*, 176 F.R.D. 254 (N.D.Ohio1997): This court relied on the "plain language of Rule 408" which provides for certain situations when statements made during compromise negotiations are admissible. For example, Rule 408 does not require exclusion when the evidence is offered for another purpose, such as to prove bias or prejudice, negative a contention of undue delay, or prove an effort to obstruct justice. The Court reasoned 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.

B. Use of Compromise Evidence For Impeachment Purposes

Rule 408 provides that statements and offers made in settlement negotiations are admissible if offered to prove "bias or prejudice of a witness." This raises the question of the scope of an "impeachment" exception to the Rule. The reference to "bias or prejudice of a witness" is intended to cover the situation where one potential defendant has settled and then testifies as part of the plaintiff's case. The policy of the Rule is that the jury should be able to know about the settlement, because it is probative evidence that the witness has a financial interest at stake. It is parallel to the criminal context, where the defendant is permitted to introduce the fact that a prosecution witness cut a deal with the government.

Beyond this standard and well-accepted rule permitting proof of bias, there is dispute over the scope of any "impeachment" exception to Rule 408. The real question in dispute is whether statements and offers made in compromise can be admitted to impeach a witness as a prior inconsistent statement or as contradiction. For example, if a defendant, in a settlement negotiation, admits that he could have been more careful, can that statement be introduced to impeach him when he testifies at trial that he was acting carefully?

Commentators

The commentators generally state that impeachment for contradiction or prior inconsistent statement should not be permitted under Rule 408. Mueller and Kirkpatrick, in *Evidence: Practice Under the Rules* at 350-51, summarize the issue this way:

> There is debate about whether statements made by a party during settlement negotiations are admissible to impeach that party or his witnesses at trial. The only form of impeachment expressly allowed by the rule is proof of "bias or prejudice of a witness" but not impeachment by prior inconsistent statements. FRE 408 was not intended to provide a shield for perjury by allowing a party to present one version of facts during settlement negotiations and another at trial. On the other hand, to permit prior inconsistent statement impeachment could significantly undermine the policies and protections of FRE 408 and inhibit the willingness of parties to talk freely during the negotiation process. Statements made in the course of settlement discussions should be admitted for impeachment only in egregious circumstances where the interests of justice compel their introduction. If the statements are

admitted, the fact that they were made in the course of settlement negotiations should be withheld from the jury.

See also *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."

And see Saltzburg, Martin and Capra, *Federal Rules of Evidence Manual* §408.02 (8th ed. 2002): "The philosophy of the Rule is to allow the parties to drop their guard and to talk freely and loosely without fear that a concession made to advance negotiations will be used against them at trial. Opening the door to prior inconsistent statement impeachment evidence on a regular basis may well result in more restricted — or more stilted, with every statement preceded by an 'assuming arguendo' — negotiations."

Fred S. Hjelmeset, in *Impeachment of Party by Prior Inconsistent Statement in Compromise Negotiations: Admissibility Under Federal Rule of Evidence 408*, 43 Clev. St. L. Rev. 75, 109-110 (1995), provides a good summary of the arguments against a broad impeachment exception in Rule 408:

> [C]ommentators warn that such use, if sanctioned, has the potential to "undercut," "eviscerate," or "destroy" the rule. One concern is that it would "allow evidence perilously close to the key issue of liability," such as "camouflaged causation evidence." It could also possibly be used as "a mere subterfuge to get before the jury evidence not otherwise admissible." * * *

It has also been warned that if settlement statements are admitted at trial, "many attorneys would be forced to testify as to the nature of discussions and thus be disqualified as trial counsel." Moreover, "the almost unavoidable impact of disclosure about compromises is that juries will consider the evidence as a concession of liability," and "the tendency of juries to disregard instructions is so well known that the admission of the evidence for even a limited purpose would result in a frustration of the policy of encouraging settlements."

Judge Wayne Brazil, in *Protecting the Confidentiality of Settlement Negotiations,* 39 Hastings L. J. 955, 975-6 (1988), similarly argues that a broad impeachment exception would swallow the protections of the rule:

> The most important argument counsel can make under rule 408 is that to admit statements made during negotiations simply because they are arguably inconsistent with a party's prior trial testimony would eviscerate the rule completely. To admit such statements would make a mockery of the rule's promise of confidentiality and defeat the rationale that inspires it. This follows because it is extremely difficult to articulate positions at different times that are

completely consistent and because it is so easy to find some tension between virtually any two statements on the same subject.

Judge Brazil also argues that the text of the Rule and the Committee Note support the notion that impeachment should be limited to an attack for bias:

> Counsel can buttress these policy arguments by noting that the only form of impeachment acknowledged by the rule itself is proof of "bias or prejudice of a witness." In addition, all of the cases cited in the Advisory Committee's note supporting admissibility for purposes of impeachment involved evidence of generous settlements with former defendants who were subsequently called to testify at trial on behalf of plaintiff. It seems unlikely that the drafters of the rule would have failed to mention as common a form of impeachment as prior inconsistent statements, if they felt that it should constitute an exception to Rule 408. Moreover, it is difficult to imagine that the drafters did not see that the apparent promise of meaningful protection offered by Rule 408 would be a charade and a huge trap for the unwary if impeachment by a prior inconsistent statement were considered a sufficient basis for admission.

One argument in favor of a broad impeachment exception is that without it, a party might commit perjury, free in the knowledge that he could not be impeached with a previous statement. Hjelmeset rebuts that argument as follows:

> It has been proposed * * * that if a party could not be impeached by prior inconsistent settlement statements, the truth would not be fully "ascertained," since the effect of barring the use of inconsistent statements would be to "protect false representations." However, one commentator surveying the issue concluded that "it is questionable whether the narrower interpretation of the rule would contribute to the goal of deterring or detecting perjury at trial or lying during settlement negotiations." Moreover, "attack by prior inconsistent statements has the weakness of being indefinite: It indicates that the witness may have erred or lied, but not which or why." Besides, the classic notion that the prior statement is "often inherently more trustworthy than the testimony itself" has been challenged in the context of a trial following free-wheeling, but failed, negotiations.

Finally, the degree of inconsistency required for impeachment is much lower than outright lying; "any material variance between the testimony and the previous statement will suffice." There is no way this variance can be ascertained with certainty; "Is bias at work, or bad character, or a defect in perception, memory or narrative ability or is it simple, human, error?"

The questionable deterrence value of such impeachment, the uncertainty of what it indicates, the low degree of inconsistency required, and its inability to distinguish between innocent errors and deliberate lies indicate that protecting a compromising party from impeachment by prior inconsistent statements does not inhibit the truthfinding process to any considerable degree. This becomes particularly clear when the facts that the "danger that the evidence will be used substantively as an

admission is greater," and "the need for additional evidence on credibility is less" (since the party's interest is obvious), are weighed in on the other side of the scale, together with the strong public policy of encouraging compromise.

Judge Brazil also notes that a broad use of inconsistent statement impeachment is not necessary to root out perjury, and will only serve to vitiate the policy of the Rule:

> [I]t is not true that only liars need fear an interpretation of Rule 408 that would permit admission of statements made in negotiations solely on the ground that they are arguably inconsistent with trial or deposition testimony. Human thought processes and forms of communication are so imperfect that there is a substantial risk that parties whose hearts are as pure as the driven snow will make statements at different times and in different contexts that are arguably inconsistent. In other words, since being perfectly consistent is virtually impossible, a rule that permits use of statements simply because they are not perfectly consistent would lead to massive penetration of settlement talks and could be used to penalize the pure of heart just as much as the unscrupulous. The choice clearly is not between protecting liars and exposing liars. Rather, the choice is between (1) an interpretation of the rule that might, to some unmeasured extent, deter some lying by permitting party opponents to expose it when negotiations do not lead to settlements, and (2) an interpretation of the rule that would give some reality to its promise of confidentiality and that might, to some unmeasured extent, make settlement negotiations more rational by encouraging parties to share the reasoning that supports their positions. Given the lack of evidence that the narrow view of the rule has any effect on lying, courts should reject that interpretation on the ground that it makes Rule 408 hollow and misleading and creates pressures on counsel and litigants that tend to defeat the rule's purposes.

Case Law on Scope of Impeachment Exception to Rule 408

The courts are in conflict over whether Rule 408 permits the use of statements and offers in compromise to be admitted to impeach a witness by contradiction or with a prior inconsistent statement.

A case permitting broad impeachment is *County of Hennepin v. AFG Indus., Inc.*, 726 F.2d 149, 153 (8th Cir. 1984), where the court allowed statements and offers in settlement to be admitted for impeachment through contradiction and inconsistent statement. The court analyzed the question as follows:

Rule 408 states that while evidence of settlement is not admissible to prove liability, "This rule does not require exclusion when the evidence is offered for another purpose, such as proving the bias or prejudice of a witness ...." The rule codifies a trend in case law that permits evidence of a settlement to impeach. Reichenbach v. Smith, 528 F.2d 1072, 1075 (5th Cir.1976); see 161 A.L.R.

395 (cases cited); Advisory Committee Notes to Rule 408; McCormick, Evidence § 274 at 665 (2d Ed.1972).

The Eighth Circuit has adhered to the *County of Hennepin* precedent. See *Freidus v. First Nat'l Bank*, 928 F.2d 793 (8th Cir. 1991) (in a breach of contract suit, letters exchanged between the parties during compromise negotiations were properly admitted to impeach by specific contradiction testimony by plaintiff's agent/husband that defendant never gave reasons for its action regarding foreclosure).

In contrast, the Tenth Circuit rejects the use of compromise evidence when offered to impeach through prior inconsistent statement or contradiction. The leading case is *EEOC v. Gear Petroleum, Inc.*, 948 F.2d 1542, 1545-6 (10th Cir.1991). The employer stated in a letter to the EEOC that the employee had been laid off as part of implementing a mandatory retirement plan. At trial, the defense was that the employee was laid off as part of a reduction of work force and to hire a more competent person. The letter to the EEOC was written as part of a settlement negotiation. The court held that the letter could not be admitted as contradiction or a prior inconsistent statement. It analyzed the impeachment question as follows:

> Although Rule 408 explicitly 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," commentators have noted that "[t]he clear import of the Conference Report as well as the general understanding among lawyers is that [inconsistent] conduct or statements [made in connection with compromise negotiations] may not be admitted for impeachment purposes." M. Graham, Federal Rules of Evidence 116 (2d ed. 1987). See also Steven A. Saltzburg & Kenneth R. Redden, Federal Rules of Evidence Manual 286 (4th ed. 1986) ("In most cases . . . the Court should decide against admitting statements made during settlement negotiations as impeachment evidence when they are used to impeach a party who tried to settle a case but failed. The philosophy of the Rule is to allow the parties to drop their guard and to talk freely and loosely without fear that a concession made to advance negotiations will be used at trial. Opening the door to impeachment evidence on a regular basis may well result in more restricted negotiations."). "[T]he risks of prejudice and confusion entailed in receiving settlement evidence are such that often . . . the underlying policy of Rule 408 require [s] exclusion even when a permissible purpose can be discerned." David W. Louisell & Christopher B. Mueller, Federal Evidence § 170, at 443 (rev. vol. 2 1985). In this case the proffer of the Bauer letters for impeachment purposes was but a thinly veiled attempt to get the "smoking gun" letters before the jury. See Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence ¶ 408[05] at 408-31, 408-34 (1991) ("The almost unavoidable impact of the disclosure of such evidence is that the jury will consider the offer or agreement as evidence of a concession of liability. . .. The danger that the evidence will be used substantively as an admission is especially great when the witness sought to be impeached, by showing the compromise with a third party, is one of the litigants in the suit being tried.").

Accord McCormick on Evidence § 274, at 813 (Edward W. Cleary ed., 3d ed. 1984). Given the propriety of the initial exclusion, we cannot say that it was clearly erroneous for the district court to exclude the Bauer letters the second time around.

The Fifth Circuit appears to be in accord with the Tenth Circuit's view, that Rule 408 prevents the use of compromise evidence for purposes of contradiction or proof of prior inconsistent statement. In *Williams v. Chevron U.S.A., Inc.*, 875 F.2d 501, 504 (5th Cir.1989), a person injury action, the plaintiff claimed that his injury caused a need for spinal surgery that he couldn't afford. The defendant sought to introduce evidence of a settlement between the plaintiff and another defendant to contradict the plaintiff's assertion that he had no money. The court found that the evidence was properly excluded, though it is somewhat vague on whether Rule 408 prohibits such impeachment:

Over Williams's objection, Chevron attempted to introduce Williams' $7500 settlement with Land and Marine ostensibly to impeach Williams' testimony that he did not have the financial means to pay for the recommended surgical procedure. The objection was sustained. Generally, settlement agreements are not admissible to question the amount of damages sought. Fed.R.Evid. 408. Although Chevron introduced the evidence for impeachment purposes, it is undoubtedly possible that the jury would have confused its purpose for that precluded by Rule 408. Whenever the possibility of jury confusion substantially outweighs the probative value of the evidence, it may be excluded. Fed.R.Evid. 403. We conclude that the exclusion was not an abuse of discretion.

Thus, the *Williams* case could be construed as holding that Rule 408 prohibits admission of statements and offers of settlement when offered to impeach through contradiction. Or it could be read as saying that exclusion must come under Rule 403.

C. Use of Offers and Statements In Compromise in Favor of the Party Who Made the Offer or Statement

The courts are in dispute about whether Rule 408 operates to exclude statements and offers during settlement negotiations even when they are proffered by the party who made them. What follows is a discussion and analysis of the case law on the subject.

1. *Pierce v. F.R. Tripler & Co.*, 955 F.2d 820 (2d Cir. 1992): *Pierce* was an employment discrimination suit arising out of the elimination of the plaintiff's position. The employer contended that the plaintiff was the victim of a realignment, not discrimination. The employer sought to introduce the fact that it had offered to settle the case by giving the plaintiff a job in a different subsidiary. The purpose for introducing the offer was to prove the employer's lack of intent to discriminate and to show that the plaintiff, who rejected the offer, had failed to mitigate damages. The employer argued that the exclusion mandated by Rule 408 was inapplicable because it was designed to protect those who *made* offers of settlement, not those who received them. In effect the defendant was trying to waive the protection of Rule 408.

Rejecting the defendant's policy argument, the *Pierce* Court held that settlement offers are subject to Rule 408 even if it is the offeror who seeks to admit them. The Court noted that the plain language of the Rule offers no distinction between offerors and offerees.

The *Pierce* Court also relied on an alternative policy ground to reject a rule that would allow more liberal use of settlement negotiations. The Court noted that settlement negotiations are almost always conducted between and among opposing attorneys, and that these attorneys are likely to have different interpretations of the seriousness of offers and negotiations, and are also likely to disagree on what terms were set forth in any proposed settlement. These disputes of fact would have to be resolved by the factfinder, probably through testimony of the attorneys themselves. The Court was thus concerned 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 Court concluded that "we prefer to apply Rule 408 as written and exclude evidence of settlement offers to prove liability for or the amount of a claim regardless of which party attempts to offer the evidence."

2. *Kennon v. Slipstreamer, Inc.*, 794 F.2d 1067, 1069-1070 (5th Cir. 1986): This case presents the same issue as *Pierce*–does Rule 408 permit evidence of settlement in favor of the settling party?–but it is different procedurally because the Rule 408 objection is lodged by someone who was not even a party to the settlement. In this personal injury case, the Judge, with the plaintiff's acquiescence, told the jury that the plaintiff had settled with other defendants for a nominal sum. The remaining defendant objected under Rule 408 to the disclosure of the amount of the settlements, even though he was not a party to the settlements and even though the plaintiff wanted the jury to have this information. The Court found reversible error, reasoning as follows:

> Fed.R.Evid. 408 provides that evidence of a settlement is not admissible "to prove liability for or invalidity of the claim or its amount." While a principal purpose of Rule 408 is to encourage settlements by preventing evidence of a settlement (or its amount) from being used against a litigant who was involved in a settlement, the rule is not limited by its terms to such a situation. Even where the evidence offered favors the settling party and is objected to by a party not involved in the settlement, Rule 408 bars the admission of such evidence unless it is admissible for a purpose other than "to prove liability for or invalidity of the claim or its amount." * * *

The district court's disclosure of the fact of settlement was clearly for the purpose of avoiding jury confusion, rather than for the purpose of showing liability. In a case such as this one, where the absence of defendants previously in court might confuse the jury, the district court may, in its discretion, inform the jury of the settlement in order to avoid confusion. The district court did not abuse its discretion in revealing the fact of settlement in this case.

The district court's disclosure of the amount of settlement, however, is a different matter. While revealing the fact of settlement explains the absence of the settling defendants and thus tends to reduce jury confusion, disclosing the amount of settlement serves no such purpose. Disclosing

the amount of settlement had no proper purpose in the circumstances of this case and therefore it violated Rule 408. The district court's disclosure of the amount of the settlement prejudiced Slipstreamer in two ways. First, the fact that the settlement was for a nominal amount suggests that the plaintiffs thought that the settling defendants were not liable for the plaintiff's injuries and therefore points the finger at Slipstreamer as the one responsible. * * * Furthermore, the willingness of the plaintiff to settle for a pittance with the other defendants could be taken by the jury as a reflection of the strength of the plaintiffs' case against Slipstreamer.

Second, revelation of the amount of the settlement informed the jury that if the plaintiff was to receive any compensation for his injuries, he would have to get it from Slipstreamer. Such information is clearly prejudicial in a case such as this one where a ten year old child is permanently injured and where defendant's liability is sharply contested.

3. *Crues v. KFC Corp.*, 768 F.2d 230, 233-4 (8th Cir. 1985): This is a case in which a franchisee alleged that it had been misled about the nature of a franchise. The franchisor offered proof that it offered to compromise the claim by setting the plaintiff up in a different franchise. This was offered to show that the plaintiff was unreasonable in continuing to rely on previous representations about the nature of the franchise. The court held that the offer was properly admitted, relying mainly on the policy of Rule 408:

> Crues cites no federal cases holding that Rule 408 applies to admissions of compromise against the offeree. The rule is concerned with excluding proof of compromise to show liability of the offeror. C. McCormick, McCormick on Evidence § 264, at 712 (E. Cleary 3d ed. 1984). KFC submitted the offer to show that Crues was unreasonable in relying on the initial representation in continuing the fish operation. This use of evidence violates neither the spirit nor the letter of Rule 408.

Reporter's Comment: *Crues* preceded *Pierce* and *Kennon*, which explains why the plaintiff in *Crues* could cite no case holding that Rule 408 applies to admissions of compromise in favor of the offeror.

The "Otherwise Discoverable" Sentence

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.

Case Law on "otherwise discoverable"

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).

Conclusion On The "Otherwise Discoverable" Sentence

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.

III. Public Comment on the Rule (Including Comments of the Style Subcommittee)

The Committee received 11 public comments on the proposed amendment to Rule 408. One comment was favorable. Nine comments were vociferously opposed, not to the amendment as a whole, but rather to the provision that statements made in compromise negotiations will not be excluded from criminal cases. One comment can be seen as providing a neutral suggestion.

Favorable Comment

The Committee on Federal Courts of the State Bar of California (04-EV-012) supports the proposed amendment to Rule 408. The Committee states that the amendment "would resolve a number of long-standing disputes concerning the scope of Rule 408 by eliminating a number of exceptions to the Rule that some courts have recognized." The Committee believes that "the elimination of such exceptions furthers the purpose of the Rule by promoting and facilitating settlements."

Neutral Suggestion

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

Reporter's Response: If such language is included, it would create a problematic interface with Rule 801(d)(2), the hearsay exception for agency-admissions. It would seem that if compromise evidence is admissible in criminal cases, then it can be admitted by way of the mouth of an agent under Rule 801(d)(2)(D).

Negative Comments

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

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

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

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

The Firm concludes that the amendment "would give a very powerful negotiating leverage to one party if the other party lets something slip that might be incriminating."

Daniel E. Monnat, Esq., (04-EV-009) applauds the "wise decision" to limit the exception for impeachment evidence and to provide that compromises or offers to compromise are not admissible in criminal cases. But Mr. Monnat is opposed to the provision in the amendment that would allow statements made in compromise negotiations to be admissible in a subsequent criminal case. Mr. Monnat, argues that "[t]he same reasons that weigh in favor of this prohibition in civil cases weigh equally if not more strongly in favor of extending the prohibition to criminal cases." Mr. Monnat contends that statements admitting criminal conduct, made during civil settlement negotiations, are questionable as evidence because "they may be made merely to encourage settlement, or may be demanded as a condition of settlement." He concludes that the "Justice Department's desire to use all evidence it deems critical in criminal trials should not alone be deemed sufficient to override the strong policy interests underlying Rule 408." He also states that a "civil lawyer may not fully understand the criminal consequences of statements made during settlement negotiations" and that the proposed amendment "puts an additional burden on civil lawyers to anticipate and understand how their representation in a civil matter might leave their clients vulnerable to future criminal prosecution."

Professor David Leonard and 25 Signatory Law Professors (04-EV-011) oppose the amendment to Rule 408, but only insofar as it would permit statements made in settlement negotiations to be admitted in subsequent criminal cases. They note that in this respect the proposed amendment "could have a substantial chilling effect in certain types of disputes that often lead to criminal prosecution." The professors note that under the amendment, even the statements of an *attorney* made during a settlement negotiation would be admissible, as agency-admissions against the client in a subsequent criminal case. "The possibility that lawyer statements may be admissible against clients in subsequent criminal cases may chill lawyers in their civil representation, make civil case lawyers witnesses against their clients in criminal proceedings, and result in their inability to continue to represent their clients in any proceedings." The professors state that the negative impact of the proposed amendment on lawyer-client relations "outweighs the beneficial effect of making evidence of limited probative value admissible in criminal cases."

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

Professor Jeffrey S. Parker (04-EV-014) opposes the amendment to Rule 408 insofar as it would permit admission in criminal cases of statements made in settlement negotiations. He states

that "[a]ttaching potential criminal liability to unguarded statements in settlement discussions discourages settlement even more than attaching civil liability, given the harshness of the criminal sanction." He states that "[t]he opportunities for ripping even hypothetical statements out of context, and then arguing inferences in the highly charged atmosphere of a criminal trial, are legion, and they will lead to abuses." Professor Parker concludes that "[o]btaining convictions based upon unguarded statements in the context of settlement discussions hardly seems consistent with the public interest in criminal law enforcement, which ultimately is not to ease the prosecutor's path to convictions, but rather is to promote the truthful and just disposition of cases." He argues that the amendment will provide a trap for the unwary, as "unsophisticated parties will be entrapped by a staged atmosphere of amicability and conciliation."

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

The Committee on the Federal Rules of Evidence of the American College of Trial Lawyers ((04-EV-017) opposes the amendment to Rule 408, but only insofar as it would permit statements made in settlement negotiations to be admitted in subsequent criminal cases. The Committee contends that the amendment "will reduce, not encourage compromise." The Committee states that the result of the amendment is "that statements or conduct that might otherwise be used against the defendant in a criminal case will not be made in settlement negotiations of a civil matter, depriving the Justice Department of the use of any such statement and as well reducing the chance of a successfully negotiated settlement." The Committee "questions whether conduct or a statement during settlement negotiations is any more reliable or probative of a criminal defendant's guilt than evidence of an offer or acceptance of settlement." It predicts that the result of the amendment will be "a revision to the earlier practice of using hypothetical statements to avoid a factual admission, a practice the Rule was intended to avoid." The Committee also contends that "the proposed amendment is bound to give rise to disputes concerning whether the evidence sought to be admitted constitutes evidence of unprotected statements or conduct, on the one hand, or evidence of protected offers or acceptances of settlements, on the other." It also opines that the proposed amendment is inconsistent with other federal law that favors confidentiality of communications during settlement negotiations, such as the Alternative Dispute Resolution Act of 1998, and local rules governing court-sponsored mediation. Finally, "the Committee observes that the proposed amendment creates an undesirable risk of causing a defendant's counsel to become a witness in criminal proceedings to the extent that the prosecution attempts to offer evidence of statements during civil settlement negotiations by, or in the presence of, defendant's counsel or seeks to have defendant's counsel testify as to the defendant's conduct or statements during negotiation." The Committee is in favor

of the other amendments to Rule 408, "as they further the larger purpose of the Rule which is to encourage compromise."

Professor James Duane (04-EV-018) is opposed to the proposed amendment to Rule 408 insofar as it would permit statements made in settlement negotiations to be admitted in subsequent criminal cases. He argues that "the proposed amendment would pose a powerfully chilling effect on the willingness of civil parties and their lawyers to engage in the robust and uninhibited give-and-take that is common in settlement negotiations." He also contends that the amendment will create the risk of a dispute as to whether a party even made a certain statement during a settlement negotiation. Therefore, "cautious lawyers representing the defendant in any civil case — even in state court — will completely refrain from participating in any sort of oral settlement talks if there is any possibility that federal criminal charges may arise out of the same matter, for there will be no other way to avoid the terrible risk of saying something perfectly innocent that might be misunderstood or incorrectly recollected by the other participant, who sometimes might not even be a lawyer." Professor Duane argues that statements made in settlement negotiations are not critical evidence of guilt, because if they are declared admissible in criminal cases, they will never be made, except by those without savvy counsel.

Response to Negative Comments

The negative comments essentially make the following points about a rule that allows admissibility of compromise statements in subsequent criminal proceedings:

1. The rule will chill settlements, because parties will be afraid of the cost of even entering into settlement negotiations. The risk of an inadvertent admission of guilt–or a mischaracterization by the adversary of a statement as being such–would be considered too great to justify the possibility of settlement.

2. The chilling consequences are not alleviated by having lawyers do the negotiations, because their statements will be admissible against their clients as agency-admissions. And because agency-admissions are possible, there is a risk that the attorney will end up having to testify against the client in a criminal case, creating a possibility of attorney-witness disqualifications.

3. The proposed amendment adopts the distinction between admissible statements and inadmissible offers that was rejected by the original rule because it was a distinction that was indefinite and artificial. The original advisory committee note to Rule 408 explains the change from the common-law distinction that would be revived by the amendment:

> 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.

4. The only reason for this apparent return to the common law is that the Committee needed to compromise with the Justice Department, and that is not a sufficient reason for return to a distinction that never worked in the first place. This is especially so because statements are less likely to be made, and therefore to be used in criminal cases, if the rule is enacted—with the exception of statements made by unschooled lawyers or parties.

5. The rule is contrary to the working principles of mediation and arbitration, which assume confidentiality.

6. The rule operates as a trap for the unwary.

These criticisms are difficult to counter. It really boils down to whether one believes that the amendment will have an effect on settlement negotiations or not. Fundamentally the question is whether the policy of Rule 408 is sound. If it is, then arguably the amendment is not justified insofar as it purports to distinguish between statements and offers.

It is true that the prospect of a litigant making an admission of crime in a settlement negotiation, and then moving to exclude it at a criminal trial, is an unnerving one. But the question is, how often does that happen? And is the cost of that exclusion, if it does happen, outweighed by the benefits of protecting the settlement process, avoiding a trap for the unwary, avoiding attorney-witness disqualification, etc.? That is obviously a balancing question for the Committee to determine.

It is fair to state that the Justice Department has never submitted data to the Committee on whether exclusion of settlement statements will impose a real hardship on the government in subsequent criminal litigation. On the one hand, this is explainable by the fact that in many of the circuits, settlement statements (and even the settlement itself) are now admissible in subsequent criminal litigation. It is hard to determine from the reported cases whether the absence of such statements would have had a crippling effect on a particular prosecution. But the fact does remain that the Committee has deferred to the Justice Department on the critical need for settlement statements in criminal litigation.

It should be remembered that even if Rule 408 is amended to exclude all settlement evidence from criminal cases, the government will still be able to admit such evidence whenever it is offered to prove anything other than the validity or amount of the claim. So for example, in the *Austin* case, cited in the Committee Note to the proposed amendment, Rule 408 was held not to prevent admission of a civil settlement when offered to show that the defendant thereby became aware of

legal obligations, and therefore his subsequent conduct was a knowing violation. (Professor Duane argues that cases such as *Austin* should be "burned at the stake" but the fact is that so long as Rule 408 refers to the "validity of the claim" as the impermissible purpose, cases like *Austin* are correctly decided.)

As a pragmatic matter of rulemaking, a question for the Committee is whether deferring to the Justice Department (and thus assuring that the proposed amendment will become law) is worth the trouble of the amendment that is actually passed. Another way to put this is: is the Rule as released for public comment any better than the Rule today? The answer to that question appears to be yes. There are several reasons for this conclusion.

1. The other changes to the rule (narrowing the impeachment exception, preventing use by the offering party, and restructuring) unquestionably improve the current rule— all of the public comment is in agreement on that point.

2. The amendment at least resolves the current conflict on the admissibility of compromise evidence in criminal cases. And the complaints in the public comment about chilling settlement should be evaluated in light of the current state of affairs, in which settlement is *already* chilled by the prospect of use in a subsequent criminal case. Certainly counsel and the parties today have to factor in the possibility of use not only of statements but also of offers and acceptances, because most courts admit them; and even if the settlement occurs in a circuit that does not permit settlement evidence in criminal cases, the parties will have to plan on the possibility that a subsequent criminal prosecution could be brought in a circuit that does permit such evidence. So the bottom line is that despite the public comment, the rule is an improvement on the current state of affairs. At least after the amendment the settlement itself (as well as offers of settlement) will be inadmissible in subsequent criminal litigation.

3. The common-law line that is drawn by the rule (distinguishing between offers and statements) is probably as unsatisfying today as it was before Rule 408 was enacted. But it is arguably an improvement on the current law, in which the default rule is that *all* settlement evidence is admissible in a subsequent criminal case. Still, it is troubling to revive a common-law distinction that was rejected by the original rule, probably with good reason.

In light of the dispute over the admissibility of settlement statements in criminal cases, I have included two versions of an amendment to Rule 408 in the next section. The first version is that released for public comment. The second version is the same in all other respects, but it would also exclude settlement statements in criminal cases.

Style Subcommittee suggestions

The Style Subcommittee of the Standing Committee has made two relatively minor, but also helpful, suggestions for changing the proposed amendment as it was released for public comment.

The first suggestion would change the headings of the Rule, and the second adds a minor clarification to the text.

The changes can best be seen by showing them on a "clean copy" of the proposed amendment:

Style Subcommittee suggestions added to clean copy of proposed amendment:

Rule 408. Compromise and Offers to Compromise

(a) ~~General rule~~ Prohibited uses. – Evidence of the following is not admissible in a civil case on behalf of any party, when offered to prove liability for or invalidity of a claim or its amount or when offered to impeach through a prior inconsistent statement or contradiction:

(1) 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 civil claim that was disputed as to validity or amount; and

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

(b) ~~Other purposes~~ Permitted uses. – This rule does not require exclusion when the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negativing a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.

Because the Style Subcommittee suggestions are helpful clarifications, they are included in the final versions of the proposed amendment set forth below.

IV. Alternatives For Rule 408 Amendment and Committee Note

A. Proposed Amendment As Released for Public Comment

What follows is the proposed amendment to Rule 408 and the Committee Note, unchanged from that released for public comment, with the exception of the minor changes for style. The proposal is formatted in accordance with Administrative Office guidelines. If the Committee is satisfied that settlement statements should be admissible in criminal cases, then this version can be forwarded to the Standing Committee.

PROPOSED AMENDMENT TO THE FEDERAL RULES OF EVIDENCE*

Rule 408. Compromise and Offers to Compromise

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

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

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

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

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

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

Committee Note

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

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

The amendment retains the language of the original rule that bars compromise evidence only when offered as evidence of the "validity", "invalidity", or "amount" of the disputed claim. The intent is to retain the extensive case law finding Rule 408 inapplicable when compromise evidence is offered for a purpose other than to prove the validity, invalidity, or amount of a disputed claim. *See, e.g., Athey v. Farmers Ins. Exchange,* 234 F.3d 357 (8th Cir. 2000) (evidence of settlement offer by insurer was properly admitted to prove insurer's bad faith); *Coakley & Williams v. Structural Concrete Equip.,* 973 F.2d 349 (4th Cir. 1992) (evidence of settlement is not precluded by Rule 408 where offered to prove a party's intent with respect to the scope of a release); *Cates v. Morgan Portable Bldg. Corp.,* 708 F.2d 683 (7th Cir. 1985) (Rule 408 does not bar evidence of a settlement when offered to prove a breach of the settlement agreement, as the purpose of the evidence is to prove the fact of settlement as opposed to the validity or amount of the underlying claim); *Uforma/Shelby Bus. Forms, Inc. v. NLRB,* 111 F.3d 1284 (6th Cir. 1997) (threats made in settlement negotiations were admissible; Rule 408 is inapplicable when the claim is based upon a wrong that is committed during the course of settlement negotiations). Nor does the amendment affect the case law providing that Rule 408 is inapplicable when evidence of the compromise is offered to prove notice. *See, e.g., United States v. Austin,* 54 F.3d 394 (7th Cir. 1995) (no error to admit evidence of the defendant's settlement with the FTC, because it was offered to prove that the defendant was on notice that subsequent similar conduct was wrongful); *Spell v. McDaniel,* 824 F.2d 1380 (4th Cir. 1987) (in a civil rights action alleging that an officer used excessive force, a prior settlement by the City of another brutality claim was properly admitted to prove that the City was on notice of aggressive behavior by police officers).

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

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

bring with it a rash of motions for disqualification of a party's chosen counsel who would likely become a witness at trial").

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

CHANGES MADE AFTER PUBLICATION AND COMMENTS

Stylistic changes were made in accordance with suggestions from the Style Subcommittee of the Standing Committee.

SUMMARY OF PUBLIC COMMENTS

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

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

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

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

The Law Firm of Cunningham, Bounds, Yance, Crowder and Brown, L.L.C., (04-EV-008) opposes the proposed amendment to Rule 408 insofar as it would permit statements made in settlement negotiations to be admitted in subsequent criminal cases. The Firm notes that it is "hard to draw a line" between offers of compromise, which would not be admissible in criminal cases, and statements made during settlement negotiations, which would be admissible. The Firm also notes that "[i]f a plaintiff or a defendant might be subject to criminal prosecution for anything he or she says or does during settlement negotiations, this new rule would have a tendency both to prevent such negotiations from taking place at all and to minimize their usefulness if they do occur." The Firm concludes that the amendment "would give a very powerful negotiating leverage to one party if the other party lets something slip that might be incriminating."

Daniel E. Monnat, Esq., (04-EV-009) applauds the "wise decision" to limit the exception for impeachment evidence and to provide that compromises or offers to compromise are not admissible in criminal cases. But Mr. Monnat is opposed to the provision in the amendment that would allow statements made in compromise negotiations to be admissible in a subsequent criminal case. Mr. Monnat argues that "[t]he same reasons that weigh in favor of this prohibition in civil cases weigh equally if not more strongly in favor of extending the prohibition to criminal cases." Mr. Monnat contends that statements admitting criminal conduct, made during civil settlement negotiations, are questionable as evidence because "they may be made merely to encourage settlement, or may be demanded as a condition of settlement." He also states that a "civil lawyer may not fully understand the criminal consequences of statements made during settlement negotiations" and that the proposed amendment "puts an additional burden on civil lawyers to

anticipate and understand how their representation in a civil matter might leave their clients vulnerable to future criminal prosecution."

Professor David Leonard and 25 Signatory Law Professors (04-EV-011) oppose the amendment to Rule 408, but only insofar as it would permit statements made in settlement negotiations to be admitted in subsequent criminal cases. They note that in this respect the proposed amendment "could have a substantial chilling effect in certain types of disputes that often lead to criminal prosecution." The professors state that under the amendment, even the statements of an attorney made during a settlement negotiation would be admissible, as agency-admissions against the client in a subsequent criminal case. "The possibility that lawyer statements may be admissible against clients in subsequent criminal cases may chill lawyers in their civil representation, make civil case lawyers witnesses against their clients in criminal proceedings, and result in their inability to continue to represent their clients in any proceedings." The professors state that the negative impact of the proposed amendment on lawyer-client relations "outweighs the beneficial effect of making evidence of limited probative value admissible in criminal cases."

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

The Committee on Federal Courts of the State Bar of California (04-EV-012) supports the proposed amendment to Rule 408. The Committee states that the amendment "would resolve a number of long-standing disputes concerning the scope of Rule 408 by eliminating a number of exceptions to the Rule that some courts have recognized." The Committee believes that "the elimination of such exceptions furthers the purpose of the Rule by promoting and facilitating settlements."

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

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

The Committee on the Federal Rules of Evidence of the American College of Trial Lawyers (04-EV-017) opposes the amendment to Rule 408, but only insofar as it would permit statements made in settlement negotiations to be admitted in subsequent criminal cases. The Committee contends that the amendment "will reduce, not encourage compromise." The Committee "questions whether conduct or a statement during settlement negotiations is any more reliable or probative of a criminal defendant's guilt than evidence of an offer or acceptance of settlement." It predicts that the result of the amendment will be "a reversion to the earlier practice of using hypothetical statements to avoid a factual admission, a practice the Rule was intended to avoid." The Committee also contends that "the proposed amendment is bound to give rise to disputes concerning whether the evidence sought to be admitted constitutes evidence of unprotected statements or conduct, on the one hand, or evidence of protected offers or acceptances of settlements, on the other." It also opines that the proposed amendment is inconsistent with other federal law that favors confidentiality of communications during settlement negotiations, such as the Alternative Dispute Resolution Act of 1998, and local rules governing court-sponsored mediation. Finally, "the Committee observes that the proposed amendment creates an undesirable risk of causing a defendant's counsel to become a witness in criminal proceedings to the extent that the prosecution attempts to offer evidence of statements during civil settlement negotiations by, or in the presence of, defendant's counsel or seeks to have defendant's counsel testify as to the defendant's conduct or statements during negotiation." The Committee is in favor of the other amendments to Rule 408, as they "further the larger purpose of the Rule which is to encourage compromise."

Professor James Duane (04-EV-018) is opposed to the proposed amendment to Rule 408 insofar as it would permit statements made in settlement negotiations to be admitted in subsequent criminal cases. He argues that "the proposed amendment would pose a powerfully chilling effect on the willingness of civil parties and their lawyers to engage in the robust and uninhibited give-and-take that is common in settlement negotiations." He also contends that the amendment will create problems of application because there may be a dispute as to whether a party even made a certain statement during a settlement negotiation. Therefore, "cautious lawyers representing the defendant in any civil case — even in state court — will completely refrain from participating in any sort of oral settlement talks if there is any possibility that federal criminal charges may arise out of the same matter, for there will be no other way to avoid the terrible risk of saying something perfectly innocent that might be misunderstood or incorrectly recollected by the other participant, who sometimes might not even be a lawyer." Professor Duane argues that statements made in settlement negotiations are

not critical evidence of guilt, because if they are declared admissible in criminal cases, they will never be made, except by those without experienced counsel.

B. Amendment to Rule 408 That Would Exclude All Evidence of Civil Compromise In Criminal Cases

The following is the language and Committee Note for an amendment that would exclude *all* evidence of civil compromise—offers, acceptances, statements and conduct—from a subsequent criminal case when offered to prove the validity or amount of the claim. The amendment includes all of the other changes, both stylistic and substantive, that have been already been agreed to by the Committee and supported by public comment. The amendment begins on the next page.

PROPOSED AMENDMENT TO THE FEDERAL RULES OF EVIDENCE

Rule 408. Compromise and Offers to Compromise*

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

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

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

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

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

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

Committee Note

Rule 408 has been amended to settle some questions in the courts about the scope of the Rule, and to make it easier to read and apply. First, the amendment clarifies that evidence of compromise of a civil claim (whether statement, conduct, offer or acceptance) is inadmissible when offered to prove the validity or the amount of the

claim in a subsequent criminal case. The amendment thus resolves 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 routinely in subsequent criminal litigation, defendants might be reluctant to settle civil claims and to compensate victims; that is 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.").

The amendment retains the language of the original rule that bars compromise evidence only when offered as evidence of the "validity", "invalidity", or "amount" of the disputed claim. The intent is to retain the extensive case law finding Rule 408 inapplicable when compromise evidence is offered for a purpose other than to prove the validity, invalidity, or amount of a disputed claim. *See, e.g., Athey v. Farmers Ins. Exchange,* 234 F.3d 357 (8th Cir. 2000) (evidence of settlement offer by insurer was properly admitted to prove insurer's bad faith); *Coakley & Williams v. Structural Concrete Equip.,* 973 F.2d 349 (4th Cir. 1992) (evidence of settlement is not precluded by Rule 408 where offered to prove a party's intent with respect to the scope of a release); *Cates v. Morgan Portable Bldg. Corp.,* 708 F.2d 683 (7th Cir. 1985) (Rule 408 does not bar evidence of a settlement when offered to prove a breach of the settlement agreement, as the purpose of the evidence is to prove the fact of settlement as opposed to the validity or amount of the underlying claim); *Uforma/Shelby*

Bus. Forms, Inc. v. NLRB, 111 F.3d 1284 (6th Cir. 1997) (threats made in settlement negotiations were admissible; Rule 408 is inapplicable when the claim is based upon a wrong that is committed during the course of settlement negotiations). Nor does the amendment affect the case law providing that Rule 408 is inapplicable when evidence of the compromise is offered to prove notice. *See, e.g., United States v. Austin,* 54 F.3d 394 (7th Cir. 1995) (no error to admit evidence of the defendant's settlement with the FTC, because it was offered to prove that the defendant was on notice that subsequent similar conduct was wrongful); *Spell v. McDaniel,* 824 F.2d 1380 (4th Cir. 1987) (in a civil rights action alleging that an officer used excessive force, a prior settlement by the City of another brutality claim was properly admitted to prove that the City was on notice of aggressive behavior by police officers).

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

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

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

CHANGES MADE AFTER PUBLICATION AND COMMENTS

In response to public comment, the proposed amendment was changed to provide that statements and conduct during settlement negotiations are to be inadmissible in subsequent criminal litigation when offered to prove the validity or amount of the claim. Stylistic changes were also made in accordance with suggestions from the Style Subcommittee of the Standing Committee.

SUMMARY OF PUBLIC COMMENTS

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

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

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which would have been admissible under the proposed amendment as released for public comment. The Firm also noted that "[i]f a plaintiff or a defendant might be subject to criminal prosecution for anything he or she says or does during settlement negotiations, this new rule would have a tendency both to prevent such negotiations from taking place at all and to minimize their usefulness if they do occur."

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

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

The Committee on Federal Courts of the State Bar of California (04-EV-012) supports the proposed amendment to Rule 408 as it was released for public comment. The Committee states that the amendment "would resolve a number of long-standing disputes concerning the scope of Rule 408 by eliminating a number of exceptions to the Rule that some courts have recognized." The Committee believes that "the elimination of such exceptions furthers the purpose of the Rule by promoting and facilitating settlements."

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

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

The Committee on the Federal Rules of Evidence of the American College of Trial Lawyers (04-EV-017) opposed the amendment to Rule 408 as released for public comment, but only insofar as it would have permitted statements made in settlement negotiations to be admitted in subsequent criminal cases. The Committee contended that such an amendment would "reduce, not encourage compromise." The Committee questioned "whether conduct or a statement during settlement negotiations is any more reliable or probative of a criminal defendant's guilt than evidence of an offer or acceptance of settlement." It predicted that the result of such an amendment would have been "a reversion to the earlier practice of using hypothetical statements to avoid a factual admission, a practice the Rule was intended to avoid." The Committee also contended that the amendment would have raised "disputes concerning whether the evidence sought to be admitted constitutes evidence of unprotected statements or conduct, on the one hand, or evidence of protected offers or acceptances of settlements, on the other." It also opined that the proposed amendment would have been inconsistent with other federal law that favors confidentiality of communications during settlement negotiations, such as the Alternative Dispute Resolution Act of 1998, and local

rules governing court-sponsored mediation. The Committee is in favor of the other amendments to Rule 408, as they "further the larger purpose of the Rule which is to encourage compromise."

Professor James Duane (04-EV-018) was opposed to the proposed amendment to Rule 408 as it was released for public comment, insofar as it would have permitted statements made in settlement negotiations to be admitted in subsequent criminal cases. He argued that "the proposed amendment would pose a powerfully chilling effect on the willingness of civil parties and their lawyers to engage in the robust and uninhibited give-and-take that is common in settlement negotiations." He also contended that the amendment would have created problems in determining whether a party even made a certain statement during a settlement negotiation. Therefore, "cautious lawyers representing the defendant in any civil case — even in state court — will completely refrain from participating in any sort of oral settlement talks if there is any possibility that federal criminal charges may arise out of the same matter, for there will be no other way to avoid the terrible risk of saying something perfectly innocent that might be misunderstood or incorrectly recollected by the other participant, who sometimes might not even be a lawyer." Professor Duane argued that statements made in settlement negotiations are not critical evidence of guilt, because if they are declared admissible in criminal cases, they will never be made, except by those without experienced counsel.

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Proposal to amend Rule 606(b): Final Committee Action
Date: April 2, 2005

At its Spring 2004 meeting the Evidence Rules Committee approved an amendment to Rule 606(b), the Rule limiting proof from jurors as to the validity of a verdict. The Standing Committee released the proposal for public comment. At this Committee meeting, the Committee must decide whether to recommend to the Standing Committee that the proposed amendment to Rule 606(b) be referred to the Judicial Conference for its approval. If no objections are rendered through the rest of the rulemaking process, the proposed amendment would become effective on December 1, 2006.

The need for an amendment to Rule 606(b) arises from two case law developments. First, the courts have engrafted another exception onto the Rule, permitting juror testimony to correct certain errors in the preparation and rendering of the verdict; these errors are referred to as "differential errors", meaning that there is some differential between the verdict *actually* reported and the verdict that the jury *intended* to report . Second, the courts have long been in dispute over the breadth of this "differential error" exception. Some courts permit juror proof only where there is a "clerical error" in the reporting of the verdict; other courts have adopted a broader exception, permitting juror proof whenever the verdict reported is different from that intended by the jury. There is no indication that this dispute will be resolved without an amendment to the Rule.

This memorandum is in four parts. Part one sets forth the existing Rule, and the proposed amendment to the Rule and Committee Note. Part two sets forth the rationale for the amendment and summarizes the Committee's work on the amendment as well as the relevant case law. Part three addresses the public comment on the proposal. Part four sets out, in final form, the proposed amendment for final Committee consideration, as well as a drafting alternative that responds to the public comment.

I. The Proposed Amendment to Rule 606(b)

A. Current Rule

Rule 606(b) currently 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 the existing 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 of Rule 606(b):

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 jurors 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

and found that there was a misunderstanding about the instructions because 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....*
> >
> > 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.

B. Proposed Amendment to Rule 606(b)

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

PROPOSED AMENDMENT TO THE FEDERAL RULES OF EVIDENCE*

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. 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~~

*New material is underlined; matter to be omitted is lined through.

~~the question~~ about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) ~~or~~ whether any outside influence was improperly brought to bear upon any juror, or (3) whether the verdict reported is the result of a clerical mistake. ~~Nor may a~~ A juror's affidavit or evidence of any statement by the juror ~~concerning~~ may not be received on a matter about which the juror would be precluded from testifying ~~be received for these purposes~~.

Committee Note

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

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

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

II. Rationale for Amendment and Committee Deliberations

The Reporter's initial memorandum 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 in an amount 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 mistakes.

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 longstanding 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 for clerical mistakes only. 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.

At its Fall 2003 meeting the Committee reviewed a working draft of the proposed amendment to consider whether the language accurately captured the narrow exception that should be added to the Rule. The draft language permitted juror proof into whether "the verdict reported is the verdict that was agreed upon by the jury." Committee members expressed concern that this language could be too broad. It might be construed, for example, to allow proof from a juror that he never actually "agreed" with the verdict the jury rendered, he only acquiesced because he wanted to make other jurors happy, or because he misunderstood the court's instructions. Thus, the language of the working draft could be read to encompass the broader exception to the Rule currently used by some courts; it could be read to allow an inquiry into jury deliberations, contrary to the policy of Rule 606(b).

The Committee deliberated and voted unanimously to change the language of the working draft to narrow the exception to situations where the verdict reported is "the result of a clerical mistake." Committee members recognized that the exception for "clerical mistakes" would apply only rarely in practice. But that was considered to be the very reason for adopting the amendment. The "clerical mistake" language would provide a very narrow exception to allow for correction in the rare cases of clerical error, and it would thereby *reject* the broader exception used by those courts permitting juror testimony whenever the jurors misunderstood the impact of the verdict that they actually agreed upon.

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

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

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

Case Law on Differential Error and Rule 606(b)

Differential Error

All courts are in agreement that juror statements can be used to prove and correct what is referred to above as a "clerical error." This is so even though there is no exception permitting juror proof of a clerical error in the text of Rule 606(b). For example, in *United States v. Dotson,* 817 F.2d 1127 (5th Cir. 1987), the Court found it permissible to take juror testimony after the trial court was informed that the foreman reported a guilty verdict on a count when the jury had in fact voted unanimously that the defendant was not guilty on that count. The rationale for this limited exception is that it does not implicate the policy of the Rule. Rule 606(b) is intended to protect the finality of jury verdicts and to prevent intrusions into jury deliberations. But there is no offense to the finality of jury verdicts if the court seeks to enforce the verdict that the jury actually reached. And there is no intrusion into jury deliberations because the court is only trying to determine what the jury *decided*: it is not trying to determine how the jury reached its decision.

For other cases approving the "clerical error" exception to Rule 606(b), *see, e g., Teevee Toons, Inc. v. MP3.Com, Inc.,* 148 F.Supp.2d 276 (S.D.N.Y. 2001) (numbers entered on the verdict sheet were incorrect because of calculation errors caused by the use of a Palm Pilot; inquiries into this "mechanical" error are unlikely to infringe on the jury's confidential deliberations); *Karl v. Burlington R.R.,* 880 F.2d 68 (8th Cir. 1988) ("The admission of a juror's testimony is proper to indicate the possibility of a 'clerical error' in the verdict, but not the 'validity' of the verdict.").

Misunderstanding Instructions

While all courts agree that juror statements can be used to correct clerical errors despite the text of Rule 606(b), the courts are in disagreement about whether the Rule supports a broader exception allowing the use of juror statements when it appears that the verdict rendered is different from that intended because of a misunderstanding or disregard of the court's instructions.

The following cases support the broader exception for juror misunderstandings:

1. *Attridge v. Cencorp.,* 836 F.2d 113 (2d Cir. 1987): In this personal injury action, the jurors thought they were giving the plaintiffs a true amount of damages adjusted for comparative negligence, but failed to understand that the adjustment for negligence would be made by the court. The Court noted that the Rule "is silent regarding inquiries designed to confirm the accuracy of a verdict." The Court stated that the instant case "involved correction of a clear miscommunication between the jury and the judge" and the trial court's interviews "were intended to resolve doubts regarding the accuracy of the verdict announced, and not to question the process by which those verdicts were reached." The Court reasoned that the trial court's inquiry did not impinge upon the confidential juror deliberations that Rule 606(b) was designed to protect. The court concluded that "Unyielding refusal to question jurors is without sound judgment where the court surmises that the verdict announced differs from the result intended."

2. *Eastridge Development Co. v. Halpert Assoc., Inc.,* 853 F.2d 772 (10th Cir. 1988): The jury reduced an award for proportional fault, even though the jurors were instructed that the adjustment would be made by the court. The trial court took evidence from the jurors, and amended the verdict to comply with the jury's intent. The Court found no violation of Rule 606(b), and simply declared that the trial court "properly amended the verdict to reflect the jury's true decision."

3. *McCullough v. Consolidated Rail Corp.,* 937 F.2d 1167 (6th Cir. 1991): This is another case in which the jury thought that it was supposed to report a "net" award of damages, reducing for proportionate fault, when in fact it was instructed to report a "gross" award that the trial judge would reduce. The Court noted that there is a "split of opinion from the other Circuit Courts" on whether Rule 606(b) permits proof of the error through juror statements. The Court opted for the broad exception to the Rule that permits proof of jury misunderstanding. It explained as follows:

> In utilizing this approach, the interests of justice are served in assuring that McCullough receives the award that the jury intended and the values protected by FRE 606(b) are not violated. The amendment of the award in no way threatens the jury's freedom of deliberation. The district judge was careful to limit his inquiry to whether the jury intended an award of $235,000 minus 50 percent. He did not inquire into the thought processes of jurors, but merely asked for clarification of the final award.

The following cases reject the broader exception for juror misunderstandings, and limit the court-made exception to clerical errors:

1. *Plummer v. Springfield Term. Ry. Co.,* 5 F.3d 1 (1st Cir. 1993): *Plummer* was another case in which the jury returned a net award (reduced for plaintiff's proportionate fault) when it was instructed to return a gross award. The Court found that Rule 606(b) prohibited proof of such an error through juror statements. The Court's analysis is as follows:

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 or mental processes, and therefore is not subject to Rule 606(b). *See, e.g., Karl v. Burlington Northern Ry. Co.,* 880 F.2d 68, 73- 74 (8th Cir.1989); *Eastridge Development Co. v. Halpert Associates,* 853 F.2d 772, 783 (10th Cir.1988); *see also Robles v. Exxon Corp.,* 862 F.2d 1201, 1207-08 (5th Cir.1989).

In the present case, Plummer similarly argues that the rendered verdict was not the one agreed upon by the jury, and therefore that his requested inquiry does not invoke Rule 606(b).

Several circuits might find this argument acceptable. In *Eastridge Development Co.,* for example, the jury, contrary to the court's instructions, reduced its verdict by the percentage of the plaintiff's own negligence. The district court interrogated the jury, accepted affidavits from the jury as to their damages calculation, and amended the ultimate award to reflect the jury's decision. The Tenth Circuit accepted the district court's rationale that the jury made a clerical error, and that the inquiry therefore did not violate Rule 606(b). *See also Attridge v. Cencorp Div. of Dover Tech. Int'l, Inc.,* 836 F.2d 113, 116-17 (2d Cir.1987).

By contrast, the Eighth Circuit in *Karl,* 880 F.2d at 73-74, reversed similar actions by a district court judge when the jury made the same mistake. The court in that case found that the inquiry was improper because it went to the thought processes underlying the verdict, rather than the verdict's accuracy in capturing what the jurors had agreed upon.

We agree with the district court that *Karl*'s approach better reflects the goals of Rule 606(b) . . . because it better insulates jury deliberations. In the present case, the verdict form, which the judge went over with the jury, instructed the jury not to reduce the damages verdict based on Plummer's negligence, and Plummer never objected to these instructions. Plummer's current allegations, however, suggest that the jurors believed that the rendered verdict would have a different effect on the parties, based on their understanding of the court's instructions. Plummer does not contend that the jurors never agreed upon the rendered verdict--the number that the jury chose is not in dispute. Accordingly, the requested inquiry went to what the jurors were thinking when they chose the number that they did and whether their thinking was sound.

2. *Robles v. Exxon Corp.,* 862 F.2d 1201 (5thCir. 1989): The jury thought that by finding the plaintiff 51% negligent, the judge would determine damages. They were wrong. The Court held

that there was no exception to Rule 606(b) that would permit proof that the jury misunderstood instructions. The court noted that the Advisory Committee Note cited with favor a case precluding proof through juror statements when the contention was that the jury misunderstood instructions. (See the Committee Note, above). The Court also relied on the legislative history, set forth above, which expressed concern that a broad exception to the rule would permit proof through juror statements whenever the jury was alleged to have misunderstood instructions. The Court distinguished the narrow "clerical error" exception from the broader exception for juror misunderstanding in the following passage:

> The district court was correct when it noted that we have held that rule 606(b) does not bar juror testimony as to whether the verdict delivered in open court was actually that agreed upon by the jury. *See United States v. Dotson,* 817 F.2d 1127, 1130 (5th Cir.), *modified on rehearing,* 821 F.2d 1034 (5th Cir.1987); *University Computing Co. v. Lykes-Youngstown Corp.,* 504 F.2d 518, 547-48 n. 43 (5th Cir.1974). These holdings simply embody the sound reasoning that such inquiries are not directed at the "validity" of the verdict and thus are not covered by the rule. In *Dotson,* we noted that the admission of such testimony was proper to investigate the possibility of "a clerical error in a verdict," not its "validity" in the sense of being correct or proper, and that the cases to which this exception would apply are "few and far between." 817 F.2d at 1130. . . . . The category of "clerical" errors described in *Dotson,* therefore, can be understood to refer only to discrepancies between the verdict delivered in court and the precise verdict physically or verbally agreed to in the jury room, not to discrepancies between the verdict delivered in court and the verdict or general result which the jury testifies it "intended" to reach.

The error here is not "clerical," as would be the case where the jury foreperson wrote down, in response to an interrogatory, a number different from that agreed upon by the jury, or mistakenly stated that the defendant was "guilty" when the jury had actually agreed that the defendant was not guilty. Rather, the error alleged 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.

The testimony from one of the jurors, for example, makes this point painfully obvious. Juror Nicholas testified that the jury understood the court's instructions to mean that "if we couldn't decide [on an award] and if it [i.e., the percentage of fault attributable to Robles] were 51 percent or more, that you would decide from the bench whether she should be rewarded." The testimony on its face violates rule 606(b) because it relates to how the jury interpreted, or as juror Nicholas put it, "misinterpretated," the court's instructions, and thus unquestionably constitutes testimony as to a "juror's mental processes" that is forbidden by the rule. In short, therefore, rule 606(b) operates in cases such as this to "[e]xclude [ ] ... testimony that a juror ... was confused about the legal significance of the jury's answers to special interrogatories...." 6 Weinstein ¶¶ 606[04] at 606-33 through 606-35 (footnotes omitted).

3. *Karl v. Burlington R.R. Co.*, 880 F.2d 68 (8th Cir. 1988): This is yet another case in which the jury rendered a net award when it was instructed to render a gross award. The Court held that Rule 606(b) precluded the use of juror statements to prove this error. The Court noted that the jury's error was not clerical in the sense that the verdict reported was not the one intended. The jury actually intended to render a verdict for the net amount. That intent was based on a misunderstanding, but it was nonetheless the exact verdict that the jury had agreed upon. The Court concluded:

> 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.

III. Public Comment on Proposed Amendment to Rule 606(b)

Only two comments were received on the proposed amendment to Rule 606(b). One was positive and one was negative.

Positive Comment

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

Negative Comment

The Committee on the Federal Rules of Evidence of the American College of Trial Lawyers (04-EV-017) opposes the amendment to Rule 606(b). The Committee agrees that the Rule should be amended to resolve a conflict in the case law over the scope of an exception for mistaken jury verdicts. But it does not believe that the language chosen by the proposed amendment is sufficiently clear. The Committee concludes as follows:

> While codifying the universally recognized but unwritten exception to Rule 606(b) for jury mistakes is a good idea, the new rule's exception for "clerical mistakes" is unclear, and even if that term's meaning can be divined by reference to the case law cited by the Advisory Committee, that meaning is not adequately clarified or justified. In addition, it is narrower that the case law upon which the Advisory Committee relies, and is likely to result in further definition through case law.

The Committee suggests that the term "inadvertence, oversight or mistake" should be substituted for "clerical mistake" in the proposed amendment.

Reporter's Response: The College's critique is twofold. First, it argues for a broader definition that would cover cases in which the jurors misunderstood or ignored instructions, and rendered a verdict they thought was one thing and turned out to be something else (as in *Plummer*, supra, where the jury apparently reduced the gross award for comparative negligence, having ignored or misunderstood the instruction that the trial judge was going to do that). Second, it argues that the term "clerical mistake" is not clear enough to capture the limit on juror proof sought to be imposed by the Committee.

Narrow or Broad Exception

As to the College's first argument—that the exception should be broad enough to permit proof of errors resulting from misunderstanding instructions—the ready answer is that the Committee has considered on three separate occasions whether to adopt this broader exception for Rule 606(b). Each time the Committee adhered to its view that the narrower exception is more consistent with the policy of the Rule. The broader exception allows juror proof on the question of jury deliberation, which is exactly what is prohibited by the Rule; it also allows a deeper intrusion into the finality of a jury verdict, again contrary to the policy of the Rule.

Nothing in the public comment or in any intervening case law supports a change from the Committee's consistent position that the narrower view of the differential error exception is preferable in terms of policy and practicality. Certainly the College's position — that the exception should apply whenever there is "inadvertence, oversight or mistake" — opens a wide door into scrutiny of jury deliberations, contrary to the policy of Rule 606(b).

The College argues that the Advisory Committee's rationale for the clerical mistake exception — that it allows an inquiry into what the jury actually decided rather than how it deliberated — does not support such a narrow exception. In its view, the *Plummer* case is also one in which inquiry would be permitted only into what the jury decided and not into how it deliberated. The College elaborates as follows:

> If every member of the *Plummer* jury actually believed that Plaintiff's full damages were $650,000 and should be reduced by 88% to $78,000, why is not inquiry into that fact an inquiry into "what the jury decided" rather than "why it decided as it did"?

The answer of course lies in the premise of the question. *If* every member of the jury actually agreed to the same amount of damages and a reduction for negligence . . . But that is precisely the problem. There is no way to tell from the verdict what everybody believed. Some might have thought Plummer was entitled to $78,000 without regard to negligence; some might have reduced the award for negligence; some might have compromised. An inquiry into how the jurors came to the figure of $78,000 goes straight to the heart of the jurors' deliberative process. This is so because there is

no discrepancy between the verdict actually reached and the number entered on the verdict form. We know *what* the *Plummer* jury decided (a verdict of $78,000) we just don't know why it decided as it did.

In contrast, where the verdict entered on the form is different from that actually reached by the jury, the inquiry is simple and does not intrude into the deliberative process. The question is, what did you decide, not why did you decide as you did? It is for that reason that the narrow exception hews more closely to the protective policy of Rule 606(b).

So to return to the *Plummer* example, the clerical mistake exception would apply if the jury reached a verdict of $78,000 (for whatever reason) and the verdict entered on the form was $7800.00. The matter could be clarified simply by testimony as to what the actual verdict was. The distinction is a fairly obvious one, although the College seems to have missed it.

Does "Clerical Mistake" Adequately Capture the Narrow Exception?

The College also argues that the term "clerical mistake" could be construed to cover mistakes such as those in *Plummer*, where the jury arguably intends to enter one award but in effect enters another due to misunderstood instruction. According to the College, the term "clerical mistake" does not clearly indicate that it applies only to what amounts to a "scrivener's error."

One response to the argument is that nothing in a case like *Plummer* is "clerical" at all. The jury ignored or misunderstood the court's instructions. It possibly entered a figure reduced for negligence when it was not supposed to do that. This is a mistake, but it is not "clerical" in any sense. It did not result from adding up a column of figures incorrectly, or checking the wrong box on the verdict form. It was instead a fundamental misunderstanding of what the jury was supposed to do. This may be "inadvertence, oversight or mistake", using the College's terminology; but it is not in the nature of a clerical mistake.

If the Committee is concerned, however, that the term "clerical mistake" might be construed more broadly to cover errors such as those in *Plummer*, it might consider language that would more substantially narrow the exception for juror proof. For example, if the exception is limited to cases where "the verdict entered on the verdict form erroneously recorded the verdict actually reached by the jury," this would cover the narrow exception as indicated in *Robles*, without the possibility that it could be misused for a broader exception.

Accordingly, for the Committee's consideration, Part Four includes an alternative that would narrow the exception for differential error to cover only those situations in which the verdict entered resulted from a mistranscription of what the jury actually decided.

IV. Alternatives For Rule 606(b) Amendment and Committee Note

A. Proposed Amendment As Released for Public Comment

What follows is the proposed amendment to Rule 606(b) and the Committee Note, unchanged from that released for public comment . The proposal is formatted in accordance with Administrative Office guidelines. If the Committee is satisfied that the term "clerical mistake" is clear enough to cover only those cases in which the verdict entered on the form mistakenly reported the verdict, then this version can be forwarded to the Standing Committee.

PROPOSED AMENDMENT TO THE FEDERAL RULES OF EVIDENCE*

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. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry into validity of verdict or indictment. — Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith; ~~, except that~~ But a juror may testify ~~on the question~~ about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) ~~or~~ whether any outside influence was improperly brought to bear upon any juror, or (3) whether the verdict reported is the result of a clerical mistake. ~~Nor may a~~ A juror's affidavit

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

or evidence of any statement by the juror ~~concerning~~ may not be received on a matter about which the juror would be precluded from testifying ~~be received for these purposes~~.

Committee Note

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

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

which is forbidden by the rule."); *Robles v. Exxon Corp.*, 862 F.2d 1201, 1208 (5th Cir. 1989) ("the alleged error here goes to the substance of what the jury was asked to decide, necessarily implicating the jury's mental processes insofar as it questions the jury's understanding of the court's instructions and application of those instructions to the facts of the case"). Thus, the "clerical mistake" exception to the Rule is limited to cases such as "where the jury foreperson wrote down, in response to an interrogatory, a number different from that agreed upon by the jury, or mistakenly stated that the defendant was 'guilty' when the jury had actually agreed that the defendant was not guilty." *Id.*

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

CHANGES MADE AFTER PUBLICATION AND COMMENTS

No changes were made from the proposal as released for public comment.

SUMMARY OF PUBLIC COMMENTS

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

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

B. Exception For Inaccurate Transcription of the Verdict Reached by the Jury

What follows is an alternative to the proposed amendment released for public comment, that purports to capture the narrow exception in terms of a mistranscription of the verdict actually reached by the jury—which is the example given in *Robles*.

PROPOSED AMENDMENT TO THE FEDERAL RULES OF EVIDENCE*

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. 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~~

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

~~the question~~ about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) ~~or~~ whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. ~~Nor may a~~ A juror's affidavit or evidence of any statement by the juror ~~concerning~~ may not be received on a matter about which the juror would be precluded from testifying ~~be received for these purposes~~.

Committee Note

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

278 (S.D.N.Y. 2001) (noting that Rule 606(b) has been silent regarding inquiries designed to confirm the accuracy of a verdict).

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

interrogatory, a number different from that agreed upon by the jury, or mistakenly stated that the defendant was 'guilty' when the jury had actually agreed that the defendant was not guilty." *Id.*

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

CHANGES MADE AFTER PUBLICATION AND COMMENTS

Based on public comment, the exception established in the amendment was changed from one permitting proof of a "clerical mistake" to one permitting proof that the verdict entered on the form resulted from an error in entering the verdict onto the verdict form.

SUMMARY OF PUBLIC COMMENTS

The Federal Magistrate Judges Association (04-EV-007) supports the proposed amendment. It notes that the amendment "addresses the incongruity between the Rule and case law" and that by

limiting the exception to clerical error, it "preserves the sanctity of jury deliberations and the finality of jury verdicts." The Association notes that the proposed amendment does not prevent the court "from polling the jury and taking steps to remedy any obvious errors evidence from that poll."

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

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Memorandum To: Advisory Committee on Evidence Rules
From: Dan Capra, Reporter
Re: Proposal to amend Rule 609(a)(2): Final Committee Action
Date: April 2, 2005

At its Spring 2004 meeting the Evidence Rules Committee approved an amendment to Rule 609(a)—the Rule permitting impeachment of witnesses with certain prior convictions. The Standing Committee released the proposal for public comment. At this Committee meeting, the Committee must decide whether to recommend to the Standing Committee that the proposed amendment to Rule 609(a) be referred to the Judicial Conference for its approval. If no objections are rendered through the rest of the rulemaking process, the proposed amendment would become effective on December 1, 2006.

The possible need for amendment of Rule 609(a) arises from a longstanding disagreement among the courts on the proper method for determining whether a proffered conviction "involved dishonesty or false statement" within the meaning of Rule 609(a)(2). If a witness's conviction falls within Rule 609(a)(2) it is automatically admissible to impeach his character for truthfulness. In contrast, if the conviction falls within Rule 609(a)(1) because it does not involve dishonesty or false statement, then it is admissible to impeach the witness only if 1) it is a felony and 2) it satisfies the balancing tests of probative value and prejudicial effect mandated by that Rule. So the question of whether a conviction is covered by (a)(2) rather than (a)(1) can affect the evidentiary outcome in both civil and criminal actions.

This memorandum is in four parts. Part one sets forth the existing Rule, and the proposed amendment to the Rule and Committee Note. Part two sets forth the rationale for the amendment and summarizes the Committee's work on the amendment as well as the relevant case law. Part three addresses the public comment on the proposal. Part four sets out, in final form, the proposed amendment for final Committee consideration, as well as a drafting alternative that responds to the public comment.

I. The Proposed Amendment to Rule 609(a)

The Existing Rule

Rule 609(a) currently provides 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.

Reporter's Note: 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.

* * * * *

Reporter's Note: 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 otherwise admissible convictions can be offered 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:

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 involving 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 pre-amendment 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 non-offering 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).

The Proposed Amendment and Committee Note Released for Public Comment:

Rule 609. Impeachment by Evidence of Conviction of Crime

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

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

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

(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.

The Committee Note released for public comment reads as follows:

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

This amendment is meant to give effect to the legislative intent to limit the convictions that are automatically admissible under subsection (a)(2). The Conference Committee provided that by "dishonesty and false statement" it meant "crimes such as perjury, subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the [witness's] propensity to testify truthfully." Historically, offenses classified as *crimina falsi* have included only those crimes in which the ultimate criminal act was itself an act of deceit. *See* Green, *Deceit and the Classification of Crimes: Federal Rule of Evidence 609(a)(2) and the Origins of* Crimen Falsi, 90 J. Crim. L. & Criminology 1087 (2000).

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

The amendment also requires that the proponent have ready proof of the nature of the conviction. Ordinarily, the elements of the crime will indicate whether it is one of dishonesty or false statement. Where the deceitful nature of the crime is not apparent from the statute and the face of the judgment – as, for example, where the conviction simply records a finding

of guilt for a statutory offense that does not reference deceit expressly – a proponent may offer information such as an indictment, a statement of admitted facts, or jury instructions to show that the witness was necessarily convicted of a crime of dishonesty or false statement. *Cf. Taylor v. United States*, 495 U.S. 575, 602 (1990) (providing that a trial court may look to a charging instrument or jury instructions to ascertain the nature of a prior offense where the statute is insufficiently clear on its face). But the amendment does not contemplate a "mini-trial" in which the court plumbs the record of the previous proceeding to determine whether the crime was in the nature of *crimen falsi.*

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

II. Rationale for Amendment and Committee Deliberations

The Reporter's research on Rule 609(a) indicated that the courts are in a longstanding conflict on how to determine that a certain conviction "involved dishonesty or false statement" within Rule 609(a)(2). The basic conflict is that some courts determine "dishonesty or false statement" solely by looking at the elements of the conviction for which the witness was found guilty. If none of the elements require proof of falsity or deceit beyond a reasonable doubt, then the conviction must be admitted under Rule 609(a)(1) or not at all. This is the narrow view of Rule 609(a)(2). Other courts look behind the conviction to determine whether the witness committed an act of dishonesty or false statement before or after committing the crime. Under this view, for example, a witness convicted of murder would have committed a crime involving dishonesty or false statement if he lied about the crime, either before or after committing it.

After discussion at the Fall 2003 meeting, Committee members unanimously agreed that Rule 609(a)(2) should be amended to resolve the dispute in the courts over how to determine whether a conviction involves dishonesty or false statement. The Committee concluded that an amendment would resolve an important practical issue on which the circuits are clearly divided— and have been so divided for more than 15 years.

The Committee was further unanimously in favor of an "elements" definition of crimes involving dishonesty or false statement. Committee members noted that requiring the judge to look behind the conviction to the underlying facts could (and often does) impose a burden on trial judges. Moreover, the inquiry can be indefinite because it may be difficult to determine, simply from a guilty verdict, just what facts of dishonesty or false statement the jury might have found when the witness

was convicted. Most importantly, whatever additional probative value there might be in a crime committed deceitfully, it is lost on the jury assessing the witness's credibility when the elements of the crime do not in fact require proof of dishonesty or false statement. This is because when the conviction is introduced to impeach the witness, the jury is told only about the conviction, not about its underlying facts.

Committee members noted that the "elements" approach to defining crimes that fall within Rule 609(a)(2) is litigant-neutral, in that it would apply to all witnesses in all cases. It was also noted that this "elements" approach was embraced in the latest version of the Uniform Rules of Evidence after extensive research and discussion by the Uniform Rules Drafting Committee. Furthermore, the "elements" approach is consistent with the limited breadth of Rule 609(a)(2) that was described in the Committee Note to the 1990 amendment to Rule 609.

The Committee also found that an "elements" test for Rule 609(a)(2) would be sound policy. Because almost every criminal act is in some broad sense a dishonest act in either preparation or execution, a broad construction of Rule 609(a)(2) would swallow up Rule 609(a)(1) and would lead to mandatory admission of almost all prior convictions, even though many of these convictions would have slight probative value as to the witness' character for truthfulness and would carry significant prejudicial effect. Given the predominance of the Rule 403 balancing approach throughout the Federal Rules and the general grant of discretion that the Rules provide to trial judges, it makes sense to limit where possible a rule that mandates admission and prohibits the use of judicial discretion and balancing.

The Committee considered whether the full impeachment of a witness would be impaired unduly by a rule limiting Rule 609(a)(2) to convictions in which dishonesty or false statement was an element of the crime charged against the witness. After extensive investigation and discussion, it concluded that an "elements" test for Rule 609(a)(2) would not unduly impair the impeachment of witnesses. First, if a crime not involving false statement as an element (e.g., murder or drug dealing) were inadmissible under Rule 609(a)(2), it will usually be admitted under the balancing test of Rule 609(a)(1) anyway; moreover, if such a crime *were* committed in a deceitful manner, the underlying facts of deceit would be a subject of inquiry under Rule 608. Thus, the costs of an "elements" approach are low as it would not result in an unjustified loss of evidence pertinent to credibility; and its benefits in promoting judicial efficiency are obvious.

A vote was taken in 2003 and the Committee tentatively agreed to propose an amendment to Rule 609(a)(2) that would use an "elements" approach to define the crimes that are automatically admissible for impeachment under Rule 609(a)(2). The Committee also agreed that if Rule 609(a) were to be amended, it would be useful to include a minor change to the opening clause of that Rule. Currently, the Rule purports to apply to convictions offered for "the purpose of attacking the credibility of a witness." As with Rule 608 before it was amended in 2003, the use of the term "credibility" is overbroad. Impeachment with a prior conviction under Rule 609(a) is an attack on the witness's *character for truthfulness*. As such it is distinct from other attacks on credibility, e.g.,

contradiction and bias. Accordingly, any amendment to Rule 609(a) should substitute the term "character for truthfulness" for the overbroad term "credibility."

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

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

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

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

methodology for determining when a crime is automatically admitted under Rule 609(a)(2); 2) to avoid a mini-trial into the facts supporting a conviction; and 3) to limit Rule 609(a)(2) to those crimes that are especially probative of the witness's character for untruthfulness.

The Committee resolved to allow the Reporter and the Department of Justice representatives to work on compromise language that would accomplish the goals on which everyone agreed. This work was done overnight and submitted for the Committee's review on the second day of the Spring 2004 meeting. The compromise would permit automatic impeachment when an element of the crime required proof of deceit; but it would go somewhat further and permit automatic impeachment if an underlying act of deceit could be "readily determined" from such information as the charging instrument.

Some Committee members expressed concern that the language might be too vague and might permit the mini-trial that the Committee sought to avoid. But other members pointed out that the burden is on the proffering party to show the underlying facts that readily indicate deceit, and that the term "readily available" provides the court with authority to terminate an inquiry it finds too indefinite or burdensome. Committee members also noted that the new draft deletes the indefinite term that identified the crime as one that "involved" dishonesty or false statement. Under the new draft, the crime actually must be a crime of dishonesty or false statement; it cannot be admitted under Rule 609(a)(2) merely because there was some act of deceit in committing the crime.

Committee members eventually agreed that the new draft captured the goals of the Committee in proposing an amendment to Rule 609(a)(2): it would rectify a conflict, prevent a mini-trial, and permit automatic admissibility for only those crimes that are especially probative of the witness's character for untruthfulness. Eventually the Committee voted unanimously to release for public comment an amendment to Rule 609(a)(2) that would limit automatic impeachment to convictions for crimes where it can readily be determined that the crime was one of dishonesty or false statement.

Case Law and Commentary on the Proper Method for Determining Whether a Conviction "Involved Dishonesty or False Statement" Under 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 whether Rule 609(a)(2) covers crimes that were committed in a dishonest manner, even if the elements of the crime do not require proof of dishonesty or false statement.

Looking At the Facts Underlying the Conviction

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 or false statement).

Second Circuit

Blake v. Coughlin, 2000 WL 233550 (2nd Cir.) (murder conviction automatically 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 acts of 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 may 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). 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. Furthermore, several state versions of Rule 609(a)(2) adopt an "elements" test, including Vermont and Michigan.

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 charging variances and 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. *See 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); *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). The courts have consistently held that evidence of the conviction is limited to "the crime charged, the date, and the disposition." *Gora v. Costa,* 971 F.2d 1325, 1330 (7th Cir. 1992) ("it is error to elicit any further information for impeachment purposes"). Consequently, whatever greater probative value there is in the manner in which 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 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 can be an indeterminate inquiry for a trial court to decide retrospectively just what facts actually led to the witness' conviction. 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.

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).

III. Public Comment

The Committee received six public comments on the proposed amendment to Rule 609(a)(2). One was positive and five were negative.

Positive Comment:

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

Negative Comments

Hon. Jack B. Weinstein (04-EV-002) opposes the amendment to Rule 609(a). Judge Weinstein questions the fairness of expanding a conviction "beyond its operative elements." He contends that the amendment will "seriously disadvantage defendants in some cases" and that it seems based on "a bad policy and theory."

Professor Peter Nicolas (04-EV-010) contends that "notwithstanding the concerns expressed by the Justice Department," the Committee's "initial impulse — to draft an amendment that focused on the elements of the conviction — was a sounder approach than that followed in the proposed amendment." Professor Nicholas contends that "courts will no doubt differ on the meaning of the phrase 'readily can be determined,' leading to inconsistent application of the rule." He also argues that even under the stricter "elements" test, the cost is ordinarily not exclusion of the conviction, "but merely the benefit of automatic admissibility." He concludes that if a crime somehow involved an act of dishonesty or false statement (but not an element), it is very likely to be admissible under the balancing test of Rule 609(a)(1).

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

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

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

Response to Negative Comments: The negative comments all basically say the same thing—the Committee was right the first time in proposing an elements test; and the "readily can be determined" test is vague, unnecessary to protect the government, and it will be difficult to administer.

The arguments in favor of an elements test, as compared to a "readily determined" test, have already been set out in this memo and in the public comment, but I will set them out quickly here.

1. The elements test is easy to apply; the court looks only to the elements of the crime for which the witness was convicted.

2. The elements test limits the breadth of Rule 609(a)(2); and this is appropriate because Rule 609(a)(2) is an extreme rule, contrary to the basic premise of the Evidence Rules — which is to give judges discretion to balance probative value and prejudicial effect.

3. The elements test focuses on the probative value of the conviction as it will be presented to the jury. Because the jury hears only the elements of the conviction, and not the underlying facts, it arguably makes little sense to rule that a conviction is probative enough for automatic admissibility because of the underlying facts.

4. The elements test does not result in much cost to the proponent, because most convictions that do not fit under Rule 609(a)(2) are going to be admissible anyway under the balancing test of Rule 609(a)(1) (with the exception of misdemeanors).

As to this fourth point, it is borne out by the case law under Rule 609(a)(1). The reported cases indicate that virtually all convictions that are offered under Rule 609(a)(1) are found properly admitted, even where the convictions appear only marginally probative as to credibility. Here are some examples:

United States v. Martinez-Martinez, 369 F.3d 1076 (9th Cir. 2004) (conviction for possession of marijuana for sale was properly admitted under Rule 609(a)(1) to impeach an accused in a prosecution for attempted illegal reentry into the United States).

United States v. Gant, 396 F.3d 906 (7th Cir. 2005) (conviction for possession of a controlled substance with intent to distribute was properly admitted under Rule 609(a)(1) to impeach an accused in a prosecution for being a felon in possession of a firearm).

United States v. Alexander, 48 F.3d 1477 (9th Cir. 1995) (robbery conviction was properly admitted under Rule 609(a)(1) to impeach an accused charged with bank robbery, even though the court recognized that the similarity between the prior crime and the charged crime weighed in favor of exclusion).

United States v. Levine, 700 F.2d 1176 (8th Cir. 1983) (prior conviction for possession of stolen mail was properly admitted to impeach an accused charged with mail theft)

United States v. Hernandez, 106 F.3d 737 (7th Cir. 1997) (in a prosecution for kidnapping related to a drug transaction, there was no error in admitting a prior conviction for possession of cocaine to impeach the accused).

United States v. Shaw, 701 F.2d 367 (5th Cir. 1983) (no error when the defendant, charged with murder, was impeached with a prior rape conviction).

United States v. Moore, 917 F.2d 215 (6th Cir. 1990) (defendant charged with armed robbery was properly impeached with a prior conviction for armed robbery).

In sum, it does not appear that the government has had a difficult time in admitting, under Rule 609(a)(1), just about any conviction it wants. It is notable that all of the above cases involved impeachment of criminal defendants, even though criminal defendants get the "benefit" of a more exclusionary balancing test under Rule 609(a)(1) — the probative value must outweigh the prejudice. And yet even under this "protective" test, criminal defendants have been impeached with convictions that bear little if at all on dishonesty or false statement, as well as with convictions that appear to be substantially prejudicial because of their similarity to the crime with which the defendant is charged. It follows *a fortiori* that there is little trouble in impeaching other witnesses under Rule 609(a)(1), because admissibility as to those witnesses is governed by the less protective standard of Rule 403.

Ultimately it is for the Committee to determine whether an elements test for Rule 609(a)(1) is more appropriate than the "readily can be determined" test that was issued for public comment. In answering that question, it is relevant to consider whether the government will suffer a substantial loss of probative impeachment evidence if required to proffer a conviction under Rule 609(a)(1) rather than Rule 609(a)(2). Balanced against this consideration is the fact that the elements test is, without doubt, easier to apply than a test that requires the court to go behind the face of the conviction, even if the inquiry is limited to that which readily can be determined.

IV. Alternatives for Amendment to Rule 609(a)

In light of the public comment, I have set forth two alternatives for the Committee's final proposal of an amendment to Rule 609(a). The first alternative is that which was issued for public comment. The second alternative is to define Rule 609(a)(2) convictions by their elements. The alternatives begin on the next page. The proposals are both formatted in accordance with Administrative Office guidelines.

Next page begins the proposed amendment Rule 609 as issued for public comment

PROPOSED AMENDMENT TO THE FEDERAL RULES OF EVIDENCE*

Rule 609. Impeachment by Evidence of Conviction of Crime

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

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

(2) evidence that any witness has been convicted of a crime that readily can be determined to have been a crime of

*New material is underlined; matter to be omitted is lined through.

dishonesty or false statement 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~~ that was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

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

in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal. — The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

Committee Note

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

This amendment is meant to give effect to the legislative intent to limit the convictions that are automatically admissible under subsection (a)(2). The Conference Committee provided that by "dishonesty and false statement" it meant "crimes such as perjury, subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of *crimen falsi*, the commission of which involves some element of

deceit, untruthfulness, or falsification bearing on the [witness's] propensity to testify truthfully." Historically, offenses classified as *crimina falsi* have included only those crimes in which the ultimate criminal act was itself an act of deceit. *See* Green, *Deceit and the Classification of Crimes: Federal Rule of Evidence 609(a)(2) and the Origins of* Crimen Falsi, 90 J. Crim. L. & Criminology 1087 (2000).

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

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

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

CHANGES MADE AFTER PUBLICATION AND COMMENTS

No changes were made from the proposal as released for public comment.

SUMMARY OF PUBLIC COMMENTS

Hon. Jack B. Weinstein (04-EV-002) opposes the amendment to Rule 609(a). Judge Weinstein questions the fairness of expanding a conviction "beyond its operative elements." He contends that the amendment will "seriously disadvantage defendants in some cases" and that it seems based on "a bad policy and theory."

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

Professor Peter Nicolas (04-EV-010) contends that "notwithstanding the concerns expressed by the Justice Department," the Committee's "initial impulse — to draft an amendment that focused on the elements of the conviction — was a sounder approach than that followed in the proposed amendment." Professor Nicholas contends that "courts will no doubt differ on the meaning of the phrase 'readily can be determined,' leading to inconsistent application of the rule." He also argues that even under the stricter "elements" test, the cost is ordinarily not exclusion, "but merely the benefit of automatic admissibility." He concludes that if a crime somehow involved an act of

dishonesty or false statement (but not an element), it is very likely to be admissible under the balancing test of Rule 609(a)(1).

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

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

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

Advisory Committee on Evidence Rules Proposed Amendment: Rule 609(a): Elements Test

PROPOSED AMENDMENT TO THE FEDERAL RULES OF EVIDENCE*

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(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~~

*New material is underlined; matter to be omitted is lined through.

~~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.

Committee Note

The amendment provides that a conviction is not automatically admitted under Rule 609(a)(2) unless a statutory element of the crime for which the witness was convicted necessarily requires proof beyond a reasonable doubt that the witness committed an act of dishonesty or false statement. The Rule prohibits the court from "automatically" admitting a conviction 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). *See also* Uniform Rules of Evidence, Rule 609(a)(2) (adopting an "elements" approach). 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., 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 was not applicable where the conviction was offered for purposes of contradiction). The use of the term "credibility" in subsection (d) is retained, however, as that subdivision is intended to govern the use of a juvenile adjudication for any type of impeachment.

CHANGES MADE AFTER PUBLICATION AND COMMENTS

In light of the public comment, the proposed amendment was changed to define Rule 609(a)(2) crimes by the statutory elements of the conviction.

SUMMARY OF PUBLIC COMMENTS

Hon. Jack B. Weinstein (04-EV-002) opposes the proposed amendment to Rule 609(a), as it was released for public comment. Judge Weinstein questioned the fairness of expanding a conviction "beyond its operative elements." He contended that the amendment would "seriously disadvantage defendants in some cases" and that it was based on "a bad policy and theory."

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

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

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

Privilege Project

Attorney-Client Privilege – Crime-Fraud Exception– Future Developments Section

Several issues remain to be resolved in the federal courts with regard to the crime-fraud exception.

A. The Need for the Client to have Carried Out the Crime or Fraud

Most federal courts have had little trouble finding the application of the crime-fraud exception regardless of whether the crime or fraud has ultimately occurred. *See United States v. Collis,* 128 F.3d 313, 320 (6th Cir. 1997) (crime or fraud need only have been the objective of the client); *In re Grand Jury Proceedings,* 87 F.3d 377, 381 (9th Cir. 1996) (since government need not prove that the crimes succeeded, it is not required to prove that the communications in fact helped the targets commit the crime); *In re Grand Jury Subpoena Duces Tecum (Marc Rich & Co., A.G.),* 731 F.2d 1032, 1039 (2d Cir. 1984) ("the client need not have succeeded in his criminal or fraudulent scheme for the exception to apply;" court finds documents unprivileged without resolving the issue of whether a crime or fraud had in fact been committed); *In re Rigby,* 199 B.R. 358, 361-62 (Bankr. E.D. Tex. 1995) (finding that "whether or not there has been an actual harm caused . . . is irrelevant. 'No harm, no foul' . . . is not the standard. It is the intent of the client that controls and not the success of the fraudulent act").

The issue seems to be in doubt only in the District of Columbia Circuit. In *In re Sealed Case,* 107 F.3d 46, 49 (D.C. Cir. 1997), the court stated that the client must have carried out the crime or fraud, citing the Comment to the Restatement arguing that to hold otherwise would "penalize a client for doing what the privilege is designed to encourage – consulting a lawyer for the purpose of achieving law compliance." (Restatement of the Law Governing Lawyers § 142, comment c at 461 (Proposed Final Draft No. 1, 1996)).[1]

It should be noted that in *In re Sealed Case,* there was no question that the crime had in fact been committed by a corporate vice-president. The only issue was whether the corporation itself had consulted its counsel for a criminal purpose and the court found the evidence

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[1]The Comment to the Restatement section continues:
By the same token, lawyers might be discouraged from giving full and candid advice to clients about legally questionable courses of action. On the other hand, a client may consult a lawyer about a matter that constitutes a criminal conspiracy but that is later frustrated – and in that sense, not later accomplished . . . – or similarly, about a criminal attempt. Such a crime is within the exception stated in the Section if its elements are established.

insufficient to support the invocation of the crime-fraud exception under these circumstances.

The dicta in *In re Sealed Case* has been repeated only in the D.C. Circuit. *See In re Sealed Case,* 223 F.3d 775 (D. C. Cir. 2000)*; Neuder v. Battelle Pac. Northwest Nat'l Lab.,* 194 F.R.D. 289 (D.D.C.2000).

The current restatement continues the statement of the rule referred to by the court in *In re Sealed Case* and repeats the comment language. The applicable section is now The Restatement (Third) of the Law Governing Lawyers § 82, which states:

> The attorney-client privilege does not apply to a communication occurring when a client:
> (a) consults a lawyer for the purpose, *later accomplished*, of obtaining assistance to engage in a crime or fraud or aiding a third person to do so, or
> (b) regardless of the client's purpose at the time of consultation uses the lawyer's advice or other services to engage in or assist a crime or fraud. (Emphasis added)

Uniform Rule of Evidence 502(d)(1) contains no requirement that the criminal purpose have been accomplished. The Rule provides that there is no privilege:

> (1) if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known was a crime or fraud;

The reasoning of the Restatement and of the court in *In re Sealed Case* is not without merit. Choices involving the attorney-client privilege are often based to an especially large extent on the balancing of policies. In the case of the privilege, the policies are the promotion of a free flow of information between an attorney and a client as opposed to the need for information in the pursuit of justice. One can make an argument that protecting communications where an attorney has talked the client out of a criminal act is a worthy goal, perhaps worthy enough to protect the initial communication even if made with criminal intent.

Nevertheless, the majority of the decisions on the question, rejecting a requirement that the criminal purpose have been accomplished, would seem likely to be the forerunner of a unanimous view by the federal courts. The crime-fraud exception exists for several reasons, not the least of which is that the client is not seeking professional service, but is in essence asking the lawyer to participate in a conspiracy. *See* John W. Strong, et. al, McCormick on Evidence § 95 at 380 (5th ed. 1999). Participation in a conspiracy does not require the ultimate completion of the act. The agreement of the parties and an intent to achieve a criminal objective is all that is required. *See* Wayne R. LaFave, Substantive Criminal Law § 12.2 (2004). The public policy that finds it a perversion of the privilege to extend it to the client who seeks advice to aid him in carrying out an illegal or fraudulent scheme would apply even though the client decides even with the advice of counsel not to commit the act.

B. Determining the Existence of the Crime-Fraud Exception[2]

Perhaps the most difficult issues facing the federal courts with regard to the crime-fraud exception to the attorney-client privilege involve the procedure and standards for determining its application. Although the standard for ordering an *in camera* review of allegedly privileged documents was clearly articulated in *United States v. Zolin,* 491 U.S. 554 (1989), questions and conflicts exist among the circuits with regard to several other important matters. Included in the issues not fully or consistently resolved by the case law are: 1) whether an *in camera* review is required or whether the exception can be applied without such a review; 2) the ultimate showing necessary to vitiate the privilege; 3) whether and how the claimed privilege holder may rebut a prima facie showing that the communications were within the exception; 4) what evidence may be considered by the court in reaching either its threshold or ultimate decision; 5) how the court may discern the client's intent to commit a crime or fraud; and 6) whether the exception applies only to words that are themselves in furtherance of a crime or fraud or whether it applies to the entire conversation or document in which the words were spoken or appear.

The uncertainty and the seeming ease with which the exception may be used to abrogate the privilege have been of concern, especially to the criminal defense bar. The procedure for applying the exception came under particularly strong attack in a report of the American College of Trial Lawyers, *The Erosion of the Attorney-Client Privilege and Work Product Doctrine in Federal Criminal Investigations* 27 (2002), where it is argued:

> The current rules allow prosecutors to obtain an *in camera* review based on unsubstantiated information that they may have collected through an unlawful intrusion into the privilege, without giving defendants an opportunity to challenge the reliability or validity of that evidence.

The report quotes with approval from H. Lowell Brown, *The Crime-Fraud Exception to the Attorney-Client Privilege in the Context of Corporate Counseling,* 87 Ky. L. J. 1191, 1259-60 (1999):

> The absence of notice of the basis of the crime-fraud claim further aggravates the inability of the privilege holder to meaningfully respond and to preserve the privilege. The court is also deprived of the robust factual development and legal argument necessary for an informed judicial decision.

As will be discussed, the case law seems to justify some concern. Whether, all factors being considered, the procedure needs changing is a question to be resolved elsewhere.

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[2] I wish to acknowledge the excellent research and analysis done on this section of this report by Robert Jason Herndon, a third year law student at the University of North Carolina School of Law.

The threshold determination for *in camera* review

The Supreme Court in *Zolin* required a party seeking to apply the exception to show "a factual basis adequate to support a good faith belief by a reasonable person that *in camera* review of the materials may reveal evidence to establish that the crime-fraud exception applies." 491 U.S. at 572. Not surprisingly, virtually all circuits adopt this language verbatim. *See, e.g., In re Sealed Case*, 107 F.3d 46 (D.C. Cir. 1997); *United States v. Edgar*, 82 F.3d 499 (1st Cir. 1996); *Haines v. Liggett Group, Inc.*, 975 F.2d 81 (3d Cir. 1991); *In re Grand Jury Proceedings, Thursday Special Grand Jury September Term, 1991,* 33 F.3d 342 (4th Cir. 1994); *In re Grand Jury Subpoena,* 190 F.3d 375 (5th Cir. 1999); *In re BankAmerica Corp. Secs. Litig.*, 270 F.3d 639 (8th Cir. 2001); *United States v. Chen,* 88 F.3d 1495 (9th Cir. 1996); *Motley v. Marathon Oil Co.*, 71 F.3d 1547 (10th Cir. 1995); *Cox v. Administrator United States Steel & Carnegie,* 17 F.3d 1386 (11th Cir. 1994). Only the Second Circuit varies the formulation, describing the threshold showing as "a factual basis [that] must strike 'a prudent person' as constituting 'a reasonable basis to suspect the perpetration or attempted perpetration of a crime or fraud, and that the communications were in furtherance thereof.'" *United States v. Jacobs,* 117 F.3d 82, 87 (2d Cir. 1997) (quoting *In re John Doe,* 13 F.3d 633, 637 (2d Cir. 1994)).

This threshold burden has been described as "relatively low to discourage abuse of privilege and to ensure that mere assertions of the attorney-client privilege will not become sacrosanct." *In re Grand Jury Investigation,* 974 F.2d 1068, 1072 (9th Cir. 1992). However, other courts have noted that the threshold is not so low as to allow the mere allegation of a crime or fraud to vitiate the privilege and thus "discourage many would-be clients from consulting an attorney about entirely legitimate legal dilemmas." *In re Grand Jury Proceedings (Corporation),* 87 F.3d 377, 381 (9th Cir. 1996). The burden requires that the proponent of the exception make a "specific showing that a particular document or communication was made in furtherance of the client's alleged crime or fraud." *In re Bankamerica Corp. Secs. Litig.,* 270 F.3d 639, 642 (8th Cir. 2001). The burden required by the Court in *Zolin* is seen as striking "a balance between the intrusion imposed upon the privilege by the [*in camera*] review process and the likelihood that *in camera* review may reveal evidence to establish the applicability of the crime-fraud exception." *In re Grand Jury Investigation,* 974 F.2d 1068, 1072 (9th Cir. 1992) (citing *Zolin*, 491 U.S. at 572).

Is *in camera* review required?

Zolin established that, once the threshold showing is made, the decision to engage in *in camera* review rests in the "sound discretion of the district court." 491 U.S. at 572. The Court added:

> The court should make that decision in light of the facts and circumstances of the particular case, including, among other things, the volume of materials the district court has been asked to review, the relative importance to the case of the alleged privileged information, and the likelihood that the evidence produced through *in camera* review, together with other available evidence then before the court, will establish that the crime-fraud exception does apply. The district court is also free to defer its *in camera* review if it concludes that additional evidence in support of the crime-fraud exception may be available that is *not* allegedly privileged, and that production of additional evidence will not unduly disrupt or delay the proceedings. *Id.*

Zolin does not consider the question of whether *in camera* review is *required* before a decision is made to apply the crime-fraud exception. There seems to be only one Court of Appeals opinion expressly dealing with a case in which the crime-fraud exception was applied without the court requiring an *in camera* inspection. In *In re Bankamerica Corp. Secs. Litig.*, 270 F.3d 639, 644 (8th Cir. 2001), the court reversed a decision in which the district court had found the crime-fraud exception applicable without an *in camera* review of the documents. The court stated that it had found no case "in which this court affirmed an order to produce documents under the crime-fraud exception where the district court did not first review the documents *in camera*." The court added:

> Requiring a threshold showing of facts supporting the crime-fraud exception followed by *in camera* review of the privileged materials helps ensure that legitimate communications by corporations seeking legal advice as to their disclosure obligations under the federal securities laws are not deterred by the risk of compelled disclosure under the crime-fraud exception. Therefore, district courts should be highly reluctant to order disclosure without conducting an *in camera* review of allegedly privileged materials. In this case, given the above-described shortcomings of plaintiffs' threshold showing, the district court abused its discretion in ordering disclosure without *in camera* review of the eleven documents. *Id.*

The facts in the *Bankamerica Corp.* case were such that the application of the crime-fraud exception was in doubt. Whether an *in camera* review would be required in the face of clear evidence of the exception's applicability is another question.

The ultimate showing required

Once the threshold showing has been made and *in camera* review undertaken, what test is to be applied by the court in determining the applicability of the exception – the ultimate showing? The court in *Zolin* expressly declined to address that issue as not being before it. *Zolin,* 491 U.S. at 564-65.

A commonly cited phrasing of the ultimate showing was articulated in *In re Grand Jury Proceedings,* 183 F.3d 71, 75 (1999):

> [T]he party invoking [the crime-fraud exception] must make a prima facie showing: (1) that the client was engaged in (or was planning) criminal or fraudulent activity when the attorney-client communications took place; and (2) that the communications were intended by the client to facilitate or conceal the criminal or fraudulent activity.

As noted by the Supreme Court in *Zolin,* the term "*prima facie,*" although commonly used to describe the ultimate showing for the application of the crime-fraud exception, is confusing when used in this context. *See Zolin,* 491 U.S. at 565, n. 7. The more common use of the term "*prima facie*" is to connote a shifting or at most a preliminary satisfaction of a burden of going forward, rather than a determination of an issue. Yet, as used in this context, the showing is sufficient to dispel the privilege altogether without affording the client an opportunity to rebut the *prima facie* showing. *Id. (citing* Note, 51 Brooklyn L. Rev. 913, 918-19 (1985)). The Court declined to resolve the confusion and the use of the term persists. *See, e.g., United States v. Davis,* 1 F.3d 606, 609 (7th Cir. 1993); *United States v. Chen,* 99 F.3d 1495, 1503 (9th Cir. 1996); *In re Sealed Case,* 107 F.3d 46, 50 (D.C. Cir. 1997).

How much proof is sufficient to establish such a *prima facie* case? While it is clear that the standard is not "beyond a reasonable doubt," *see, e.g., United States v. Chen*, 99 F.3d 1495, 1503 (9th Cir. 1996) ("[P]roof beyond a reasonable doubt is not necessary to justify application of the crime fraud exception."), courts have pondered whether "[i]n terms of the level of proof,...a 'prima facie showing' [is] a preponderance of the evidence, clear and convincing evidence, or something else." *In re Sealed Case*, 107 F.3d 46, 50 (D.C. Cir. 1997).

The burden is less than "clear and convincing evidence" and almost as certainly less than even a "preponderance of the evidence." The Third Circuit, for example, has stated that the ultimate showing "requires presentation of evidence which, if believed by the fact-finder, would be sufficient to support a finding that the elements of the crime-fraud exception were met." *In re Grand Jury Subpoena,* 223 F.3d 213, 217 (3d Cir. 2000). The Seventh Circuit, on the other hand, has described the evidentiary showing necessary to satisfy the ultimate showing burden as "something to give colour to the charge [that the crime-fraud exception applies]; there must be 'prima facie evidence that it has some foundation in fact.'" *United States v. Davis*, 1 F.3d 606, 609 (7th Cir. 1993) (*quoting Matter of Feldberg,* 862 F.2d 622, 625 (7th Cir. 1985)). The Court went on to state that "'prima facie evidence' [does] not mean 'enough to support a verdict in favor of the person making the claim,'" but rather "evidence sufficient 'to require the adverse party, the one with superior access to the evidence and in the best position to explain things, to come forward with that explanation.'" *Id.* Finally, the Court noted that "if the district court finds such an explanation satisfactory 'the privilege remains.'" *Id.*

The Sixth Circuit stated that the ultimate, or prima facie, showing "is the same as that for probable cause--such that 'a prudent person [would] have a reasonable basis to suspect the perpetration of a crime or fraud'--and not as demanding as the 'clear and convincing' threshold." *United States v. Clem,* 2000 U.S. App. LEXIS 6395 at *10 (6th Cir. Mar. 31, 2000). The Ninth Circuit described the ultimate showing burden as requiring evidence creating "'reasonable cause to

believe that the attorney's services were utilized in furtherance of the ongoing unlawful scheme,'"*United States v. Chen*, 99 F.3d 1495, 1503 (9th Cir. 1996) (*quoting In re Grand Jury Proceedings (The Corporation)*, 87 F.3d 377, 381 (9th Cir. 1996)). and then defined "reasonable cause" as "more than suspicion but less than a preponderance of the evidence."

One court sought to review the tests in the various courts, stating in *In re Grand Jury Subpoenas,* 144 F.3d 653, 660 (10th Cir. 1998):

> Although the exact quantum of proof necessary to meet the prima facie standard has not been decided by the Supreme Court, *see Zolin, 491 U.S. at 563-64 & n. 7, 109 S.Ct. 2619,* **several circuits have attempted to define precisely what the standard requires. See, e.g.,** *In re Richard Roe, Inc., 68 F.3d 38, 40 (2d Cir.1995)* **(probable cause to believe a crime or fraud has been committed);** *Haines v. Liggett Group Inc., 975 F.2d 81, 95-96 (3d Cir.1992)* **(evidence that if believed by the fact finder would be sufficient to support a finding that the elements of the crime-fraud exception were met);** *In re International Sys. & Controls Corp. Sec. Litig., 693 F.2d 1235, 1242 (5th Cir.1982)* **(evidence such as will suffice until contradicted and overcome by other evidence);** *United States v. Davis, 1 F.3d 606, 609 (7th Cir.1993)* **(evidence presented by the party seeking application of the exception is sufficient to require the party asserting the privilege to come forward with its own evidence to support the privilege);** *In re Grand Jury Proceedings (Appeal of Corporation), 87 F.3d 377, 381 (9th Cir.1996)* **(reasonable cause to believe attorney was used in furtherance of ongoing scheme);** *In re Grand Jury Investigation (Schroeder), 842 F.2d 1223, 1226 (11th Cir.1987)* **(evidence that if believed by the trier of fact would establish the elements of some violation that was ongoing or about to be committed);** *In re Sealed Case, 107 F.3d 46, 50 (D.C.Cir.1997)* **(evidence that if believed by the trier of fact would establish the elements of an ongoing or imminent crime or fraud). We need not articulate the exact quantum of proof here because under any of these announced standards, the government has made a prima facie showing.**

***See also In re Grand Jury Proceedings (Violette)*, 183 F.3d 71, 78 (1st Cir. 1999) ("the district court's determination that the government carried its burden is unassailable, regardless of which version of the standard applies."); *Intervenor v. United States,* 144 F.3d 653, 660 (10th Cir. 1998) ("We need not articulate the exact quantum of proof here because under any of these announced standards, the government has made a prima facie showing.").**

At some point, the Supreme Court is likely to weigh in on the issue of the ultimate showing establishing what exactly is meant by *prima facie* in this context and how much proof is necessary to satisfy that burden. Until then, each circuit is committed to a test that is at least slightly different from each of its sister circuits.

Rebuttal by the Proponent of the Privilege

At least some of the cases seeking to set a standard of proof for the ultimate application of the crime-fraud privilege assume that once the *prima facie* showing has been made, the proponent of the privilege will have an opportunity to come forward with its own evidence to support the privilege. *See, e.g., United States v. Davis,* 1 F.3d 606, 609 (7th Cir. 1993). The reality is not so clear. Although the courts have recognized that the "crime-fraud standard does seem to contemplate the possibility that the party asserting the privilege may respond with evidence to explain why the vitiating party's evidence is not persuasive," *United States v. Under Seal (In re Grand Jury Proceedings),* 33 F.3d 342, 352 (4th Cir. 1994), whether this opportunity for rebuttal is actually given will probably depend upon the nature of the case and the context of the inquiry. Cases that involve grand jury inquiries are in a different category from those that do not.

Grand jury cases present a unique struggle for the courts, as the ideals of protecting the secrecy of grand jury proceedings on the one hand, and protecting the due process rights of a criminal defendant on the other, come squarely into conflict. When faced with this conflict, the First Circuit stated:

> **The law seems well-settled that, in the context of grand jury proceedings, the government may proffer ex parte the evidence on which it bases its claim that a particular privilege does not apply, and that the court may weigh that evidence, gauge its adequacy, and rule on the claim without affording the putative privilege-holder a right to see the evidence proffered *or an opportunity to rebut it.***

***In re Grand Jury Proceeding (Violette),* 183 F.3d 71, 79 (1st Cir. 1999) (emphasis added) *(Violette* dealt with the crime-fraud exception in the context of the psychotherapist-patient privilege, but relied upon the established law regarding the crime-fraud exception in the realm of attorney-client privilege as the basis for its decision).**

A ruling such as that in the *Violette* case does not translate to an absolute lack of opportunity to ever rebut the prima facie case in a criminal proceeding involving a grand jury. For example, the district court provided the defendant in that case an opportunity to provide argument on why the privilege should not be vitiated. *Violette* 183 F.3d at 73. Rather, the position of the First Circuit was that a defendant does not have the right to see, and therefore specifically rebut, the government's submission in support of the crime-fraud exception *if* that submission warrants protection due to the secret nature of the

grand jury. The Second,[3] Third,[4] Fourth,[5] Eighth ,[6] and Tenth[7] Circuits are in accord with this decision, refusing to require an opportunity to review and rebut evidence presented to establish a prima facie case that the crime-fraud exception applies when confronted with the need to protect the secrecy of grand jury proceedings. *See also In re Grand Jury Proceeding Impounded,* 241 F.3d 308, 318 n9 (3d Cir. 2001) ("Because the need for secrecy in grand jury proceedings prohibits an adversarial proceeding regarding ex parte, *in camera* evidence, *courts may rely exclusively on ex parte materials in finding sufficient prima facie evidence to invoke the crime-fraud exception...*" (emphasis added)).

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[3] *See* John Doe, Inc. v. United States (In re John Doe, Inc.), 13 F.3d 633 (2d Cir. 1994) ("Appellants were thus properly denied access to the sealed affidavit, and *any resultant limit on their ability to rebut the government's submission was of marginal importance* and not violative of due process." *Id.* at 636. (emphasis added)).

[4] *See* In re Grand Jury Proceeding Impounded, 241 F.3d 308, 318 n9 (3d Cir. 2001). The Court stated that "[b]ecause the need for secrecy in grand jury proceedings prohibits an adversarial proceeding regarding ex parte, *in camera* evidence, courts may rely exclusively on ex parte materials in finding sufficient prima facie evidence to invoke the crime-fraud exception." The Court went on to say that our judicial system must place reliance "'on the district court's discretion and appellate review of the exercise of that discretion to ensure that the power of the grand jury is not abused while preserving the secrecy that is a necessary element of the grand jury process.'" *Id.* (*quoting* In re Grand Jury Subpoena, 223 F.3d 213, 219 (3d Cir. 2000)).

[5] *See* United States v. Under Seal (In re Grand Jury Proceedings), 33 F.3d 342, 352-53 (4th Cir. 1994). Faced with the defendant's argument that he should have been allowed access to the *in camera* submission of the government and, following that review, a chance to rebut the evidence, the Court stated that "[h]owever appealing [the argument] may sound, we have [previously] rejected such an argument...the government has the right to preserve the secrecy of its submission because it pertains to an on-going investigation." *Id.* at 353.

[6] *See* In re Grand Jury Subpoena as to C97-216, 187 F.3d 996 (8th Cir. 1999). The district court informed defendant's attorney that the defense "could also file an argument or brief concerning the application of the crime-fraud exception...appellant's counsel did neither." *Id.* at 997. The Eighth Circuit, in response to defendant's argument that he should have been allowed to "inspect and rebut the [ex parte] affidavit," *id.* at 997-98, agreed with the government that there was no error in refusing to allow the defendant access to the ex parte submission. *See id.* at 998.

[7] *See* Intervenor v. United States (In re Grand Jury Subpoenas), 144 F.3d 653 (10th Cir. 1998). The Court stated that "[t]he district court did not abuse its discretion in refusing to allow Intervenor to review the contents of the government's ex parte, *in camera* submission and in refusing to hear rebuttal evidence," *id.* at 663, and went on to note that the district court had in fact "entertained some of counsel's arguments intended to rebut the government's prima facie showing." *Id.*

The problem for the defendants in these grand jury criminal cases is that an opportunity to rebut the government's assertion that the crime-fraud exception applies is severely limited if the court relies solely on material protected as grand jury material, as the court is entitled to do, because the defendant will have no access to the material and, therefore, little or no idea what type of evidence, or the strength of that evidence, he is trying to rebut.

The limitations on rebuttal by the defendant in grand jury inquiries ordinarily do not apply in other criminal cases. For example, the Third Circuit has noted that "[w]here there are no secrecy or confidentiality imperatives...there would seem to be no impediment to permitting the attorney to challenge the government's prima facie evidence, subject also to the Supreme Court's admonition to avoid 'minitrials.'" *In re Grand Jury Proceeding Impounded,* 241 F.3d 308, 318 n9 (3d Cir. 2001). Similarly, the Fourth Circuit has recognized the opportunity for rebuttal envisioned by the crime-fraud exception. *United States v. Under Seal (In re Grand Jury Proceedings),* 33 F.3d 342, 352 (4th Cir. 1994) ("The crime-fraud standard does seem to contemplate the possibility that the party asserting the privilege may respond with evidence to explain why the vitiating party's evidence is not persuasive.").

Civil cases in which the crime-fraud exception arises track the trend of non-grand jury related criminal cases. As with the non-grand jury cases, the lack of secrecy imperatives in most civil cases removes the "impediment to permitting the attorney to challenge the government's prima facie evidence." *In re Grand Jury Proceeding Impounded,* 241 F.3d 308, 318 n9 (3d Cir. 2001) (noting that "[i]n the civil context, we have permitted" the opportunity to challenge the evidence constituting the prima facie case of the crime-fraud exception's applicability). Without the off-setting grand jury concerns, "fundamental concepts of due process require that the party defending the privilege be given the opportunity to be heard, by evidence and argument, at the hearing seeking an exception to the privilege." *Haines v. Liggett Group, Inc.,* 975 F.2d 81, 96 (3d Cir. 1992). The court in *Haines* added that adequate protection of the attorney-client privilege can only be assured "when the district court undertakes a thorough consideration of the issue, *with the assistance of counsel on both sides of the dispute.*" *Id.* (emphasis added) (*citing* Matter of Feldberg, 862 F.2d 622 (7th Cir. 1988)).

Language in Ninth Circuit cases casts some doubt on the uniformity of an approach to be taken in non-grand jury cases. Although the Ninth Circuit cases involve grand jury proceedings, the opinions in those cases seem to reach beyond that context. *In re Grand Jury Proceedings (Doe),* 1993 U.S. App. LEXIS 1247 at *3-4 (9th Cir. Jan. 22, 1993) was an appeal from the district court's refusal to hold "an adversarial evidentiary hearing on whether the crime-fraud exception applie[d] to the information that the government [sought] from Roe's attorney, Doe." After reviewing the case law from its sister circuits, the Ninth Circuit held "that an adversarial minitrial is not required to determine whether the government shows a prima facie foundation for application of the crime-fraud exception." *Id. at *8.* This holding is in line with the decisions of the other circuits. *See, e.g., In re Grand Jury Proceeding Impounded,* 241 F.3d 308, 318 (3d Cir. 2001) ("...subject also to the Supreme Court's admonition to avoid 'minitrials'"); *In re Grand Jury Proceedings (Vargas),* 723 F.2d 1461, 1467 (10th Cir. 1983) (the case cited by

the Ninth Circuit as support for its holding). However, the Court went on to state that while the district court could consider rebuttal evidence, there was no requirement that this be done so long as the district court judge was satisfied that the proponent of the exception had met its burden, adding:

> [I]t is difficult to see how specification of any further requirements [than that the judge may, in his discretion, take evidence from the proponent of the privilege into consideration] could reduce the chance of mistake. *Requiring the district court to hear the client's rebuttal to the government's prima facie proffer would in many cases serve no purpose because the government's proof is clear.* Furthermore, the Supreme Court has cautioned that needless 'procedural delays and detours' in grand jury proceedings frustrate the public's interest in 'fair and expeditious administration of the criminal laws. *Id. at *11* (emphasis added) (*quoting* United States v. R. Enter., Inc., 498 U.S. 292, 298-99 (1991)).

Although the court's remarks could well be limited to the grand jury context, they are also arguably applicable to other situations in both criminal and civil cases. The Ninth Circuit followed this case with *In re Grand Jury Subpoena 92-1 (SJ),* 31 F.3d 826, 830 (9th Cir. 1994), in which the court stated (without reference to *In re Grand Jury Proceedings (Doe),* that while it is not improper for a district court to consider evidence offered by the proponent of the attorney-client privilege, there is no requirement that such a hearing take place.

Evidentiary considerations at each stage of the crime-fraud analysis

Just as the burden place on the proponent of the crime-fraud exception is different at each stage of the two-step analysis, the evidence that may be present at each stage is also different.

a. The threshold inquiry

The rule controlling this difference is found in *Zolin*, where the Court described the evidence that may be used during the threshold showing as "any relevant evidence, lawfully obtained,[8] that has not been adjudicated to be privileged." *United States v. Zolin,* 491 U.S. 554, 575 (1989). Although the proponent of the exception may not use privileged documents, communications, or other materials in making the threshold showing, the *Zolin* court held that "evidence directly but incompletely reflecting the content of the contested communications,

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[8] Although this issue does not appear to arise often, the legality of the proponent's evidence has nevertheless been challenged by some litigants. *See, e.g.*, In re Sealed Case, 162 F.3d 670, 673-74 (D.C. Cir. 1998) (in which Monica Lewinsky challenged as unlawful the obtainment of tape recorded conversations she had with Linda Tripp).

generally will be strong evidence of the subject matter of the communications themselves," *id.* at 573, and that so long as the material submitted by the proponent of the exception "has not itself been determined to be privileged, its exclusion does not serve the policies which underlie the attorney-client privilege," *id.* at 574 n.12. and the material may be used "not only in the pursuit of in camera review, but also may provide the evidentiary basis for the ultimate showing that the crime-fraud exception applies." *Id.*

The courts of appeals often give only a brief description of the material submitted by the proponent of the exception to make the threshold showing.[9] For example, the court may disclose that the proponent of the exception simply presented "an in camera, ex parte good faith statement of evidence as to the alleged criminal activity,"[10] without describing what information the statement actually contained. The descriptions, however, are nevertheless helpful as examples of materials the courts of appeals have found useful for threshold showings in the past. Examples of threshold submissions include: summaries of grand jury testimony;[11] grand jury documents;[12] government affidavits;[13] tape recordings;[14] affidavits of FBI and Customs agents;[15] sworn declarations of corporation "insiders;"[16] rulings and opinions of trial judges

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[9] One reason for the lack of information available is that many of these cases involve on-going grand jury investigations. No less than 82 of the approximately 170 federal courts of appeals cases that at least mention both the crime-fraud exception and the attorney-client privilege are set in the context of secret grand jury proceedings.

[10] Intervenor v. United States, 144 F.3d 653, 657 (10th Cir. 1998).

[11] *See* In re Sealed Case, 162 F.3d 670, 673-74 (D.C. Cir. 1998); In re Grand Jury Proceedings, 33 F.3d 342, 345 (4th Cir. 1994); In re Bankamerica Corp. Secs. Litig., 270 F.3d 639, 642 (8th Cir. 2001); John Roe, Inc. v. United States, 142 F.3d 1416, 1419 (11th Cir. 1998).

[12] *See* In re Sealed Case, 162 F.3d 670, 673-74 (D.C. Cir. 1998); In re Grand Jury Proceedings, 33 F.3d 342, 345 (4th Cir. 1994); John Roe, Inc. v. United States, 142 F.3d 1416, 1419 (11th Cir. 1998).

[13] *See* In re John Doe, Inc., 13 F.3d 633, 635 (2d Cir. 1994); In re Grand Jury Subpoena, 223 F.3d 213, 219 (3d Cir. 2000); In re Grand Jury Subpoena as to C97-216, 187 F.3d 996 (8th Cir. 1999); In re Grand Jury Subpoena 92-1(SJ), 31 F.3d 826, 830 (9th Cir. 1994).

[14] *See* United States v. Jacobs, 117 F.3d 82, 87-88 (2d Cir. 1997).

[15] *See* In re John Doe, Inc., 13 F.3d 633, 635 (2d Cir. 1994); United States v. Clem, 2000 U.S. App. LEXIS 6395 at *2 (6th Cir. Mar. 31, 2000).

[16] *See* In re Sealed Case, 754 F.2d 395, 398 (D.C. Cir. 1985).

from previous proceedings in the same case;[17] exhibits created by the proponent of the crime-fraud exception;[18] transcripts of telephone conversations;[19] press releases;[20] company profit and loss statements;[21] telephone records;[22] and business invoices.[23] On the rare occasion that a more in-depth description of the contents of the threshold submission is given, the description clearly evinces the requirement that "it isn't enough for the government merely to allege that it has a *sneaking suspicion* the client was engaging in or intending to engage in a crime or fraud when it consulted the attorney,"[24] as in each case the proponent of the exception made very specific allegations and statements of fact.[25]

b. The ultimate showing

Once the threshold showing has been made and the proponent of the exception attempts to make the ultimate showing that the exception applies, the evidence available for consideration expands. The Supreme Court, in *Zolin*, made clear that in the ultimate showing stage the court may take into account the contested communications in conjunction with the other evidence. 491 U.S. 554, 569 (1989) "In our view, the costs of imposing an absolute bar to consideration of the communications *in camera* for purpose of establishing the crime-fraud exception are intolerably high. ...A *per se* rule that the communications in question may never be considered creates, we feel, too great an impediment to the proper functioning of the

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[17] *See* In re Sealed Case, 754 F.2d 395, 398 (D.C. Cir. 1985).

[18] *See* In re Sealed Case, 754 F.2d 395, 398 (D.C. Cir. 1985).

[19] *See* United States v. Clem, 2000 U.S. App. LEXIS 6395 at *2 (6th Cir. Mar. 31, 2000).

[20] *See* In re Bankamerica Corp. Secs. Litig., 270 F.3d 639, 642 (8th Cir. 2001).

[21] *See* In re Bankamerica Corp. Secs. Litig., 270 F.3d 639, 642 (8th Cir. 2001).

[22] *See* In re Grand Jury Subpoena 92-1(SJ), 31 F.3d 826, 830 (9th Cir. 1994) (government submitted an affidavit based, in part, on phone records of the subject of the grand jury investigation).

[23] *See* In re Grand Jury Subpoena 92-1(SJ), 31 F.3d 826, 830 (9th Cir. 1994) (government submitted an affidavit based, in part, on invoices of the subject of the grand jury investigation).

[24] In re Grand Jury Proceedings (Corporation), 87 F.3d 377, 381 (9th Cir. 1996) (emphasis added).

[25] *See* In re Grand Jury Subpoena 92-1(SJ), 31 F.3d 826, 830 (9th Cir. 1994); United States v. Jacobs, 117 F.3d 82, 87-88 (2d Cir. 1997); In re Sealed Case, 754 F.2d 395, 398 (D.C. Cir. 1985).

adversary process.". *See also United States v. Edgar,* 82 F.3d 499, 509 (1st Cir. 1996); *John Doe, Inc. v. United States (In re John Doe, Inc.),* 13 F.3d 633, 637 (2d Cir. 1994); *United States v. Under Seal (In re Grand Jury Proceedings),* 33 F.3d 342, 350 (4th Cir. 1994); *In re Bankamerica Corp. Secs. Litig.,* 270 F.3d 639, 641-42 (8th Cir. 2001); *United States v. De La Jara,* 973 F.2d 746, 748 (9th Cir. 1992).

c. Non-documentary evidence

The evidence presented in support of, or in opposition to, application of the crime-fraud exception is not limited to documentary evidence. This principle is evident from the Supreme Court's language in *Zolin* that "the court is not required to avert its eyes *(or close its ears).*" *Zolin,* at 568. Not surprisingly, the court may hear and consider argument on the application of the crime-fraud exception at both the threshold stage[26] and the ultimate showing stage of the inquiry.[27] Additionally, it is permissible for the court to conduct an *in camera* interview of a witness when determining whether the appropriate evidentiary showing in support of the exception's application has been made. *See, e.g., In re Grand Jury Subpoena as to C97-216,* 187 F.3d 996, 997 (8th Cir. 1999) ("The court informed them that based on its review of the affidavit and supporting materials, the government had made a threshold showing to justify *an in camera examination of the attorney to determine if the crime-fraud exception applied.*" (emphasis added)); *John Doe, Inc. v. United States (In re John Doe, Inc.),* 13 F.3d 633, 635 (2d Cir. 1994) ("The district court then concluded on the basis of the affidavit that the threshold showing had been made, and it decided to question the attorney in camera."). As with other forms of evidence submitted by the proponent of the crime-fraud exception, there is no requirement in criminal grand jury cases that the proponent of the privilege be allowed access to the live testimony considered by the court. *See, e.g., John Doe, Inc. v. United States (In re John Doe, Inc.)* at 637 (noting first that the district court "decided to question the attorney in camera...because of a concern for preserving grand jury secrecy, [the district court] denied the requests of the attorney's and appellants' counsel that they be permitted to be present during the examination," and then that "[i]n light of the district court's legitimate concern that the secrecy of the grand jury be preserved, its in camera examination of the attorney was the most effective method of determining that the crime-fraud exception had been established"). Moreover, at

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[26] *See, e.g.,* John Doe, Inc. v. United States (In re John Doe, Inc.), 13 F.3d 633, 637 (2d Cir. 1994) ("The district court proceeded to an in camera review of the allegedly privileged communication only after oral argument and after the threshold showing required by Zolin was made. Then, on the basis of information garnered from the affidavit, oral argument and the in camera examination of the attorney, it determined that the crime-fraud exception had been established.")

[27] *See, e.g.,* Intervenor v. United States (In re Grand Jury Subpoenas), 144 F.3d 653, 657 (10th Cir. 1998) ("...the court did allow counsel for Intervenor to present arguments intended to rebut the prima facie showing.").

least where the person questioned by the judge is a potential grand jury witness, it is permissible for a district court to order that the witness not be interrogated by the proponent of the attorney-client privilege after the *in camera* examination, *see John Doe, Inc. v. United States (In re John Doe, Inc.)* at 637. and to refuse a subsequent request by the proponent of the attorney-client privilege to review the *in camera* examination. *See In re Grand Jury Subpoena as to C97-216* at 998 ("...appellant's counsel stated the relief he really was seeking was an opportunity to review the in camera examination...we know of [no] right appellant has to such review.").

Determining the intent of the client

Once the judge begins to consider the evidence presented by the proponent of the crime-fraud exception, the intent of the proponent of the privilege becomes a central issue. Specifically, the court must determine "whether the client made or received the otherwise privileged communication with the intent to further [or conceal] an unlawful or fraudulent act," *In re Sealed Case,* 223 F.3d 775, 778 (D.C. Cir. 2000), because the mere fact that "some communications may be related to a crime is not enough to subject the communication to disclosure." *In re Antitrust Grand Jury,* 805 F.2d 155, 168 (6th Cir. 1986).

In some cases, such as when the attorney is intimately involved in the crime or fraud with her client, the issue of intent will be clear-cut. However, in most cases the issue of intent will be more opaque. These crime-fraud cases, as with cases in other areas of the law in which intent is an issue, often require that the intent be inferred from other evidence and circumstances. *See, e.g., United States v. Wonderly,* 70 F.3d 1020, 1023 (8th Cir. 1995) (stating that "[i]ntent to defraud need not be shown by direct evidence; rather, it may be inferred from all the facts and circumstances surrounding the defendant's actions."); *Florence Mfg. Co. v. Dowd,* 189 F. 44, 46 (2d Cir. 1911) (stating, in an unfair competition case, that "in many of these unfair competition cases, the fraudulent intent is inferred from the facts"). As the Eighth Circuit noted, "since the condition of the mind is rarely susceptible to direct proof, recourse must be to all pertinent circumstances." *United States v. Hardesty,* 645 F.2d 612, 614 (8th Cir. 1981).

One circumstance considered by the courts is whether the attorney provided actual services at the behest of her client, such as the filing of documents or the making of statements to investigators, that served to further or conceal the crime or fraud. For example, in *In re Sealed Case,* 754 F.2d 395, 402 (D.C. Cir. 1985), the court considered the clients' use of their attorneys to present perjured testimony and "file and verify the authenticity of false documents" as evidence of the client's intent. Similarly, in *United States v. Under Seal (In re Grand Jury Proceeding),* 102 F.3d 748, 752 (4th Cir. 1996), the Fourth Circuit considered the client's use of its attorneys to "file pleadings, documents, and to write letters" to legitimize an illegal loan as evidence of the client's intent. Finally, in *United States v. Chen,* 99 F.3d 1495, 1503-04 (9th Cir. 1996), the Ninth Circuit considered as evidence of intent the defendants' use of their attorneys to prepare fraudulent Customs corrective disclosures designed to further and conceal

fraudulent Customs and income tax dealings. The court in *Chen* noted that the evidence tended to show that the defendants were "proposing to make a fraudulent corrective disclosure to Customs in order to evade income taxes," *id.* and "were using their lawyers to help prepare the paperwork for this fraudulent scheme, and using their prestige in the customs bar to hide it." *Id.*

Another circumstance considered by the courts of appeals is whether the client has already set upon a criminal course when she sought the assistance of counsel, which assistance served to further or conceal the crime or fraud. In *United States v. Jacobs*, 117 F.3d 82, 88 (2d Cir. 1997), the defendant was involved in a fraudulent debt elimination program. Before engaging his attorney in an investigation of the program's merits, the defendant "had already agreed to host a seminar [for the fraudulent program] in Cincinnati and obtained a false driver's license, social security card and juristic identification in Mexico." *Id.* After receiving his attorney's evaluation, the defendant "used the communications to lend credibility to the scheme, by telling prospective customers that his attorney declared the program legal." *Id.* at 89. The Second Circuit court of appeals concluded, based on this evidence, that it was "reasonable to believe...that Jacobs' intent in securing Attorney Swob's opinion was to further his Debt Elimination Plan." *Id.*

The Ninth Circuit reached a similar conclusion in *United States v. Martin,* 278 F.3d 988, 1001 (9th Cir. 2002). In *Martin*, the defendant established a sham company that posed as the United States division of a legitimate Hong Kong corporation, and that was "created solely to defraud legitimate businesses." *Id.* In holding that the crime-fraud exception vitiated the attorney-client privilege otherwise applicable to communications between the defendant and attorney, the Ninth Circuit stated that "[b]efore Defendant hired [the attorney], he had already researched the real CCM[, the Hong Kong corporation], filed a false Dun & Bradstreet report that listed actual CCM officers as being affiliated with the bogus CCM, and obtained a $ 2 million line of credit from IBM claiming to be the real CCM." *Id.* The Court then concluded that the attorney "was hired as CCM's 'general counsel' *id.* to assist Defendant in continuing the CCM fraud," and the crime-fraud exception therefore applied.

Some courts have held that the mere fact that a client sought advice regarding a legitimate legal issue, and then at some later time violated the law about which the advice was sought does not, without more, activate the crime-fraud exception. For example, in *In re Sealed Case*, 107 F.3d 46 (D.C. Cir. 1997), the president and vice president of a corporation met with its general counsel to discuss campaign finance laws. A few weeks later the vice president of the corporation supposedly violated the campaign finance laws by soliciting donations from corporate clients to a particular candidate, and then reimbursing those clients with corporate funds. *Id.* at 48. The court, in finding that the government had not met its burden of showing the crime-fraud exception's application, stated:

> Companies operating in today's complex legal and regulatory environments routinely seek legal advice about how to handle all sorts of matters, ranging from their political

> activities to their employment practices to transactions that may have antitrust consequences. There is nothing necessarily suspicious about the officers of this corporation getting such advice. True enough, within weeks of the meeting about campaign finance law, the vice president violated that law. *But the government had to demonstrate that the Company sought the legal advice with the intent to further its illegal conduct. Showing temporal proximity between the communication and a crime is not enough.* *Id.* at 50 (emphasis added).

The Eighth Circuit reached the same conclusion in *In re Bankamerica Corporate Securities Litigation*, 270 F.3d 639, 643-44 (8th Cir. 2001) where the Court cited the Second Circuit's opinion in *Sealed Case* as support for its conclusion that "it is not enough to show that an attorney's advice was sought before a decision was made not to disclose information that is alleged, as a matter of hindsight, to have been material."

In determining intent, an issue may arise as to the identity of the client – especially where corporations are involved. For example, in *In re Sealed Case,* discussed above, a corporation sought advice regarding campaign finance laws. The corporation's vice president was alleged subsequently to have violated those laws. In noting that the government had failed to carry its burden under the crime-fraud exception, the Second Circuit stated:

> The critical consideration is that the government's presentation had to be aimed at the intent and action of the client. ...The holder of the privilege is the client and, in this case, the client was the Company, not the vice president. Unless the government made some showing that the *Company* intended to further and did commit a crime, the government could not invoke the crime-fraud exception to the privilege. *In re Sealed Case,* 107 F.3d at 50 (emphasis added).

The Court then concluded that "there was no way of knowing or even guessing whether the vice president was on a frolic of his own, against the advice of Company counsel, when he reimbursed the donors with corporate funds," *id.* and that, although "there are circumstances under which corporations are responsible for the crimes of their agents," *id.* the government had not offered "anything in terms of evidence or law to support the idea that the Company bore criminal responsibility for the acts of this officer." *Id.* at 51.

What words are covered by the crime-fraud exception?

An issue may arise under the crime-fraud exception as to whether the exception applies only to words that are themselves in furtherance of a crime or fraud or whether it applies to the entire conversation or document in which the words were spoken or appear. It is often difficult to discern a court's treatment of this issue. Often the exact communications are not reflected in the court's opinion and it is difficult to tell whether the court is referring simply to the words themselves or to an entire conversation or document. *See, e.g., In re Bankamerica Corporate*

Secs. Litig., 270 F.3d 639, 642 (8thCir. 2001); *United States v. Under Seal (In re Grand Jury Proceedings)*, 102 F.3d 748, 751-52 (4th Cir. 1996).

At least one court has held "that the crime-fraud exception does not operate to remove communications concerning past or completed crime or frauds from the attorney-client privilege" *In re Federal Grand Jury Proceedings 89-10,* 938 F.2d 1578, 1581-82 (11th Cir. 1991) even if the subsequent communication simply memorializes earlier communications that are themselves subject to the exception. *Id.* The Court in that case held that the exception is inapplicable even if the subsequent communications occur with the same lawyer whose advice was earlier sought by the client to further or conceal a crime or fraud. *Id.* at 1582-83. *See also In re Sealed Case,* 244 U.S. App. D.C. 11, 754 F2d 395, 402 (D.C. Cir. 1985) (communications with attorneys who had been involved with the client's past crimes remained privileged).

But the issue is more in doubt with regard to statements that may not themselves be communications in furtherance of a crime or fraud but which are made in the same conversation or document. Although the cases are far from clear, there seems to be a distinction between oral and written communications. The courts seem more willing to parse oral conversations than written ones. For example, in *United States v. Davis,* 1 F.3d 606 (7th Cir. 1993), the Seventh Circuit approved the district court's "expressly limit[ing] the government's inquiry to 'asking [the attorney] whether, during the course of his representation of [the client], [the client] admitted lying to him about the existence of the pertinent document and his compliance with the grand jury's subpoena.'" *Id.* at 611. Neither the district court nor the court of appeals authorized delving into other topics that arose at or near the time of the exchange involving the existence of the pertinent document. Similarly, in *In re Grand Jury Proceedings (Doe), 1993 U.S. App. LEXIS* 1247 at *13 (9th Cir. Jan. 15 1993), the Ninth Circuit approved the district court's order limiting the attorney's testimony to very specifically identified transactions. In these cases, both the Seventh and the Ninth Circuits seems to treat an oral exchange between lawyer and client as composed of many small communications, some of which were subject to disclosure and some of which were not.

The same limiting language does not seem to appear in cases involving documents containing communications between lawyer and client. In *In re Bankamerica Corporate Securities Litigation,* 270 F.3d 639, 642 (8th Cir. 2001), the government sought production of eleven documents that "contain or reflect attorney-client communications *relevant to*" the corporate disclosure issues which were the subject of investigation. The court's language leaves it far from clear that the documents solely concerned the disclosure issues under investigation, yet the Eighth Circuit directed the district court to "determine, *separately for each document,* whether plaintiffs have made the threshold showing required in *Zolin.*" *Id.* at 644 (emphasis added). Rather than directing the district court to determine whether some portions of the document in question were subject to the crime-fraud exception while some portions retained their privileged status, the Court's language treated these documents as items to be disclosed or protected as a whole. Similarly in *United States v. Richard Roe, Inc. (In re Richard Roe, Inc.),* 68 F.3d 38 (2d Cir. 1995), the Second Circuit remanded the case to the district court "for an

examination of each document under the proper standard" *id.* at 41 and directed the court to "determine which, if any, of the documents . . . were in furtherance of a crime or fraud." *Id.* Like the Eighth Circuit in *Bankamerica,* the Second Circuit appears to have treated each document as wholly subject to disclosure or wholly subject to protection, rather than treating the documents as composed of many smaller communications for which the crime-fraud exception may eviscerate the privilege as to only some portions of the non-oral exchange, while leaving the privilege intact as to other portions.

Conclusion

The future development of the law involving the crime-fraud exception to the attorney-client privilege will likely flesh out the issues set for forth in this section. The Supreme Court may have to address some of them, especially the "ultimate showing" required for the application of the exception and the extent to which the proponent of the privilege can rebut the opponent's evidence. Without such a resolution, the fears expressed in the American College of Trial Lawyer's report, *supra* page 3 may continue to plague this area of the law.

Memorandum To: Advisory Committee on Evidence Rules
From: Ken Broun, Consultant
Re: Draft of proposed statute dealing with scope of waiver of privilege
Date: April 5, 2005

Several members of the Committee have raised the issue of the impact on counsel and the courts of a broad application of waiver of privilege rules in large volume document cases. Many courts find that any disclosure of a privileged communication results in a waiver of the privilege not only with regard to the disclosed document but for all other communications involving the same subject matter. Such rulings may create an unnecessary burden both on counsel and the court.

Most of the cases involve the attorney-client privilege, but other privileges may also be implicated. The cases differ widely on such matters as the effect of an inadvertent disclosure and the scope of the subject matter if a waiver or forfeiture is found. Anecdotal evidence, with some case support, shows that stipulations or case-management orders saving the privilege, at least against inadvertent disclosure, have become common. Nevertheless, as will be discussed, such orders are of somewhat limited usefulness.

The memorandum that follows seeks to set out the dimensions of the problem and to propose some statutory models intended to ease the burden on the courts and counsel. It is intended as a preliminary exploration of the issue and as a basis for discussion with the Civil Rules Committee.

The problem

The best formal statement of the problem is contained in Richard L. Marcus, *The Perils of Privilege: Waiver and the Litigator*, 84 Mich. L. Rev. 1605 (1986).

Marcus sets forth the concerns as follows:

> . . . [E]normous energy can be expended to guarantee that privileged materials are not inadvertently revealed in discovery, and lawyers may adopt elaborate witness preparation strategies in order to prevent witnesses from seeing privileged materials. Judges also feel the burden; where waiver is at stake, parties will litigate privilege issues that otherwise would not require judicial attention. Finally, for those not lucky or wealthy enough to adopt strategies that avoid waiver, broad waiver rules erode the reliability of the privilege. In recognition of these costs, courts are increasingly willing to enter orders preserving privilege despite disclosure in order to facilitate the pretrial preparation process. Although commendable, these orders appear totally unenforceable under classical waiver doctrine.

See also, Leslie, *The Costs of Confidentiality and the Purpose of Privilege,* 2000 Wis. L. Rev. 31, 73; Paul R. Rice, *The Eroding Concept of Confidentiality,* 47 Duke L. J. 853 (1998).

Although the Marcus piece is now almost twenty years old, its description of the problem is still largely current. Perhaps the only things that have changed are the even more frequent use of protective orders to deal with inadvertent disclosures in discovery and the added complexities caused by the increasing existence of electronically stored information.

The Report of the Civil Rules Advisory Committee (May 17, 2004, Revised, August 3, 2004) dealing with proposed amendments concerning electronic discovery specifically notes the problem as well as the attempts of parties to deal with the issue by protocols minimizing the risk of waiver.[1] The Committee notes (p. 8):

> Such protocols may include so-called quick peek or claw back arrangements, which allow production without a complete prior privilege review and an agreement that production of privileged documents will not waive the privilege.

The Civil Rules Committee Report cites the Manual for Complex Litigation (4th)§ 11.446 setting forth the same issue:

> A responding party's screening of vast quantities of unorganized computer data for privilege prior to production can be particularly onerous in those jurisdictions in which inadvertent production of privileged data may constitute a waiver of privilege as to a particular item of information, items related to the relevant issue, or the entire data collection. Fear of the consequences of inadvertent waiver may add cost and delay to the discovery process for all parties. Thus, judges often encourage counsel to stipulate to a "nonwaiver" agreement, which they can adopt as a case-management order. Such agreements protect responding parties from the most dire consequences of inadvertent waiver by allowing them to "take back" inadvertently produced privileged materials if discovered within a reasonable period, perhaps thirty days from production.[2]

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[1]The Civil Rules Advisory Committee elected to use the term "waiver" in connection with even inadvertent or unintended disclosures of privileged material. Technically, such disclosures may result in a "forfeiture" rather than a "waiver," which by definition would be intentional. Nevertheless, the courts have consistently used the term "waiver" in connection with unintentional disclosures and this memorandum and proposed model statutes continue that use of terminology.

[2]An example of a case-management order dealing with disclosure of privileged documents is contained in *Hoechst Celanese Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh,* 1995 WL 411805 at 4, where the court quotes the order as stating:

The Civil Rules Committee's concern for the problem is reflected in its proposed amendments to Rules 16(b)(6), 26(f)(4) and Form 35 providing that if the parties can agree to an arrangement that allows production without a complete privilege review and protects against waiver, the court may enter a case-management order adopting that agreement.

The same problems noted by Marcus and the Civil Rules Committee were described by members of our Committee. Not only must counsel carefully scrutinize each document for privilege problems, privilege is often claimed even though counsel does not care whether or not the particular document is disclosed. Courts get involved in ruling on privilege issues despite the fact that neither party cares how the issue is decided.

However, although a protective or case-management order may be quite useful as among the parties to a particular litigation, it is likely to have no effect with regard to persons or entities outside the litigation. As Marcus indicates in the statement quoted above, protective orders "appear totally unenforceable under classical waiver doctrine."

In an analogous situation, most courts hold that the disclosure of documents to a governmental agency under a confidentiality agreement effectively waives the privilege with respect to all other parties. *See, e.g., Westinghouse Elec. Corp. v. Republic of the Phillippines,* 951 F.2d 1414 (3d Cir. 1991) (agreement for confidential disclosure of documents to the government does not preserve the attorney-client privilege as against the rest of the world); *Permian Corp. v. United States*, 665 F.2d 1214 (D.C. Cir. 1981) (privilege lost where documents made available to the SEC). To the contrary is *Diversified Industries, Inc. v. Meredith,* 575 F.2d 596 (8th Cir. 1978). However, the *Diversified Industries* case is clearly a minority view and, in any event, may be limited to governmental agency as opposed to litigation disclosures.

Moreover, even if the courts were to hold that a stipulation or protective order is effective to guard against waiver with regard to parties outside the litigation, problems still exist. For example, such orders may deal only with inadvertent disclosures. Questions may and do arise under such orders as to what is an inadvertent disclosure. *See Baxters Travenol Laboratories, Inc. v. Abbott Laboratories,* 117 F.R.D. 119 (N.D.Ill. 1987) (disclosure not inadvertent under the circumstances).

> The production of a privileged document shall not constitute, or be deemed to constitute, a waiver of any privilege with respect to any document not produced. The production of a document subject to a claim of privilege or other objection and the failure to make a claim of privilege or other objection with respect thereto shall not constitute a waiver of a privilege or objection. . . .

Thus, an order requiring the return of inadvertently disclosed document may help in the instant litigation, but it still requires careful counsel to claim privilege even where she doesn't care about disclosure.

Because both concepts are important to a discussion of possible legislative remedies for the above described problem, the next two sections of this memorandum attempt briefly to describe the various court views on 1) the effect of inadvertent waiver and 2) the scope of waiver based upon disclosure of documents during the litigation process.

Inadvertent waiver

The courts have taken three different approaches to inadvertent disclosure: 1) inadvertent disclosure does not waive the privilege even with regard to the disclosed document; 2) inadvertent disclosure waives the privilege regardless of the care taken to prevent disclosure; 3) inadvertent waiver may waive the privilege depending upon the circumstances, especially the degree of care taken to prevent disclosure of privileged matter and the existence of prompt efforts to retrieve the document.

Perhaps the fewest number of cases take the first approach finding no waiver from inadvertent disclosure. The leading case is *Mendenhall v. Barber-Greene Co.,* 531 F. Supp. 951, 955 (1982). The court stated:

> Mendenhall's lawyer (not trial counsel) might well have been negligent in failing to cull the files of the letters before turning over the files. But if we are serious about the attorney-client privilege and its relation to the client's welfare, we should require more than such negligence by counsel before the client can be deemed to have given up the privilege. [citing *Dunn Chemical Co. v. Sybron Corp.,* 1975-2 Trade Cas. P 60,561 at 67,463 (S.D.N.Y. 1975)] No waiver will be found here.

See also Connecticut Mutual Life Insurance Co. v. Shields, 18 F.R.D. 448 (S.D.N.Y. 1955) (no evidence of intent to waive privilege).

The opposite approach has been taken by a significant number of courts. Among the more frequently cited cases holding that an inadvertent disclosure waives the privilege regardless of the circumstances is *International Digital Systems Corp. v. Digital Equipment,* 120 F.R.D. 445, 449-50 (D. Mass. 1988). The court in *International Digital Systems* analyzed the three different approaches to inadvertent disclosure. The court is particularly critical of the approach that analyzes the precautions taken, noting that if precautions were adequate "they would have prevented disclosure." It added:

> When confidentiality is lost through "inadvertent" disclosure, the Court should not look at the intention of the disclosing party. . . It follows that the Court should not examine the adequacy of the precautions taken to avoid "inadvertent" disclosure either.

The Court adds that a strict rule "would probably do more than anything else to instill in attorneys the need for effective precautions against such disclosure." 120 F.R.D. at 450.

The Court in *International Digital Systems* relied upon *Underwater Storage, Inc. v. United States Rubber Co.*, 314 F. Supp. 546, 549 (D.D.C. 1970). In that case, the Court stated:

> The Court will not look behind this objective fact [of disclosure] to determine whether the plaintiff really intended to have the letter examined. Nor will the Court hold that the inadvertence of counsel is not chargeable to his client. Once the document was produced for inspection, it entered the public domain. Its confidentiality was breached thereby destroying the basis for the continued existence of the privilege.

In accord are *Harmony Gold U.S.A., Inc. v. FASA Corp.*, 169 F.R.D. 113, 117 (N.D.Ill. 1996) ("With the loss of confidentiality to the disclosed documents, there is little this court could offer the disclosing party to salvage its compromised position."); *Ares-Serono v. Organon Int'l. B.V.*, 160 F.R.D. 1 (D.Mass. 1994) (trade secrets privilege); Wichita Land & Cattle Co. V. American Federal Bank, F.S.B. 148 F.R.D. 456 (D.D.C. 1992) (attorney-client and work product privileges).

The third or balanced approach is also taken by a significant number of courts. Many decisions cite the factors for determining whether waiver exists as a result of inadvertent disclosure set forth in *Hartford Fire Insurance Co. v. Garvey,* 109 F.R.D. 323, 332 (N.D. Cal. 1985). In *Hartford Fire*, the Court relied upon the analysis in an earlier case, *Lois Sportwear, Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103 (S.D.N.Y. 1985), which had found the following elements significant in deciding the existence of a waiver, calling it the "majority rule":

> (1) the reasonableness of the precautions to prevent inadvertent disclosure; (2) the time taken to rectify the error, (3) the scope of discovery; (4) the extent of the disclosure; and (5) the "overriding issue of fairness.

The court in *Hartford Fire* found no waiver under the circumstances.

Other cases among the many taking a similar balancing approach to inadvertent disclosure include *Alldread* v. *City of Grenada,* 988 F.2d 1425 (5th Cir. 1993 (governmental privilege); *Zapata v. IBP*, 175 F.R.D. 574, 576-77 (D.Kan. 1997) (work product privilege); *Hydraflow, Inc. v. Enidine, Inc.*, 145 F.R.D. 626, 637 (W.D.N.Y. 1993) (attorney-client privilege) ; *Edwards v. Whitaker,* 868 F.Supp. 226, 229 (M.D. Tenn. 1994) (attorney-client privilege).

For more detailed descriptions of the various approaches see Note, *Waiver of Evidentiary Privilege by Inadvertent Disclosure – Federal Law,* 159 A.L.R. Fed. 153 (2005); Note, Jennifer A. Hardgrove, *Scope of Waiver of Attorney-Client Privilege: Articulating a Standard That Will Afford Guidance to Courts,* 1998 U.Ill. L. Rev. 643, 659.

The scope of waiver based upon disclosure of documents during the litigation process

A decision that an inadvertent disclosure results in waiver with respect to the disclosed document does not necessarily mean that the privilege is waived with regard to all communications dealing with the same subject matter. As in the case of the effect of an inadvertent disclosure with regard to disclosed document, there are various approaches to the issue of subject matter waiver.

Some courts hold that even where an inadvertent disclosure results in a waiver with regard to the disclosed documents themselves, there is no waiver with regard to other communications – even those dealing with precisely the same subject matter.

For example, in *Golden Valley Microwave Foods, Inc. v. Weaver Popcorn, Inc.* 132 F.R.D. 204 (N.D. Ind. 1990), the court found that there had been a waiver of the attorney client privilege based upon an inadvertent disclosure. Waiver was found under either the strict or balancing approach. However, the court limited the waiver to the actual document produced, stating (132 F.R.D. at 208):

> Laying aside for the moment the question of whether the attorney-client privilege has been waived as to the letter, the court could find no cases where unintentional or inadvertent disclosure of a privileged document resulted in the wholesale waiver of the attorney-client privilege as to undisclosed documents concerning the same subject matter. [citing Marcus, *supra* at 1636].

International Digital Systems Corp. v. Digital Equipment, 120 F.R.D. 445, 449-50 (D. Mass. 1988), discussed above, is a leading case for the strict approach to inadvertent disclosure. Yet, the court in that case refused to find subject matter waiver.

In *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.,* 116 F.R.D. 46, 52 (M.D.N.C. 1987), the court used the balancing test to find waiver with regard to an inadvertent disclosure. However, the court noted:

> The general rule that a disclosure waives not only the specific communications but also the subject matter of it in other communications is not appropriate in the case of inadvertent disclosure, unless it is obvious a party is attempting to gain an advantage or

> make offensive or unfair use of the disclosures. In a proper case of inadvertent disclosure, the waiver should cover only the specific document in issue.

Despite the strong language in cases such as *Golden Valley,* other courts have in fact found subject matter waiver even where the disclosure was inadvertent. *E.g., In re Sealed Case,* 877 F.2d 976 (D.C. Cir. 1989); *In re Grand Jury Proceedings,* 727 F.2d 1352 (4th Cir. 1984); *Nye v. Sage Products, Inc.* 98 F.R.D. 452 (N.D. Ill. 1982) (court notes that plaintiffs had secured no agreement from defendants that inadvertent disclosure would not waive privilege with respect to other documents); *Duplan Corp. v. Deering Milliken, Inc.,* 397 F. Supp. 1146 (D.S.C. 1974) (statement of intent not to waive privilege ineffective); Malco Mfg. Co. V. Elco Corp., 307 F. Supp. 1177 (E.D. Pa. 1960) (attempt to reserve privilege ineffective).

Other courts have applied a subject matter waiver, but have limited that waiver in some way based upon the circumstances – often indicating a concern for fairness to both of the parties. For example in *Hercules, Inc. v. Exxon Corp.* 434 F. Supp. 136, 156 (D.Del. 1977), the court applied subject matter waiver but noted:

> The privilege or immunity has been found to be waived only if facts relevant to a particular, narrow subject matter have been disclosed in circumstances in which it would be unfair to deny to the other party an opportunity to discover other relevant facts with respect to that subject matter.

See also In re Grand Jury Proceedings, Oct. 12, 1995, 78 F.3d 251 (6th Cir. 1996) (intentional, non-litigation disclosure; waiver of subject matter, but subject matter limited under the circumstances); *Weil v. Investment/Indicators, Research and Management, Inc.,* 647 F.2d 18 (9th Cir. 1981) (subject matter waiver; however, because disclosure made early in proceedings and to opposing counsel rather than the court the subject matter of the waiver is limited to the matter actually disclosed and not related matters); *In re Sealed Case,* 877 F.2d 976 (D.C. Cir. 1989) (determination of subject matter of waiver depends on the factual context); *Goldman, Sachs & Co. v. Blondis,* 412 F. Supp. 286 (D.C. Ill. 1976) (disclosure at deposition; waiver limited to specific matter disclosed at deposition rather than broader subject matter); *Perrignon v. Bergen Brunswig Corp.,* 77 F.R.D. 455 (D.C. Cal. 1978) (same).

The Marcus article surveys the cases up to that point in time in great depth. The author uses the case of *Transamerica Computer v. IBM,* 573 F.2d 646 (9th Cir. 1978) as an example of a court that appropriately considered the circumstances of the case in determining the existence of waiver. In *Transamerica Computer*, the court considered whether the inadvertent disclosure of documents in an earlier case waived the privilege in this case. The court determined that it did not, based upon the extreme logistical difficulties of protecting documents in the earlier case.

Marcus argues that waiver should be analyzed in terms of fairness, stating ". . . the focus should be on the unfairness that results from the privilege-holder's affirmative act misusing the

privilege in some way." (84 Mich. L. Rev. at 1627). Elsewhere in the article, the author states (84 Mich. L. Rev. at 1607-08):

> This article therefore concludes that the focus should be on unfairness flowing from the act on which the waiver is premised. Thus focused, the principal concern is selective use of privileged material to garble the truth, which mandates giving the opponent access to related privileged material to set the record straight. . . .
>
> . . . Contrary to accepted dogma that all disclosures work a waiver, the article suggests that there is no reason for treating disclosure to opponents or others as a waiver unless there is legitimate concern about truth garbling or the material has become so notorious that decision without that material risks making a mockery of justice.

Marcus expands on his "truth garbling" point later in the article where he raises the possibility that the use of disclosed information, while still protecting other information through the exercise of the privilege, might result is a distortion of the facts. He refers to cases involving the Fifth Amendment privilege against self-incrimination, including *Rogers v. United States,* 340 U.S. 367, 371 (1951). Marcus notes (84 Mich. L. Rev. at 1628-29):

> Similarly with the attorney-client privilege, the courts have condemned 'selective disclosure,' in which the privilege-holder picks and chooses parts of privileged items, disclosing the favorable but withholding the unfavorable. It is the truth-garbling risk that results from such affirmative but selective use of privileged material, rather than the mere fact of disclosure, that justifies treating such revelations as waivers. . . .

Even where there is no use of the disclosed communications by the privilege holder, it is also possible that the matter disclosed has become so much a part of the common knowledge that protection of the other communications dealing with the same subject matter makes no sense. Marcus states (84 Mich. L. Rev. at 1641):

> At some point widespread circulation of privileged information threatens to make a mockery of justice if, due to his inability to obtain the information or offer it in evidence, the opponent is subjected to a judicial result that many others (who do have the information) know to be wrong. Very strong fairness arguments then counsel disclosure, and the interest in preserving the privilege diminishes to the vanishing point. This, indeed, seems to be a central concern of courts that condemn 'selective disclosure' to some but not others.

The need for a statute rather than a rule.

Much of the controversy surrounding the adoption of the Federal Rules of Evidence involved the proposed rules governing privilege. As a result, Congress not only deleted those rules from the rules ultimately adopted, it enacted a statute, 28 U.S.C. § 2074(b), providing that any "rule creating, abolishing, or modifying an evidentiary privilege" must be approved by an act of Congress. Put otherwise, rules governing privilege cannot be enacted through the normal rule making process. *See* Kenneth S. Broun, *Giving Codification a Second Chance – Testimonial Privileges and the Federal Rules of Evidence,* 53 Hastings L. J. 769, 778 (2002).

There has been no case directly construing § 2074(b), largely because the judiciary has elected not to deal with privileges in face of the Congressional mandate. *(But see Baylson v. Disciplinary Board of Supreme Court of Pennsylvania,* 764 F. Supp. 328 (E.D. Pa. 1991) (28 U.S.C. § 2074(b) cited in the case considering the effect of a Pennsylvania Rule of Professional Conduct and its application to federal prosecutors).

An argument might be made that a rule governing the scope of waiver of privileges would not come within § 2074(b) because such a rule would not modify a privilege itself – only its effect after disclosure.

Nevertheless, probably the better argument is that change the scope of waiver would be a modification and thus within the meaning of the statute. A statutory, rather than a rule, approach to the issue is clearly the more prudent course.

Some possible statutes

Following are two models of statutes. The core of each model is taken from the language of Proposed Federal Rule 511 dealing with Waiver of Privilege by Voluntary Disclosure. The proposed statute is also intended to be consistent with § 79 of the Restatement the Law Governing Lawyers 3d (2000), which provides:

> The attorney-client privilege is waived if the client, the client's lawyer, or another authorized agent of the client voluntarily discloses the communication in a non-privileged communication.

Both models incorporate the fairness considerations discussed in the Marcus article as set forth above. No guidance is given as to what might constitute fairness under the circumstances. In that respect, the statutes are patterned on Fed. R.Evid. 106, which 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.

Under Model 1, there is no waiver, even with regard to the disclosed document, for inadvertent disclosure, provided the privilege holder took reasonable precautions to prevent

disclosure and took reasonably prompt measures to rectify the error. This treatment of inadvertent waiver is an attempt to incorporate the balancing test put forth in cases such as *Hartford Fire Insurance Co. v. Garvey,* 109 F.R.D. 323, 332 (N.D. Calif. 1985), discussed above. The *Hartford Fire* case lists several factors. Model 1 sets out only two of those facts: the reasonableness of the precautions and the time taken to rectify the error. The statute could be reworked to add the other factors and the language could be amended to provide more predictability.

The word "inadvertent" is used in Model 1. Arguably, "unintended" or "mistaken" may be better terms. The word "inadvertent" is used because that is the word used in the cases. In addition, using "inadvertent" seems to avoid the argument that a document may be intentionally produced but without consideration of the implications of production on the question of privilege. "Intended or unintended" is used in Model 2 for the sake of parallelism and because the subtleties are not as significant where the mental state of the lawyer or client is made irrelevant to the issue.

Model 2 specifically provides for waiver with regard to the documents disclosed, even if disclosure was inadvertent. Most of the concern by lawyers and judges involved in large document cases has to do with the scope of the waiver. Once a document is disclosed, it is difficult to put its contents back into the privileged domain. Under both of the drafted statutes, there would have to be a hearing as to the fairness of limiting disclosure to the document. Putting a balancing test in place for the document itself would cause one more issue to be resolved at a hearing and likely cause even more uncertainty.

Part (d) of each model provides for a potentially binding effect of a court order. Such a provision may not be necessary if Part ©) is adopted. However, the language (together with the first clause of part (a)) recognizes specifically that the parties may want the court to tailor results in a particular case to their circumstances. The language of parts (a) and (d) give the courts that flexibility and provide for greater assurance to the parties in the event that a non-party seeks to take advantage of a disclosure in other litigation.

There are many other possible permutations of the statute. For example, the statute could be drafted to cover attorney-client privilege only. However, there are enough cases dealing with other privileges that it makes sense to deal with all privileged documents, not simply those covered by the attorney-client privilege.

The two models deal with disclosures generally, not just those in the context of litigation. The problem discussed in this memorandum occurs primarily in the context of litigation. However, there are enough instances in which the courts have had to deal with scope of waiver where the disclosure has been outside the litigation process that it would be useful to deal with that situation in the statute as well. *See, e.g., In re Von Bulow,* 828 F.2d 94 (2d Cir. 1987) (disclosure in book written by client's lawyer).

ACT DEALING WITH WAIVER OF PRIVILEGE

MODEL 1

The Federal Rules of Evidence are amended to add a new Rule 502, providing as follows:

(a) Waiver of privilege. Unless provided otherwise by court order, a person upon whom the law confers a privilege against disclosure of a confidential matter or communication waives the privilege if the privilege holder or a predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication, except as provided in part (b).

(b) Exceptions. A voluntary disclosure of a communication shall not operate as a waiver of a privilege where

(1) the disclosure is itself a privileged communication, or

(2) the disclosure is inadvertent provided the privilege holder took reasonable precautions to prevent disclosure and took reasonably prompt measures to rectify the error.

©) **Subject matter.** Disclosure of a communication waives the privilege with regard to other communications dealing with the same subject matter where the other communications ought in fairness to be considered in connection with the disclosed communication. The privilege is not waived with regard to any other communications dealing with the same subject matter.

(d) Binding effect of court orders on non-parties. To the extent that the order so provides, an order entered in any matter to which these rules apply, concerning the existence or waiver of privilege held or claimed by a party to the matter, governs the continuing existence of the privilege with regard to all persons or entities, whether or not they were parties to the matter.

MODEL 2

The Federal Rules of Evidence are amended to add a new Rule 502, providing as follows:

(a) Waiver of privilege. Unless provided otherwise by court order, a person upon whom the law confers a privilege against disclosure of a confidential matter or communication waives the privilege if the privilege holder or a predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication. The waiver operates whether the disclosure was intended or unintended. A voluntary disclosure of a

communication shall not operate as a waiver of a privilege where the disclosure is itself a privileged communication.

(b) Subject matter. Disclosure of a communication waives the privilege with regard to other communications dealing with the same subject matter where the other communications ought in fairness to be considered in connection with the disclosed communication. The privilege is not waived with regard to any other communications dealing with the same subject matter.

(d) Binding effect of court orders on non-parties. To the extent that the order so provides, an order entered in any matter to which these rules apply, concerning the existence or waiver of privilege held or claimed by a party to the matter, governs the continuing existence of the privilege with regard to all persons or entities, whether or not they were parties to the matter.

COMMENTARY ON ATTORNEY-CLIENT PRIVILEGE SURVEY RULE

(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 definition in part (a) (1) is taken from the Restatement (Third) of the Law Governing Lawyers § 69 (2000).

The definition of a communication within the meaning of the rule provides an essential limiting parameter of the rule. In addition to providing a guideline as to what is within the rule, the definition necessarily and perhaps more importantly defines what is not a communication.

Confining the privilege to "expressions" is consistent with the federal cases. For example, a client's appearance is not regarded as a communication, *see United States v. Kendrick,* 331 F.2d 110, 113-114 (4th Cir. 1964); *Provenzano v. Singletary,* 3 F.Supp. 2d 1353, 1367 (M.D. Fla. 1997) *aff'd,* 148 F.3d 1327 (11th Cir. 1998), nor is his or her demeanor, *In re Walsh*, 623 F.2d 489 (7th Cir. 1980). A characterization of a client as a "sly fox" is not a communication protected by the privilege. *United States v. Sayan,* 968 F.2d 55, 64 (D.C. 1992). There is some authority that the mental competency of a client is within the privilege, *see Gunther v. United States,* 230 F.2d 222, 223-224 (D.C. Cir. 1956), but this is clearly a minority position. *See* Edward J. Imwinkelried, The New Wigmore §6.7.1 (2002). Even in the *Gunther* case, the court does not quarrel with the definition of a communication as an expression, but rather expresses concern that testimony with regard to competency would necessarily open the inquiry into the "factual data," *i.e.*, the actual communications between lawyer and client.

The federal courts have consistently held that the identity of a client is not itself a communication. *E.g., United States v. Blackman,* 72 F.3d 1418, 1425 (9th Cir. 1995); *Lefcourt v. United States,* 125 F.3d 79, 86 (2d Cir.1997); *In re Shargel,* 742 F.2d 61, 62 (2d Cir. 1984). Whether the revelation of identity is tantamount to the disclosure of a communication is another question and is addressed in the commentary to part (b).

The definition recognizes that a communication need not be oral, but may be contained in a record intending to convey information between lawyer and client. *See* 1 John W.Strong, et al. McCormick on Evidence, § 89 at 359 (5th ed. 1999). This does not mean that any information contained in a document passed between lawyer and client is a communication. Indeed, the courts have consistently held that a preexisting document does not become privileged simply because it is passed from client to lawyer. *See, e.g., Fisher v. United States,* 425 U.S. 391, 404 (1976); *United States v. Robinson,* 121 F.3d 971, 975 (5th Cir. 1997). Rather, the record itself must be an expression of information from the client to the lawyer or vice versa.

The definition does not distinguish between communications coming from the client and communications coming from the lawyer. A communication meets the definition so longs as it is between privileged persons – defined later in the rule as both lawyer and client – regardless of which one is speaking. Some federal cases take a narrow view of the privilege and confine its application either to expressions made by the client or to attorney communications that reveal client confidences. *See, e.g., In re Fischel,* 557 F.2d 209, 212 (9th Cir. 1977)*; Potts v. Allis-Chalmers Corp.,* 118 F.R.D. 597, 602 (N.D. Ind. 1987). The court in *Potts* criticized the extension of the privilege to all communications from the attorney as "contrary to the expressed intention of the Seventh Circuit to confine the privilege to the narrowest limits consistent with the privilege's purpose."

However, there is also support in the federal cases for the broad extension of the privilege to all communications from lawyer to client. *Sprague v. Thorn Americas, Inc.,* 129 F.3d 1355, 1369-70 (10th Cir. 1997); *United States v. Amerada Hess Corp.,* 619 F.2d 980, 986 (3d Cir. 1980). *See also* Timothy P. Glynn, Federalizing Privilege, 52 Amer.U.L.Rev. 59, 100-101 (2002). The Court in the *Sprague* case gives the topic extended discussion, setting forth the rationale for both the narrow and the broad approach to the issue. In deciding upon a broad application of the rule, the Court relies upon the reasoning of the district court in *In re LTV Securities Litigation,* 89 F.R.D. 595, 605 (N.D. Tex. 1981). In *LTV*, the court rejected the narrower view, emphasizing that predictability of confidence is central to the role of the attorney and that "[a]doption of such a niggardly rule has little to justify it and carries too great a price tag." The court also relied upon an earlier Tenth Circuit case, *Natta v. Hogan,* 392 F.2d 686, 692-93 (10th Cir. 1968) where the court noted: "The recognition that privilege extends to statements of a lawyer to a client is necessary to prevent the use of the lawyer's statements as admissions of the client." The operation of the privilege to protect communications going both from the lawyer and from the client is also consistent with proposed Federal Rule 503 and Uniform Rule of Evidence 502.

Thus, despite some authority to the contrary, the Survey Rule adopts the broader approach to the definition of communications.

(2) A "client" is a person who or an organization that consults a lawyer to obtain professional legal services;

This definition is based on Proposed Rule 503(a) (1) and Uniform Rule 502(a)(1), with some language changes.

The definition is in accord with the law generally, *see* 1 Strong, McCormick on Evidence, *supra* at § 88 (5th ed. 1999). The federal cases confirm that the payment of a fee is not essential. *United States v. Costanzo,* 625 F.2d 465, 469 (3d Cir. 1980). However, the consultation must be for legal services, not as a friend, *Modern Woodmen of America v. Watkins,* 132 F.2d 352, 354 (5th Cir. 1942), as a business advisor, *United States v. United Shoe Machinery Corp.,* 89 F.Supp. 357, 360 (D. Mass. 1950), or as an accountant, *Olender v. United States,* 210 F.2d 795, 866-67 (9th Cir. 1954). The court in *Modern Woodman*, stated (132 F.2d 352):

> If the statement is about matters unconnected with the business at hand, or in a general conversation, or to the lawyer merely as a personal friend, the matter is not privileged. The fact that a person is a lawyer does not disqualify him as a witness, for he, like any other person, may testify to any competent facts except those which came to his knowledge by means of confidential relations with his client.

(3) An "organization" is a corporation, unincorporated association, partnership, trust, estate, sole proprietorship, governmental entity, or other for-profit or not-for-profit association.

This definition is consistent with Proposed Federal Rule 503(a)(1), Uniform Rule 502 and Restatement (Third) of the Law Governing Lawyers § 73-74 (2000), although none of those sources contain a separate definition of organization.

The definition is supported by federal case authority. Despite some musings to the contrary, *see Radiant Burners, Inc. v. American Gas Assn.*, 207 F. Supp. 771, 772-73 (N.D.Ill. 1962), the privilege has consistently been applied to corporations. *See Upjohn Corp. v. United States*, 449 U.S. 383, 389-92 (1981); *Radiant Burners, Inc. v. American Gas Assn.*, 320 F.2d 314, 322-24 (7th Cir. 1963). The few cases dealing with the issue have extended the privileged to unincorporated associations. *See United States v. Rowe*, 96 F.3d 1294, 1296 (9th Cir. 1996) (law firm); *Kneeland v. National Collegiate Athletic Ass'n*, 650 F. Supp. 1076, 1087 (W.D. Tex. 1986), *rev'd on other grounds*, 850 F.2d 224 (5th Cir. 1988) (unincorporated association). *See also Nesse v. Shaw Pittman*, 206 F.R.D. 325, 329-30 (D.D.C. 2002) (privilege applied to communications to law firm's general counsel but not to member of management committee). For the view that the privilege should not extend to unincorporated entities, *see* 24 C. Wright & K. Graham, Federal Practice & Procedure § 5477 (1986).

The applicability of the privilege to governmental entities has also been recognized by the federal courts. *See Town of Norfolk v. Corps of Engineers*, 968 F.2d 1438, 1457-58 (1st Cir. 1992) (Army Corps of Engineers); *Coastal Corp. v. Duncan*, 86 F.R.D. 514, 520 (D.Del. 1980) (Department of Energy, *dictum*). Again, some writers have argued against such an extension of the privilege. *See* 24 Wright & Graham *supra*, at § 5477. This is not to say that the privilege applies to communications between federal officials and government attorneys in all instances. For example, in the context of grand jury subpoenas, the courts have held that the privilege will not apply where one federal government arm, *i.e.*, the grand jury, seeks information from counsel for another federal government agency. *See In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 915-16 (8th Cir. 1997); *In re Lindsey*, 158 F.3d 1263, 1278 (D.C. Cir. 1998). *Also see* the discussion in connection with the Standard for Organizations Clients, part (d).

(4) An "attorney" is a person who is authorized to practice law in any domestic or foreign jurisdiction or whom a client reasonably believes to be an attorney;

This definition is based upon Proposed Federal Rule of Evidence 503(a)(2) and Uniform Rule of Evidence 502(a)(3).

The few federal cases dealing with the issue have held that the privilege applies when the client reasonably believes that the person consulted is a lawyer, even if that belief is incorrect. *See United States v. Tyler,* 745 F. Supp. 423, 435 (W.D.Mich. 1990) (reasonable belief that fellow prisoner was a lawyer); *United States v. Boffa,* 513 F.Supp. 517, 523 (D.Del. 1981) (reasonable belief is sufficient, but not established under the facts of case); *United States v. Ostrer,* 422 F.Supp. 93, 98 (S.D.N.Y. 1976) (reasonable belief that lawyer was extending legal, rather than simply friendly, advice).

The courts have also held that communications with an individual licensed as an attorney in a foreign jurisdiction are within the privilege, *Renfield Corp. v. E. Remy Martin & Co., S.A.,* 98 F.R.D. 442, 444 (D.Del. 1982). Because of licensing arrangements and titles of lawyers vary significantly from nation to nation, there has been some dispute as to who is qualified as a lawyer in a particular country. In the *Renfield* case, the court stated that the requirement is a functional one of whether the individual is competent to render legal advice and is permitted by law to do so. The corporate in-house counsel in *Renfield* was found to be so authorized under French law. In *Honeywell, Inc. v. Minolta Camera Co., Ltd.,* 1990 Wl 66182, 2-4 (D.N.J. 1990), the court took issue with the functional test, finding that communications to a Japanese individual who had never been licensed as an attorney in Japan or elsewhere were not within the privilege, despite the fact that the person sought to give legal advice. The language of this definition takes an approach consistent with both *Renfield* and *Honeywell.* The test is whether the person in question was *authorized* to practice law in the foreign jurisdiction. The lawyer in *Renfield* was; the person in *Honeywell* was not. Whether an individual is in fact authorized to practice will necessarily be dependent on the court's analysis of the facts and the law of the foreign jurisdiction. The definition gives as much general guidance as is warranted.

A question related to the application of the privilege to persons authorized to practice law in foreign jurisdictions is the issue of whether the court's should recognize as privileged communications with non-lawyers who are covered by a comparable privilege in other countries. However, this question is more appropriately viewed as a choice of law problem. The question is whether the foreign privilege should be recognized, not whether the federal attorney-client privilege should apply. *See, e.g., Golden Trade, S.r.L. v. Lee Apparel Co.* 143 F.R.D. 514, 518-19 (S.D.N.Y. 1993)(communications between attorney and foreign patent agent assisting him come within ambit of the privilege); *SmithKline Beecham Corp. v. Apotex Corp.,* 193 F.R.D. 530, 535-36 (N.D. Ill. 2000) (question was the application of the privilege by law of the United Kingdom).

There is also the related issue of the application of the privilege to communications with United States patent agents. A number of cases have held that communications between a patent

agent and a client may be privileged where the proceeding is before the patent office and the agent is registered with that office. *See, e.g., In re Ampicillin Antitrust Litigiation,* 81 F.R.D. 377, 391 (D.D.C. 1978); Daiske Yoshida, Note, The Applicability of the Attorney-Client Privilege to Communications with Foreign Legal Professionals, 66 Fordham L.Rev. 209 (1997). There are certainly instances in which a patent agent is acting as the agent either of an attorney or the client and the communications are privileged under the usual application of the attorney-client privilege. *See Foseco Int'l Ltd. v. Fireline, Inc.* 546 F.Supp. 22, 25 (N.D. Ohio 1982); *see also* discussion in connection with definition (a) (5). However, some courts, such as in both *Ampicillin* and *Foseco,* have the recognized the existence of privileged communications beyond the situation where the patent agent is acting for the attorney. The definition in this Survey Rule would not recognize such an extension. However, the exclusion of patent agents from the definition of attorney within the rule does not mean that such communication are not privileged. There may well be a separate privilege governing patent agents subject to its own rules and limitations. It is simply not the attorney-client privilege and thus not covered by this Survey Rule.

(5) A "privileged person" is a client, that client's attorney, or an agent of either who is reasonably necessary to facilitate communications between the client and the attorney.

This definition is based upon Restatement (Third) of the Law Governing Lawyers § 70 (2000). It is also consistent with both Proposed Federal Rule 503 and Uniform Rule 502.

The issues involved in this definition concern the question of who is an agent of either the client or the attorney. The definition itself provides only a broad rule, stating that the agent be "reasonably necessary to facilitate communications."

The words "reasonably necessary" are added to the definition in the Restatement § 70 in dealing with the agents of either the client or the lawyer. However, the Comment to the Restatement section notes that "a person is a confidential agent for communication if the person's participation is reasonably necessary to facilitate the client's communication with a lawyer or another privileged person. Although the same language is not used in either Proposed Federal Rule 503 or Uniform Rule 502, the addition of the words "reasonably necessary" is not inconsistent with those rules.

The language is also consistent with the federal cases. The leading case on the issue involved communications made by a client to an accountant in his attorney's employ. *United States v. Kovel,* 296 F.2d 918, 922 (2d Cir. 1961). The court noted that what was "vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer." The court compared the role of the accountant to that of a foreign language interpreter:

> [T]he presence of an accountant, whether hired by the lawyer or by the client, while the client is relating a complicated tax story to the lawyer, ought not to destroy the privilege, any more than would that of the linguist . . .; the presence of the accountant is necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to permit.

See also United States v. Alvarez, 519 F.2d 1036, 1045-46 (3d Cir. 1975) (privilege extended to client communication with psychiatrist); *Mendenhall v. Barber-Greene Co.,* 531 F. Supp. 951, 953-54 (N.D. Ill. 1982) (privilege applied to communications with foreign patent agents who were agents of the attorney); *Cedrone v. Unity Sav. Ass'n.*, 103 F.R.D. 423, 429 (E.D.Pa. 1984) (internal memoranda and conversations between lawyers in the same firm were within the privilege).

A leading case setting forth limits on the privilege where agents are involved is *United States v. Ackert,* 169 F.3d 136, 139 (2d Cir. 1998), where the court found that there was an insufficient showing that an investment banker was hired to translate or interpret information given to the attorney by the client. Rather, the consultant was sought out for information about a proposed transaction and its tax consequences. It was not sufficient that the information was of assistance to the attorney.

The party claiming the privilege has the burden of showing that the person with whom the

communications took place was the agent of either the lawyer or the client for the purpose of facilitating legal services. Where that burden is not met, the privilege fails. *See United States v. Adlman,* 68 F.3d 1495, 1500 (2d Cir. 1995) (insufficient showing that auditor was consulted to assist in giving legal as opposed to tax advice); *Von Bulow v. Von Bulow,* 811 F.2d 136, 146 (2d Cir. 1987) (party failed to meet burden to show that person claiming to be a paralegal was assisting lawyer in representation of the client); *FTC v. TRW, Inc.,* 628 F.2d 207, 213 (D.C. Cir. 1980) (party failed to meet burden of showing that the report prepared by a credit reporting agency was done as an agency for attorneys); *Dabney v. Investment Corp. Of America,* 82 F.R.D. 464, 464-65 (E.D. Pa. 1979) (law student not found to been acting as agent or associate of attorney; no privilege).

The same considerations apply where it is the client, rather than the lawyer, who has employed or used the agent. *See In re Bieter,* 16 F.3d 929, 938-40 (8th Cir. 1994) (business consultant found to be agent of client); *In re Grand Jury Proceedings,* 947 F.2d 1188, 1190-91 (1991) (clients' conversations with accountant immediately before consulting lawyer were privileged; earlier conversations not found to be for purpose of assisting client in communicating with his lawyer); *Miller v. Haulmark Transport Systems,* 104 F.R.D. 442, 444-45 (E.D.Pa. 1984) (presence of insurance agent instrumental in arranging coverage that was the subject of the lawsuit did not destroy privilege where presence was the limited purpose of aiding the attorney).

(6) 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.

This definition is based on Restatement (Third) of the Law Governing Lawyers § 71 (2000), although it differs from the Restatement section as discussed below. It is also consistent with both Proposed Federal Rule 503 and Uniform Rule 502.

There are primarily two kinds of situations in which the confidentiality of a communication may come into question. First, is where someone other than the lawyer or client was present and in a position to hear the communication. Second, is where the client may have intended that the communication be relayed to another person.

In the first scenario, the presence of a third person will not destroy confidentiality where the other person is an agent of either the lawyer or the client for the purpose of assisting in the rendering of legal services. *See* discussion in the commentary to part (a)(5). *Compare Kevlik v. Goldstein,* 724 F.2d 844, 849 (1st Cir. 1984) (confidentiality not destroyed by presence of client's father) *with Cafritz v. Kolslow,* 167 F.2d 749 (D.C. Cir. 1948) (presence of client's sister destroyed confidentiality where no sufficient reason shown for her presence). *See also Cavallaro v. United States,* 284 F.3d 236, 247 (1st Cir. 2002) (presence of accountants who were not acting to aid in obtaining legal advice destroyed confidentiality of the communications); Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence, § 183, 186 (2d ed. 1994).

The phrase "reasonably believe that no one except a privileged person will learn the contents of the communication" is consistent with federal cases holding that reasonable precautions must be taken to assure confidentiality. *United States v. Gann,* 732 F.2d 714, 723 (9th Cir. 1984) (no privilege where statement made by client to attorney on telephone within hearing of law enforcement personnel); *United States v. Waller,* 581 F.2d 585, 585-86 (6th Cir. 1978) (leaving notepad in prominent place in a public courtroom was not consistent with a claim of confidentiality). *But see Gomes v. Vernon,* 255 F.3d 1118, 1133 (9thCir. 2001) (prisoners did all as they could to secure documents' confidentiality within the context of a prison situation).

The second situation in which confidentiality is in doubt is where the client may have intended the communication to be communicated to another person. Under the definition, if the communication is made with the intention of it being conveyed publicly, there is no confidentiality. This result is consistent with a great number of federal cases. *See, e.g., In re Grand Jury Proceedings,* 33 F.3d 342, 355 (4th Cir. 1994) (matters were communicated to attorneys for use in connection with public disclosures); *United States v. Oloyede,* 982 F.2d 133 (4th Cir. 1992) (information intended for use in citizenship applications); *Colton v. United States,* 306 F.2d 633, 638 (2d Cir. 1962) (information given for inclusion in tax return not confidential).

Federal cases have held that matters communicated to an attorney where the client is seeking advice on the possibility of disclosure may still be privileged. *In re Grand Jury Proceedings,* 33

F.3d 342, 354 (4th Cir. 1994); *United States v. (Under Seal),* 748 F.2d 871, 878 (4th Cir. 1984). However, these same cases conclude that once there is a decision to disclose the privilege no longer exists. Furthermore, as stated in *Under Seal,* all of the details underlying the data which was to be published is outside the privilege. The court noted (748 F.2d at 875, n. 7):

> The details underlying the published data are the communications relating the data, the document, if any, to be published containing the data, all preliminary drafts of the document, and any attorney's notes containing material necessary to the preparation fo the document. Copies of other documents, the contents of which were necessary to the preparation of the published document, will also lose the privilege.

Not all federal courts have followed the Fourth Circuit in this respect. Thus, the court in *Schenet v. Anderson,* 678 F. Supp. 1280, 1283 (E.D. Mich. 1988), relying in large measure on *United States v. Schlegel,* 313 F. Supp. 177, 179 (D. Neb. 1970), declined to follow that authority, stating:

> [T]he attorney-client privilege applies to all information conveyed by clients to their attorneys for the purpose of drafting documents to be disclosed to third persons and all documents reflecting such information, to the extent that such information is not contained in the document published and is not otherwise disclosed to third persons. With regard to preliminary drafts of documents intended to be made public, the court holds that preliminary drafts may be protected by the attorney-client privilege. Preliminary drafts may reflect not only client confidences, but also the legal advice and opinions of attorneys, all of which is protected by the attorney client privilege. The privilege is waived only as to those portions of the preliminary drafts ultimately revealed to third parties.

The Survey Rule definition of "in confidence" does not deal directly with this split in authority. The language can be interpreted as supporting either line of case authority.

The definition of "in confidence" found in Restatement § 71 differs from the definition in this Survey Rule in that the Restatement section adds that the communication may be in confidence if made either to a privileged person or "another person with whom communications are protected under a similar privilege." The Restatement Comment supplies no authority for this addition. The additional clause is contrary to cases that find that communications made by one spouse to a lawyer in the presence of the other spouse are not confidential unless the non-client spouse is found to be an agent of the client. *See discussion in State v. Gordon,* 504 A.2d 1020, 1024-26 (Conn. 1985) (issue was whether wife, who participated in conferences and assisted husband's defense counsel was really agent of the State).

(b) General Rule of Privilege.

A client 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 purpose of obtaining or providing legal assistance for the client. The client's identity and the fee paid to the attorney are privileged only if the disclosure of this information would thereby disclose a confidential communication, such as the client's motive for seeking representation.

The general rule of privilege set out in Section (b) is derived from several sources including Restatement (Third) of the Law Governing Lawyers § 67 (2000), Proposed Federal Rule of Evidence 503 and Uniform Rule of Evidence 502. However, the second sentence of the section, dealing with identity and fee, is not contained in any of those sources and is intended to reflect and emphasize the prevailing holdings of federal cases.

The first sentence of the rule draws upon the definitions contained in Section (a)(1)-(6). The discussions in this commentary concerning the case law supporting those definitions is also pertinent to the general rule. Thus, cases such as *United States v. Ostrer,* 422 F.Supp. 93, 98 (S.D.N.Y. 1976) (reasonable belief that lawyer was extending legal, rather than simply friendly, advice) support the general rule as well as the definition of "attorney" in Section (a)(4). *See generally* 1 John W. Strong, et al., McCormick on Evidence § 88 (5th ed. 1999).

Other significant federal cases ruling on whether a communication was for the purpose of obtaining or providing legal assistance include: *Simon v. G.D. Searle & Co.,* 816 F.2d 397, 402-04 (8th Cir. 1987)(documents intended to apprise lawyers of business matters will be privileged only if they embody an implied request for legal advice based on the documents); *United States v. Tedder,* 801 F.2d 1437, 1442-43 (4th Cir. 1986) (communications not privileged where lawyer consulted as a friend and not for legal advice); *United States v. Wilson,* 798 F.2d 509, 513 (1st Cir. 1986) (no privilege where lawyer's services sought as a negotiator or messenger rather than as a lawyer); *United States v. Johnston,* 146 F.3d 785, 794 (10th Cir. 1998) (no privilege where lawyer was acting as a messenger for drug dealers rather than as a lawyer); *United States v. Knoll,* 16 F.3d 1313, 1322 (2d Cir. 1994) (papers relating solely to business transactions not privileged); *United States v. Aramony,* 88 F.3d 1369, 1387-90 (4th Cir. 1996) (executive's communications to internal investigators and corporate counsel were not privileged where executive did not seek legal advice on his own behalf).

The court's discussion in *United States v. Frederick,* 182 F.3d 496 (7th Cir. 1999) is particularly enlightening. In *Frederick,* the court considered communications made by a client to an individual who was both an accountant and a lawyer. The information concerned both tax returns and IRS audits. The court rejected the existence of an client-accountant privilege. 182 F.3d at 500. It then affirmed the trial court's rejection of an attorney-client privilege under the circumstances of the case, finding that the communications with the lawyer/accountant were in his capacity as an accountant. In the course of its discussion, the court considered the issue of documents prepared for

use both in preparing tax returns and for use in litigation, stating (182 F.3d at 501-02):

> Put differently, a dual-purpose document – a document prepared for use in preparing tax returns *and* for use in litigation – is not privileged; otherwise, people in or contemplating litigation would be able to invoke, in effect, an accountant's privilege, provided that they used their lawyer to fill out their tax returns. And likewise if a taxpayer involved in or contemplating litigation sat down with his lawyer (who was also his tax preparer) to discuss both legal strategy and the preparation of his tax returns, and in the course of the discussion bandied about numbers related to both consultations: the taxpayer could not shield these numbers form the Internal Revenue Service. This would be not because they were numbers, but because, being intended (though that was not the only intention) for use in connection with the preparation of tax returns, they were an unprivileged category of numbers. (*Emphasis by the court*)

See also *Montgomery County v. MicroVote Corp.,* 175 F.3d 296, 301-04 (3d Cir. 1999) (reversing trial court determination that lawyer acted as an "election consultant," finding instead that the services were legal, applying Pennsylvania law but citing Federal authority); *United States v. Bauer,* 132 F.3d 504, 507-09 (9th Cir. 1997) (privilege attached where attorney not merely conveying public information as an officer of the court, but giving legal advice); *Rehling v. City of Chicago,* 207 F.3d 1009, 1019 (7th Cir. 2000) (police department counsel was giving legal advice to senior officers when he advised them concerning placement of disabled officer).

Although there do not seem to be federal cases directly on point, the modern trend, adopted by this section of the Survey Rule, is that the client may assert the privilege against an eavesdropper, provided that reasonable precautions were taken to preserve the confidentiality of the communication. *See* Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence, § 186 (2d ed. 1994). *See also Lively v. Washington County Dist. Court,* 747 P.2d 320, 321 (Okla. 1987)(phone conversation with attorney secretly videotaped). Both Proposed Federal Rule 503 and Uniform Rule 502 take this position.

The second sentence of this section of the rule, dealing with the identity of the client and the fee paid to the attorney, is not contained in any of the other rules that have served as the basis for this Survey Rule. As discussed in the commentary to section (a) (1) of this Survey Rule, the identity of the client is not itself a communication and is therefore ordinarily outside the rule. The sentence is intended to reenforce the holding of a majority of federal cases that clearly establish that rule, while making clear that the privilege may attach but only if the disclosure of such information would disclose a confidential communication.

A view at odds with this sentence of the rule was at least suggested by language in *Baird v. Koerner,* 279 F.2d 623, 632 (9th Cir. 1960). In that case, an attorney had paid back taxes on behalf of an undisclosed client. The court held that the disclosure of the client's identity would necessary convey information that would be conceded to be part of the usual privileged comunication between attorney and client. The *Baird* case has been cited as creating what has come to be known as a "last

link" rule, *i.e.,* that where "a strong probability exists that disclosure of such information would implicate the client in the very criminal activity for which legal advice was sought" the privilege will attach. *United States v. Hodge and Zweig,* 548 F.2d 1347, 1353 (9th Cir. 1977). *See also* discussion in 1 John W. Strong, et al., McCormick on Evidence § 90 (5th ed. 1999).

The "last link" rule has been almost universally rejected in the federal courts. Instead, the courts have held that the identity or facts of retention of a lawyer are ordinarily not protected by the privilege, despite their incriminating nature. Cases such as *In re Shargel,* 742 F.2d 61 (2d Cir. 1984), are representative of the prevailing view. In *Shargel,* the government sought information as to whether an attorney had represented certain defendant and the amount of fees pays as evidence of "unexplained wealth." 742 F.2d at 62. In finding that no privilege protected the identity and amount of fees, the court stated (742 F.2d at 64):

> It seems evident to us that a broad privilege against the disclosure of the identity of clients and of fee information might easily become an immunity for corrupt or criminal acts. [citation omitted] Such a shield would create unnecessary but considerable temptations to use lawyers as conduits of information or of commodities necessary to criminal schemes or as launderers of money. The bar and the system of justice will suffer little if all involved are aware that assured safety from disclosure does not exist.
>
> We adhere to our prior decisions, therefore, and define the limits of the privilege in terms of the goal of enabling lawyers to render informed legal advice and advocacy. We of course continue to recognize that "there may be circumstances under which the identification of a client may amount to the prejudicial disclosure of a confidential communications," [citation omitted]. However, we find no such circumstances here.

See also In re Grand Jury Proceedings, 791 F.2d 663, 665 (8th Cir. 1986) (court rejects "last link" analysis); *Clarke v. American Commerce Nat'l Bank,* 974 F.2d 127 (9th Cir. 1992) (identity not privileged where records did not reveal communications); *Vingelli v. United States,* 992 F.2d 449, 452 (2d Cir. 1992) (same). Several federal cases refusing to protect the identity of clients involved situations where a lawyer seeks to shield the name of clients making fee payments in excess of $10,000 in cash. *See, e.g., Lefcourt v. United States,* 125 F.3d 79, 86 (2d Cir. 1997); *United States v. Leventhal,* 961 F.2d 936, 941 (11th Cir. 1992).

What is required in order for the privilege to apply is a link to communications, including the motive of the client. Such circumstances may occur, for example, where revelation of the client's identity would necessarily link the client to already disclosed communications. *See, e.g., In re Grand Jury Proceedings,* 517 F.2d 666, 672 (5th Cir. 1975); *United States v. Liebman,* 742 F.2d 807, 810 (3d Cir. 1984). The privilege may also exist where the disclosure of identity would necessarily reveal tihe client's motive. For example, in *In re Subpoenaed Grand Jury Witness,* 171 F.3d 511, 514 (7th Cir. 1999), the court protected identity, stating:

> We will not go into detail as to why we make this finding – that would be showing the hand to the government – but we are sure that disclosure of this information would identify a client of Hagen's who is potentially involved in targeted criminal activity which, on this record, would lead to revealing that client's motive to pay the legal bills for some of Hagen's other clients. And motive, we think, is protected by the attorney-client privilege.

See also In re Grand Jury Proceeding, Cherney, 898 F.2d 565, 568 (7th Cir. 1990) (identity protected where revelation would reveal client's motive).

(c) Who May Claim the Privilege.

A client, a personal representative of an incompetent or deceased client, or a person succeeding to the interest of a client may invoke the privilege. A client may, implicitly or explicitly, authorize an attorney, agent of the attorney, or an agent of a client to invoke the privilege on behalf of the client.

This section of the Survey Rule is based on Restatement (Third) of the Law Governing Lawyers § 86 (2000), Proposed Federal Rule of Evidence 503 (c) and Uniform Rule of Evidence 502(c).

The section is fully consistent with federal law. All authorities agree that the privilege is that of the client, not the attorney. *See* 1 John W. Strong, et al., McCormick on Evidence § 92 (5th ed. 1999); Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 200 (2d ed. 1994). *See also In re Grand Jury Subpoena,* 220 F.3d 406, 408 (5th Cir. 1967) (in-house counsel had no right to assert privilege waived by corporate client). The attorney may raise the privilege on behalf of the client, *Fisher v. United States,* 425 U.S. 391, 402 n. 8 (1976), and the attorney is duty bound to assert the privilege in the client's absence. *Republic Gear Co. v. Borg-Warner Corp.*, 381 F.2d 551, 556 (2d Cir. 1967).

Although there seem to be no specifically articulating that the attorney has implicit authority to invoke the privilege, the language in this section providing for implicit authority is consistent with general law, *see* Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence, § 200 (2d ed. 1994), as well as with Proposed Federal Rule 503(c) and Uniform Rule 502(c). These sources all provide that an attorney's authority is presumed in the absence of evidence to the contrary.

Most of the federal cases dealing with authority to invoke the privilege involve the question of who is the client. Thus, in *Commodity Futures Trading Comm'n v. Weintraub,* 471 U.S. 343, 350-51 (1985) the Supreme Court held that the trustee in bankruptcy, not the debtor's directors had the right to claim the privilege. *But see In re Foster,* 188 F.3d 1259, 1265-66 (10th Cir. 1999) (individual debtor may hold privilege as opposed to trustee in bankruptcy). *See also United States v. International Bhd. of Teamsters,* 119 F.3d 210, 215 (2d Cir. 1997) (campaign organization in union election, not campaign manager, held privilege); *In re Bevill, Bresler & Schulman Asset Mgt. Corp.,* 805 F.2d 120, 126 (3d Cir. 1986) (corporation, not officers, held privilege); *In re Grand Jury Subpoenas,* 144 F.3d 653, 658-59 (10th Cir. 1998) (corporate officer could claim privilege for communications on his own behalf but not on behalf of corporation).

The language of this section providing that the privilege may be claimed by "a person succeeding to the interest of a client" is consistent with these cases, although it does not elaborate on the issue.

As set forth in this section, a personal representative of an incompetent or deceased may claim the privilege. There is no longer any doubt that, in the federal court, the privilege survives the death of the client. *Swidler & Berlin v. United States,* 524 U.S. 399, 405-06 (1998). The privilege

in that case was claimed by the attorney on behalf of the deceased client. Because the issue was not raised in the case, there was no discussion of the question of who can raise the privilege on behalf of the deceased person and, perhaps more controversially, who, if anyone, would have the ability to waive it.

The issue of who actually holds the privilege after death has not been addressed in the federal cases. Both Proposed Federal Rule 503(c) and Uniform Rule 502(c) provide that the privilege may be claimed by the client's personal representative. Neither rule expressly states that the personal representative also has the right to waive the privilege. However, states with statutory or rule privileges containing similar language have held that the right to claim the privilege necessarily entails the right to waive it. *See, e.g., In Curtis' Estate,* 394 P.2d 59, 62 (Kan. 1964); *Scott v. Grinnell,* 161 A.2d 179, 183 (N.H. 1960). It likely that if this Survey Rule were adopted either as a rule or a statute, the language would have the same necessary effect. This Survey Rule obviously does not have the same effect. It seems probable that the federal courts will go in the direction that gives the personal representative the right both to claim and waive the privilege, but that matter has not yet been resolved.

(d) Standards for Organizational Clients

With respect to an organizational client, the attorney-client privilege extends to a communication that

(1) is otherwise privileged;

(2) is between an organization's agent and a privileged person where the communication concerns a legal matter of interest to the organization within the scope of the agent's agency or employment; and

(3) is disclosed only to privileged persons and other agents of the organization who reasonably need to know of the communication in order to act for the organization.

Section (d) is not contained in this form in any of the standard sources. It is derived in part from Restatement (Third) of the Law Governing Lawyers §§ 73-74 (2000), but differs from the Restatement in at least two important respects. First, unlike Restatement §73, the Survey Rule requires, consistent with *Upjohn Corp. v. United States,* 449 U.S. 383 (1981), that the communication concern a legal matter "within the scope of the agent's agency or employment." Section (d) also differs from the Restatement in that it provides, through its definition of organization in Section (a) (3), that communications between attorneys and agents of private organizations and governmental are to be analyzed under the same test. Specific problems in connection with the application of the privilege in the governmental context are discussed below.

Neither Proposed Federal Rule 503 nor Uniform Rule 502 have a specific section dealing with the organizational client. However, Survey Rule Section (d) is consistent with those rules. Proposed Rule 503(b) makes privileged communications between the client "or his representative." Uniform Rule 502(a)(4) includes a person "who, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client."

The language of this section is an attempt to articulate the Supreme Court's holding in the *Upjohn* case. As stated in 1 John W. Strong, et al., McCormick on Evidence § 87.1 at 349 (5th ed. 1999), the basic principles of the holding are that information communicated by corporate agents to an attorney or representative of an attorney will be privileged if (1) it is communicated for the express purpose of securing legal advice for the corporation; (2) it relates to the specific corporate duties of the communicating employee; and (3) it is treated as confidential within the corporation itself. *Upjohn Corp. v. United States, 449 U.S. at 394.* Although the Court in *Upjohn* cautioned that it was not stating a rule for all cases, the court's opinion in that case has been widely regarded as doing so. The rule is firm in the federal courts. *See, e.g., Admiral Ins. Co. v United States Dist. Court,* 881 F.2d 1486, 1492-93 (9th Cir. 1989) (employee's communications to lawyer concerning matters within the scope of his employment even though the company planned to terminate the employee after the interview); *James Julian, Inc. v. Raytheon Co.,* 93 F.R.D. 138, 141-42 (D. Del.

1982) (privilege upheld against claim that corporation did not adequately maintain confidentiality); *Leucadia, Inc. v. Reliance Ins. Co.,* 101 F.R.D. 674, 678 (S.D.N.Y. 1983)(communications between employees of predecessor company made in confidence for the purpose of legal advice were privileged).

Although Section (a) (3) defines organizations as including government entities and, as stated above, Section (d) applies the same standard to government entities as to other organizations, there may be a significant difference in the application of the test in the government situation. The key portion of the standard in this respect is Section (d) (1) requiring that the communication be "otherwise privileged." Federal courts have held that there is no privilege for communications made to a government attorney in the course of that attorney's duties in the face of a grand jury subpoena. In so holding, the court in *In re Lindsey,* 158 F.3d 1263, 1272 (D. C. Cir. 1998) stated:

> When any executive branch attorney is called before a federal grand jury to give evidence about alleged crimes within the executive branch, reason and experience, duty and tradition dictate that the attorney shall provide that evidence. With respect to investigations of federal criminal offenses, and especially offenses committed by those in government, government attorneys stand in a far different position from members of the private bar.

To the same effect is *In re Grand Jury Subpoenas Duces Tecum,* 112 F.3d 910, 915-16 (8th Cir. 1997) (President Clinton and his wife could not claim privilege for communications to White House lawyers as against a grand jury subpoena). The same holding has been applied where a federal grand jury seeks information from attorneys for state agencies. *In re Witness Before the Special Grand Jury 2000-2,* 288 F.3d 289, 294 (7th Cir. 2002) ("[I]nterpersonal relationships between an attorney for the state and a government official acting in an official capacity must be subordinate to the public interest in good and open government, leaving the government lawyer duty-bound to report internal criminal violations, not to shield them from public exposure).

Thus, the test for privilege with regard to communications between corporate and government employees and their corporate or government lawyers may be the same, but the privilege will not exist at all in the government context where the information is sought in a criminal case.

Specific exceptions to the privilege in dealing with claims against trustees and disputes between organizations and their shareholders, members or other constituents are considered in connection with Sections (f) (5) and (6) of the Survey Rule.

(e) Privilege of Co-Clients and Common-Interest Arrangements.

If two or more clients are jointly represented by the same attorney in a matter or if two or more clients with a common interest in a matter are represented by separate attorneys and they agree to pursue a common interest and to exchange information concerning the matter, a communication of any such client that is otherwise privileged and relates to matters of common interest is privileged as against third persons. Any such client may invoke the privilege unless the client making the communication has waived the privilege. Unless the clients agree otherwise, such a communication is not privileged as between the clients. Communications between clients or agents of clients outside the presence of an attorney or agent of an attorney representing at least one of the clients are not privileged.

Section (e) is based on Restatement (Third) of the Law Governing Lawyers §§ 75-76 (2000), although it is modified in some respects. It is also consistent with Proposed Federal rule 503((b) and Uniform Rule 502(b).

The portion of the rule covering situations where two or more clients consult a single lawyer or law firm, has not been the subject of much controversy in the federal or state courts. Communications among the lawyer and joint clients are privileged as against the rest of the world; they are not privileged as between or among the parties. *See Grand Trunk Western R. Co. v. H.W. Nelson Co.,* 116 F.2d 823, 835 (6th Cir. 1941); 1 John W. Strong, et al., McCormick on Evidence § 91 (5th ed. 1999).

Most of the federal court decisions, however, involve the other scenario addressed by Section (e), where two or more clients with a common interest in a matter are represented by separate attorneys and agree to pursue a common interest and to exchange information concerning the matter.

The language of the survey differs from Restatement § 76, dealing with common interest arrangements, in that it states specifically that the clients must not only have a common interest, but agree to pursue it together before they communicate in confidence. *See, e.g., United States v. Melvin,* 650 F.2d 641, 646 (5th Cir. 1981) (conversations including party who had not yet agreed to the joint representation not privileged).

The common interest privilege applies whether or not a litigated matter is involved, *see In re Regents of Univ. of California,* 101 F.3d 1386, 1389-90 (Fed. Cir. 1996) (patent application) and to plaintiffs in litigation as well as defendants, *see Schachar v. American Academy of Ophthalmology, Inc.,* 106 F.R.D. 187, 191 (N.D. Ill. 1985) (plaintiffs involved in different lawsuits). However, the rule makes clear, as do the cases that the communications must otherwise be privileged. Thus, information supplied by the client must be shown to be communicated for the purpose of obtaining legal advice. If not, it is not privileged, irrespective of the existence of a joint defense or common interest. *See United States v. Bay State Ambulance & Hosp. Rental Serv.,* 874 F.2d 20, 29 (1st Cir. 1989) (client failed to show that communication was for purposes involving the joint defense).

A common interest privilege sometimes will not arise, even where two clients jointly consult lawyers with regard to related matters. For example, in *In re Grand Jury Subpoena Duces Tecum,* 112 F.3d 910, 922 (8th Cir. 1997), the court held that matters discussed in connection with the Whitewater investigation between Hilary Rodham Clinton and her lawyers and lawyers representing the Office of the President were not within the common interest doctrine. Mrs. Clinton's interests were in avoiding personal liability, criminal or civil; the White House as a governmental institution did not have a similar interest.

The last sentence of the Survey Rule, dealing with communications between clients or their agents outside the presence of an attorney or her agent is not found in the Restatement, Proposed Federal Rule 503 or Uniform Rule 502. Although there is no direct authority on the point, by way of dictum, the court in *United States v. Gotti,* 771 F. Supp. 535, 545 (E.D.N.Y. 1991) stated that such communications would not be protected. *See also* Stephen A. Saltzburg, Michael M. Martin, Daniel J. Capra, Federal Rules of Evidence Manual, § 501[5][e] at 501-33 (8th ed. 2002)

As in the case of the joint defense, the common interest privilege does not apply in later actions between or among the parties. *E.g., Simpson v. Motorists Mut. Ins. Co.,* 494 F.2d 850, 854 (7th Cir. 1974) (statement made by insurer defending an insured not privileged in a coverage action against the insurer).

The sentence in section (e) providing that any client may invoke the privilege "unless the client making the communication has waived" it is consistent with the federal cases. *See., e.g., In re Grand Jury Subpoenas, 89-3 & 89-4,* 902 F.2d 244, 248, 249 (4th Cir. 1990) (no unilateral waiver of privilege); *In re Grand Jury Subpoenas Duces Tecum,* 406 F. Supp. 381, 394 (S.D.N.Y. 1975) (waiver of privilege by one co-client did not destroy privilege as to communications by other co-clients).

This section of the Survey Rule includes the language of Restatement §§ 75-76, providing that the communication is not privilege as between clients *"unless the clients agree otherwise."* The rule adopts the language based upon the considerations set forth the Reporter's Note to Restatement § 75 (at 583):

> No direct authority has been found for giving effect to agreements among co-clients that the privilege shall be preserved in subsequent adverse proceedings between them. The approach taken [in the Restatement section and Comment] is consistent with the theory of the co-client privilege and with the basis for removing the privilege in subsequent adverse proceedings, the presumed intent of the co-clients and fairness considerations. [citation omitted] The result is similar to that which would obtain if the parties contracted on other matters. Perhaps most obviously, the result is the same that would be reached if, during litigation itself, adversary parties agreed to a confidentiality obligation as part of an effort to expedite pretrial discovery or for other reasons.

(f) Exceptions. The attorney-client privilege does not apply to a communication

(1) from or to a deceased client if the communication is relevant to an issue between parties who claim an interest through the same deceased client, either by testate or intestate succession or by an inter vivos transaction;

This subsection is taken from Restatement (Third) of the Law Governing Lawyers § 81 (2000). A similar provision is found in Proposed Federal Rule 503(d)(2) and Uniform Rule 502(d)(2).

The provision is supported by cases from a number of jurisdictions. *See* John W. Strong, et al, McCormick on Evidence, § 94 at 379 (5th ed. 1999). The Supreme Court, while deciding that the privilege generally survives the death of the client, noted the existence of this exception. *Swidler & Berlin v. United States,* 524 U.S. 399, 404 (1998). Indeed, the Court looked to cases applying the testamentary exception as affirming the survival of the privilege under other circumstances. In addition to a number of state cases, the Court also cites *Glover v. Patten,* 165 U.S. 394 (1897) for its recognition fo the testamentary exception in the federal courts. In *Glover*, the Court stated (165 U.S. at 406):

> [W]e are of opinion that, in a suit between devisees under a will, statements made by the deceased to counsel respecting the execution of the will, or other similar document, are not privileged. While such communications might be privileged if offered by third persons to establish claims against an estate, they are not within the reason of the rule requiring their exclusion, when the contest is between the heirs or next of kin.

The Court in *Glover* goes on to note that it would be arbitrary to hold that the privilege belongs to one and not to others claiming from the deceased. The same considerations would seem to apply regardless of whether the litigation involves testate or intestate succession or inter vivos transactions.

(2) that occurs when a client consults an attorney to obtain assistance to engage in a crime or fraud or aiding a third person to do so. Regardless of the client's purpose at the time of consultation, the communication is not privileged if the client uses the attorney's advice or other services to engage in or assist in committing a crime or fraud.

This exception is based on the language of Restatement (Third) of the Law Governing Lawyers § 82 (2000), with one significant difference. Restatement § 82 requires that the criminal or fraudulent purpose for which a client seeks assistance be "later accomplished." The exception set forth in (f)(1) is also consistent with Proposed Federal Rule 503(d)(1) and Uniform Rule 502(d)(1). Neither of these rules contain the requirement that the crime or fraud actually take place.

The elimination of the requirement of actual fulfillment of the criminal or fraudulent purpose is consistent with most, but not all, federal authority. For cases holding that there is no such requirement *see United States v. Collis,* 128 F.3d 313, 320 (6th Cir. 1997) (crime or fraud need only have been the objective of the client); *In re Grand Jury Proceedings,* 87 F.3d 377, 381 (9th Cir. 1996) (since government need not prove that the crimes succeeded, it is not required to prove that the communications in fact helped the targets commit the crime); *In re Grand Jury Subpoena Duces Tecum (Marc Rich & Co., A.G.),* 731 F.2d 1032, 1039 (2d Cir. 1984) ("the client need not have succeeded in his criminal or fraudulent scheme for the exception to apply;" court finds documents unprivileged without resolving the issue of whether a crime or fraud had in fact been committed); *In re Rigby,* 199 B.R. 358, 361-62 (Bankr. E.D. Tex. 1995) (finding that "whether or not there has been an actual harm caused . . . is irrelevant. 'No harm, no foul' . . . is not the standard. It is the intent of the client that controls and not the success of the fraudulent act").

To the contrary is *In re Sealed Case,* 107 F.3d 46, 49 (D.C. Cir. 1997). In that case, the court stated that the client must have carried out the crime or fraud, citing the Comment to the Restatement arguing that to hold otherwise would "penalize a client for doing what the privilege is designed to encourage – consulting a lawyer for the purpose of achieving law compliance." However, in that case, there was no question that the crime had in fact been committed by a corporate vice-president. The only issue was whether the corporation itself had consulted its counsel for a criminal purpose and the court found the evidence insufficient to support the invocation of the crime-fraud exception under these circumstances.

By requiring that the consultation be "for the purpose of obtaining assistance to engage in a crime or fraud," the exception set out in this subsection takes into account the federal cases that state that communication must be made "in furtherance of" a crime or fraud. *See, e.g., In re BankAmerica Corp. Securities Litigation,* 270 F.3d 639, 642 (8th Cir. 2001) ("legal advice was obtained in furtherance of the fraudulent activity and was closely related to it"); *In re Spalding Sports Worldwide, Inc.,* 203 F.3d 800, 808 (Fed. Cir. 2000)(communication not "in furtherance" where disputed conduct actually lowered the chance of fraud). *See also* Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence, § 195 (2d ed. 1994). A statement that is merely relevant to a criminal or fraudulent act, and not in furtherance of it, is not within the exception. *In re Richard*

Roe, Inc. 68 F.3d 38, 40 (2d Cir. 1995) (lower court improperly used relevancy test). Again, the crime or fraud need not actually have been completed so long as the client intended the communications to be in its furtherance. *E.g., In re Grand Jury Subpoena Duces Tecum (Marc Rich & Co., A.G.),* 731 F.2d 1032, 1039 (2d Cir. 1984).

The exception is also consistent with virtually all of the federal cases in that it looks only to the client's intention. The attorney's intention is irrelevant. *See, e.g., In re Sealed Case,* 754 F.2d 395 (D.C. Cir. 1985); *United States v. Friedman,* 445 F.2d 1076 (9th Cir. 1971) (attorney need not be aware of the illegality involved). *But see In re Sealed Case,* 107 F.3d 46, 47 n. 2 (D.C. Cir. 1998) ("there may be rare cases . . . in which the attorney's fraudulent or criminal intent deat a claim of privilege even if the client is innocent").

The language in this subsection referring to statements made for the purpose of aiding a third person to commit a crime or fraud is also consistent with the federal cases. *See, e.g., In re Doe,* 551 F.2d 899, 900-902 (2d Cir. 1977) (client informed lawyer of scheme by third persons to bribe juror in client's case; crime/fraud exception applied); *United States v. Hodge & Zweig,* 548 F.2d 1347, 1354-55 (9th Cir. 1977) (consultation for the purpose of carrying out agreement of members of drug conspiracy to furnish bail and pay legal expenses for arrested members).

The language of this exception is limited to statements to obtain assistance to engage in crime or fraud. It does not include other tortious conduct. Several federal cases that have looked at the issue have expanded the exception to include intentional torts. Virtually all are district court opinions. *E.g., Recycling Solutions, Inc. v. Dist. of Columbia,* 175 F.R.D. 407, 409 (D.D.C. 1997); *Horizon of Hope Ministry v. Clark County, Ohio,* 115 F.R.D. 1,5 (S.D. Ohio (1986). *See also the dictum in United States v. United Shoe Machinery Corp.,* 89 F. Supp. 357, 358 (D. Mass. 1950) (communications not privileged if made "for the purpose of committing a crime or tort") The District of Columbia Circuit uses language that includes "other type of misconduct fundamentally inconsistent with the basic premises of the adversary system." *In re Sealed Case,* 754 F.2d 395 , 399 (D.C. Cir. 1989); *In re Sealed Case*, 676 F.2d 793, 812 (D.C. Cir. 1982). However, these District of Columbia Circuit cases both involved activities that were criminal or fraudulent, rather than simply tortious.

Several other federal cases have refused to extend the exception beyond fraud or crime. Most prominent is *Motley v. Marathon Oil Co.,* 71 F.3d 1547, 1551 (10th Cir. 1995) (crime/fraud exception did not apply to statements even if in furtherance of illegal racial discrimination if not criminal or fraudulent). *See also Bulk Lift Intl. v. Flexon & Systems, Inc.,* 122 F.R.D. 493, 496 (W.D.La. 1988) (fraud, not mere inequitable conduct must be involved). *See also Cooksey v. Hilton Int'l Co.,* 863 F.Supp. 150, 151 (S.D.N.Y. 1994) (exception may apply to "intentional torts moored in fraud"). The rationale of such cases is perhaps best reflected in the Comment to Restatement (Third) of the Law Governing Lawyers, §82, p. 616-17: "[L]imiting the exception to crimes and frauds produces an exception narrower than principle and policy would otherwise indicate. Nonetheless, the prevailing view limits the exception to crimes and frauds. The actual instances in which a broader exception might apply are probably few and isolated, and it would be difficult to formulate a broader exception

that is not objectionably vague."

There is an old Supreme Court case, *Alexander v. United States,* 138 U.S. 353, 360 (1891), in which the Court stated that the crime/fraud exception "should be limited to cases where the party is tried for the crime in furtherance of which the communication was made." However, the *Alexander* case involved a situation in which the consultation with the lawyer had nothing to do with any future crime. The murder in question, if had been committed by the client, had already taken place. The consultation had to do with business advice dealing with the ownership of horses. At most, the communications had relevancy to the past crime, but were not made to obtain assistance to engage in a crime or fraud. The federal courts have generally not hesitated to apply the exception despite the fact that the criminal or fraudulent conduct is not directly involved in the case in which the privilege is claimed. One case clearly applying the privilege to a case not involving the subject of the communication is *Petition of Sawyer,* 229 F.2d 805, 808-09 (7th Cir. 1956). The court in *Sawyer* refused to apply the Supreme Court's statement in *Alexander,* finding it dictum. Instead, it held that the crime/fraud exception applied to remove the privilege from communications made by a non-party witness in the case to his attorney because the statements were made in connection with a proposal to give false testimony. *See also, United States v. Reeder,* 170 F.3d 93, 106 (1st Cir. 1999) (consultations with attorney not privileged under the crime/fraud exception even though consultations involved conduct that covered up rather than directly involved the crimes involved in the case); *In re Berkeley & Co.,* 629 F.2d 548, 554-55 (8th Cir. 1980) (court doubts validity of statements in *Alexander*, but finds applicability of exception based upon related nature of the subject of the communication and the crimes under investigation); *SEC v. Harrison,* 80 F.Supp. 226, 230-31 (D.D.C. 1948) (exception applicable in investigatory proceedings in which no charge of fraud was made; *Alexander* case distinguished as involving communications concerning a past crime). In all of these instances, the statements related in some way to the conduct involved in the litigation. However, it could hardly be otherwise in order for the communications to be relevant.

Ordinarily, the key factor under the crime/fraud exception is the intent of the client to engage in the crime or fraud at the time of the consultation with the lawyer. Indeed, there is language in federal cases limiting the exception to situations where it is shown that "the client was engaged in or planning a criminal or fraudulent scheme when it sought the advice of counsel to further the scheme." *In re Sealed Case,* 754 F.2d 395, 399 (D.C. Cir. 1985). However, there are also cases applying the exception where the evidence does not really show the client's state of mind at the time of the consultation with the attorney. The second sentence of the exception is intended to deal with the situation where the client uses the lawyer's advice to engage in or assist a crime or fraud, irrespective of the client's intention at the time of consultation. The language is taken from Restatement § 82 (b) and is supported by federal cases as well as cases from other jurisdictions. *See United States v. Ballard,* 779 F.2d 287, 292-93 (5th Cir. 1986) (conversations with attorney concerning the disclosure of transfer of assets prior to bankruptcy filing not within privilege where client hired another lawyer who filed bankruptcy without disclosing assets); *Fidelity-Phenix Fire Ins. Co. v. Hamilton,* 340 S.W.2d 218 (Ky. 1960)(no privilege where client consulted lawyer who told him that insurance policy did not cover a fire because of coverage limitations; client then had another lawyer file suit on policy relating a different set of facts). These cases must be distinguished

from situations where there is simply proof that the client committed a crime or fraud after consulting the lawyer. *See, e.g., Pritchard-Keang Nam Corp. v. Jaworski,* 751 F.2d 277, 281-82 (8th Cir. 1984) (that communications with attorneys may help prove that a fraud occurred does not mean that the communications were used in perpetrating the fraud); *In re Sealed Case,* 107 F.3d 46, 50 (D.C. Cir. 1997) (mere fact that a person commits a crime after consulting with counsel does not establish a prime facie case that the consultation was in furtherance of the fraud; showing "temporal proximity between the communication and a crime is not enough"). The distinction between these cases and cases such as *Ballard* and *Fidelity-Phenix,* reflected in the second sentence of this subsection, is, in the latter instance, the existence of evidence of the use of the consultation with the attorney in the perpetration of the crime of fraud.

This Survey Rule as a whole does not deal with any of the procedural aspects of the attorney-client privilege. For example, questions such as when the privilege must be asserted, what the standard of proof for its application and the appealability of rulings with regard to its application or non-application are not covered. Questions with regard to waiver are covered in a separate Survey Rule. However, some procedural aspects of the application of the crime/fraud exception have been the subject of considerable federal court attention and should be mentioned briefly. The Supreme Court has held that a court, in its discretion, may hold an *in camera* review of the evidence to determine the existence of a crime/fraud exception to the privilege. *United States v. Zolin,* 491 U.S. 554, 572 (1989). The Court in *Zolin* held that the judge may review documents *in camera* where there is a "factual basis adequate to support a good faith belief by a reasonable person" that such an inspection may reveal evidence to establish the existence of the exception.

The Court in *Zolin* did not address the standard of proof for determining the existence of the exception. Various courts, including various federal courts, have expressed it differently. *See discussion in In re Grand Jury Subpoenas,* 144 F.3d 653, 660 (10th Cir. 1998). The essence of the test most commonly applied is that there must be evidence from which the existence of an unlawful purpose could reasonably be found. *See* John W. Strong, et al, McCormick on Evidence, § 95 at 382 (5th ed. 1999); Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence, § 195 at 373-74 (2d ed. 1994)

(3) that is relevant and reasonably necessary for an attorney to reveal in a proceeding to resolve a dispute with a client concerning the compensation or reimbursement that the attorney reasonably claims the client owes the attorney;

This subsection is based upon Restatement (Third) of the Law Governing Lawyers §83(1). It is covered in Proposed Federal Rule 503 (d)(3) and Uniform Rule 502(d)(3) by language excepting from the privilege communications "relevant to an issue of breach of duty by a lawyer to the client or by a client to the lawyer." The Restatement language is used in this section as well as the next (Section (f) (4)) because it more specifically states the rule as found in the case law. In both this subsection and subsection (4), the Restatement language, unlike that of the Proposed Federal rule or the Uniform Rule, makes clear that there is an exception from the privilege only insofar as the communications are relevant and reasonably necessary to resolve the dispute. The Restatement language also follows the case law in that it limits breaches of duty by the client to instances involving compensation or reimbursement.

There is federal case authority for an exception to the privilege where an attorney is in a fee dispute with a client. *Cannon v. U.S. Acoustics Corp.*, 532 F.2d 1118, 1120 (7th Cir. 1976) (recognizing exception).

Although not specifically covered by this section, the language of the section, as well as section (f) (4), limiting revelations to those relevant and reasonably necessary to resolve the dispute would make such case appropriate for protective orders limiting the dissemination of the information. *See, e.g., Siedle v. Putnam Investments, Inc.*, 147 F.3d 7, 10 (1st Cir. 1998) (documents that may be subject to attorney-client privilege properly sealed against public revelation).

This subsection does not definitively resolve the issue of whether the exception should apply in an action brought by corporate counsel for retaliatory discharge. Although the issue raised in such instances is ordinarily confidentiality under the applicable Rules of Professional Conduct, questions of privilege may also arise. The few cases considering the issue are split on the issue as to whether a retaliatory discharge complaint is the kind of dispute between lawyer and client as to compensation or reimbursement that will give rise to the exception. *Compare Willy v. Costal States Management Co.*, 939 S.W.2d 193, 196-200 (Tex. Ct. App. 1996) (discharge claim may not be brought where proof of the claim would necessarily reveal confidential communications) *with Kachmer v. SunGard Data Systems, Inc.*, 109 F.3d 173, 178 (3d Cir. 1997) (possibility of revelation of confidential communications did not preclude retaliatory discharge action). *See also Siedle v. Putnam Investments, Inc.* 147 F.3d 7, 11 (1st Cir. 1998) (lawyer may not use confidential information as a sword to make out a claim of defamation against client). The language used in the subsection leaves the question of whether instances of retaliatory discharge or similar claims involve compensation.

(4) that is relevant and reasonably necessary for an attorney to reveal in order to defend against an allegation by anyone that the attorney, the attorney's agent, or any person for whose conduct the attorney is responsible acted wrongfully or negligently during the course of representing a client;

This subsection is based upon Restatement (Third) of the Law Governing Lawyers § 83(2). Like subsection (f)(3), the same concept is covered in Proposed Federal Rule 503 (d)(3) and Uniform Rule 502(d)(3) by language excepting from the privilege communications "relevant to an issue of breach of duty by a lawyer to the client or by a client to the lawyer." Again as in subsection (3), the Restatement language is used to make clear that the exception to the privilege applies only to the extent that the information is relevant and reasonably necessary to reveal in the attorney's defense.

The exception as set forth is consistent both with the general law, *see* John W. Strong, et. al, McCormick on Evidence, § 91 at 367-68 (5th ed. 1999), and the federal cases, *see* Stephen A. Saltzburg, Michael M. Martin, Daniel J. Capra, Federal Rules of Evidence Manual, §§ 501.02([l][i], 501.03 [i][ii] (8th ed. 2002). Cases dealing with the exception include *Tasby v. United States,* 504 F.2d 332, 336 (8th Cir. 1974) (privilege inapplicable where ineffective assistance of counsel alleged); *In re National Mtg. Equity Corp. Mtg. Pool Certificates Secs. Litig.,* 120 F.R.D. 687, 691-92 (C.D. Cal. 1988) (attorney-client privilege did not prevent attorney from revealing client confidences to defend against third-party allegations of fraud against the attorney); *First Fed. Sav. & Loan v. Oppenheim, Appel, Dixon & Co.,* 110 F.R.D. 557 (S.D.N.Y. 1986) (attorney entitled to disclose information to defend himself against charges brought by a third party, although exception would be limited to protect against unnecessary violation of the client's interest). *See also United States v. Ballard,* 779 F.2d 287 (5th Cir. 1986) (exception recognized but court holds that bringing of malpractice action against attorney did not operate as a waiver of the privilege in subsequent criminal action against client).

This rule is properly treated as an exception to the privilege rather than as a waiver by the client. As illustrated by the *In re National Mtg. Equity Corp. Mtg. Pool Certificates Secs. Litig.* and *First Fed. Sav. & Loan* cases cited above, the exception may be invoked by counsel even though the client has taken no action that might be construed as a waiver.

(5) relevant to an issue concerning an attested document to which the lawyer is an attesting witness;

This subsection is taken from Proposed Federal Rule 503(d)(4) and Uniform Rule 502(d) (5).

Although there do not appear to be any federal cases dealing with the issue, the rationale of the Advisory Committee in proposing the exception to the Federal Rule seems sound:

> When the lawyer acts as attesting witness, the approval of the client to his so doing may safely be assumed, and waiver of the privilege as to any relevant lawyer-client communication is a proper result.

An argument can be made that the exception is unnecessary. The communications are arguably not intended to be confidential.

(6) between a trustee of an express trust or a similar fiduciary and an attorney or other privileged person retained to advise the trustee concerning the administration of the trust, if relevant to a beneficiary's claim of breach of fiduciary duties;

Subsection (6) is based upon Restatement (Third) of the Law Governing Lawyers § 84 (2000).

Sometimes referred to as the fiduciary doctrine, this exception is most often supported by the argument that the fiduciary acts for the beneficiaries and that the attorney is seeking advice for their benefit. For example, the court in *Washington-Baltimore Newspaper Guild Local 35 v. Washington Star Corp.*, 543 F. Supp. 906, 909 (D.D.C. 1982), dealing with the privilege in the context of a claim by beneficiaries of an ERISA plan against their employer, stated:

> When an attorney advised a fiduciary about a matter dealing with the administration of an employee's benefit plan, the attorney's client is not the fiduciary personally, but rather, the trust's beneficiaries.

Professor Imwinkelried states the rationale somewhat differently and less dependently on the theory that the fiduciary acts for the beneficiary in communicating with the attorney. He states simply that "the rationale for overriding the fiduciary's privilege is that the fiduciary's duty to the beneficiary is paramount to the fiduciary's right to the privilege." Edward J. Imwinkelried, The New Wigmore, §6.13.2 at 960 (2002).

Whatever is the best articulation of the rationale for the rule, the rule as set forth in this subsection is consistent with the federal cases. *See In re Occidental Petroleum Corp.*, 217 F.3d 293 (2000) (no privilege where breaches of fiduciary duty relating to Employee Stock Ownership Plan alleged); *In re Long Island Lighting Co.*, 129 F.3d 268, 271, 273 (2d Cir. 1997)(employer, as fiduciary under employee benefit plan covered by ERISA, could not claim privilege as to matters concerning the administration of the plan); United States v. Evans, 796 F.2d 264, 265-66 (9th Cir. 1986) (no privilege as between pension trustee and attorney advising the trustee with regard to administration of the trust).

Under this subsection, there is no requirement that the beneficiary be required to show "good cause," such as must be done in order for the communications to come within the exception set forth in subsection (7), below. *See Helt v. Metropolitan Dist. Comm'n,* 113 F.R.D. 7, 10 n.2 (D. Conn. 1986) (*dictum*).

The exception does not apply where the fiduciary is communicating with the an attorney with regard to his or her personal liability. *See, e.g., United States v. Mett,* 178 F.3d 1058, 1064-66 (9th Cir. 1999).

(7) between an organizational client and an attorney or other privileged person, if offered in a proceeding that involves a dispute between the client and shareholders, members, or other constituents of the organization toward whom the directors, officers, or similar persons managing the organization bear fiduciary responsibilities, provided the court finds

(A) those managing the organization are charged with breach of their obligations toward the shareholders, members, or other constituents or toward the organization itself;

(B) the communication occurred prior to the assertion of the charges and relates directly to those charges; and

(C) the need of the requesting party to discover or introduce the communication is sufficiently compelling and the threat to confidentiality sufficiently confined to justify setting the privilege aside.

This subsection is based on Restatement (Third) of the Law Governing Lawyers § 85 and the case of *Garner v. Wolfinbarger,* 430 F.2d 1093 (5th Cir. 1970). The rationale of this exception is similar to that articulated in support of the fiduciary doctrine: management of an organization acts for the benefit of the organization's shareholders or other constituents or, to paraphrase Professor Imwinkelried's statement in connection with the fiduciary doctrine, management's duty to the shareholders is paramount to management's right to the privilege.

Nevertheless, there are some significant differences between fiduciaries, as in the case of employers acting for their employees with regard to an ERISA plan, and corporate management. As stated in Jack P. Friedman, Is the *Garner* Qualification of the Corporate Attorney-Client Privilege Viable after *Jaffee v. Redmond*?, 55 Bus. Law. 243, 272-73 (1999):

> Notwithstanding the fiduciary duty that corporate management owes to corporate shareholders, modern scholarship suggest that corporate directors and officers do not manage exclusively for the benefit of shareholders. Corporate directors owe a fiduciary duty primarily to the corporation itself and a corporation may have interests that differ from those of its shareholders.

Thus, the courts in sometimes finding an exception to the privilege in actions brought by shareholders against corporate management do not always do so. The exception as stated in the leading case of *Garner v. Wolfinbarger* would apply only if certain criteria were met. The court in *Garner* imposed a "good cause" criteria on the shareholders seeking the benefit of the exception. The court articulated the criteria as follows(430 F.2d at 1104):

> There are many indicia that may contribute to a decision of presence or absence of good cause, among them the number of shareholders and the percentage of stock they represent; the bona fides of the shareholders; the nature of the shareholders' claim and whether it is

> obviously colorable; the apparent necessity or desirability of the shareholders having the information and availability of it from other sources; whether, if the shareholders' claim is of wrongful action by the corporation, it is of action criminal, or illegal but not criminal, or of doubtful legality; whether the communication related to past or to prospective actions; whether the communication is of advice concerning the litigation itself; the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing; the risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons.

As in the case of the Restatement, the list of nine factors in *Garner* is reduced and embellished in subsection (f)(7). *See* Comment c. to Restatement §85. For example, one criterion that is not articulated in the exception is whether the communication is "of advice concerning the litigation itself." The Restatement comments also notes the elimination of a specific statement of such a criterion, stating (Restatement (Third) of the Law Governing Lawyers § 85, Comment at 631):

> The factor can be misunderstood. It does not mean that all communications that might also be immunized under the lawyer work-product doctrine [internal cross-reference omitted] should be immune from discovery by a beneficiary, particularly if the communication also is subject to a "good cause" exception as work product. The factor instead refers to situations in which a second lawyer has been retained to defend the organization or its managers against the beneficiary's claim and thus the communications were not contemporaneous with the acts being challenged by the beneficiary. It is important that *Garner* be applied in a way that recognizes the legitimate interest of an organization in resisting a derivative or similar claim.

For a case discussing the distinction between the exception as applied with regard to pre-litigation communications from corporate management to counsel and communications between management and litigation counsel, as to which the work product privilege applies, see *In re Int'l Systems & Controls Corp. Securities Litigation,* 693 F.2d 1235, 1239 (5th Cir. 1982) (communications between management and counsel involved in litigation considered under work product privilege).

The *Garner* doctrine has been followed by many federal courts that have considered the question, usually irrespective of whether the action is derivative or brought by shareholders in their own right. *See, e.g., Fausek v. White,* 965 F.2d 126, 130-31 (6th Cir. 1992)(exception applies where shareholder brought action in his own right); *In re Gen. Instrument Corp. Sec. Litig.,* 190 F.R.D. 527, 529 (N.D. Ill. 2000) (applies exception in derivative action); *Bailey v. Meister Brau,* 55 F.R.D. 211, 213 (N.D. Ill. 1972) (conversations between corporate officer and counsel not privileged in securities law action brought by shareholder); *Valente v. Pepsico, Inc.,* 68 F.R.D. 361, 367-68 (D.Del. 1975) (communications by corporate directors owing fiduciary duties to minority shareholders not privileged in class action brought by minority shareholders). Cases have also extended the doctrine beyond the corporation to other organizations. *E.g., Nellis v. Air Line Pilots*

Ass'n, 144 F.R.D. 68 (E.D. Va. 1992) (labor union).

Other courts have put limitations on its applicability. *See, e.g., Weil v. Investment/Indicators Research & Management, Inc.,* 647 F.2d 18, 23 (9th Cir. 1981)(doctrine limited to derivative actions; shareholders did not own stock at time of the suit); *In re LTV Securities Litigation,* 89 F.R.D. 595, 607-08 (N.D. Tex. 1981) (*Garner* exception does not apply where the communications took place after the alleged wrongdoing was completed).

Some courts have rejected the *Garner* holding and its good cause limitation. *See Shirvani v. Capital Investing Corp.,* 112 F.R.D. 389, 390-91 (D.Conn. 1986) (shareholder interests can be protected by application of the crime/fraud exception).

The Friedman article, cited above, takes the position that *Garner* establishes a balancing test for the privilege and that balancing in connection with privilege was rejected by the United States Supreme Court in cases such as *Jaffee v. Redmond,* 518 U.S. 1, 18 (1996) (psychotherapist-patient privilege must be absolute in order to be effective in promoting a free flow of information between patient and psychotherapist). Friedman would provide an absolute exception applicable in shareholder derivative actions, such as *Garner* itself, arguing that in such cases the shareholders are acting in the role of management. But he would reject the exception entirely where in non-derivative actions. Friedman, *supra* at 281.

Other writers are critical of the exception generally as inhibiting the free flow of information between management and corporate counsel. *See, e.g.,* Stephen A. Saltzburg, Michael M. Martin, Daniel J. Capra, Federal Rules of Evidence Manual, § 501.02[5]([l][ii] (8th ed. 2002). The authors of that text state that if *Garner* is to apply at all, it should be limited to shareholders derivative litigation. One of the authors of that text, Stephen A. Saltzburg, took a somewhat different position in a law review article, Stephen A. Saltzberg, Corporate Attorney-Client Privilege in Shareholder Litigation and Similar Cases: *Garner* Revisited, 12 Hofstra L. Rev. 817 (1984). In that article, Saltzburg is critical of the doctrine as inhibiting the flow of information from corporate officers to the corporation's attorney. However, he is also critical of the limitation of the doctrine to derivative cases, arguing that the rationale should be the same whether the shareholders sue on behalf of the corporation or in their own right.

Like the drafters of Restatement § 85, this Survey Rule adopts what can be discerned as the prevailing federal rule – there is an exception to the attorney-client privilege for communications between management and corporate or organizational counsel in actions brought by shareholders or other constituents under the circumstances set forth in subsection (f) (7). The exception applies both in derivative and non-derivative cases.

The argument that the *Garner* doctrine creates a qualified privilege, bringing in a balancing test and thus created uncertainty in the application of the privilege certainly raises a valid concern. However, one could also look at the exception not as creating a balancing test for the application of the privilege but rather as applying the exception unless the shareholder fails to bring himself or

herself within the policy of the exception. In other words, the exception is absolute once the shareholder demonstrates that the cause of action he or she brings and their status entitle them to it. Similarly, although the argument that the exception should be limited to derivative actions has some appeal, one could argue that the analogy to the fiduciary doctrine is such that the shareholder himself or herself is entitled to the benefit of the communications, whether or not the suit is brought on behalf of the corporation.

This is one of the areas of the Survey Rule whose full parameters will have to await future judicial development.