RECEIVED 2/14/05

# American College of Trial Lawyers

National Headquarters
19900 MacArthur Boulevard, Suite 610
Irvine, California 92612

04-EV-017

Committee Chair
for: **Federal Rules of Evidence**

Please direct reply
to: **Simpson Thacher & Bartlett LLP**
425 Lexington Avenue
New York, New York 10017
Telephone: (212) 455-2588
Telecopier: (212) 455-2502
jkenney@stblaw.com

February 11, 2005

**FEDERAL EXPRESS**

Mr. Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

Re: Proposed Amendments to the Federal Rules of Evidence

Dear Mr. McCabe:

On behalf of the Committee on the Federal Rules of Evidence (the "Committee") of the American College of Trial Lawyers (the "College"), I am writing to convey to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (the "Standing Committee") comments on the Advisory Committee on Evidence Rules proposals to amend Federal Rules of Evidence 404, 408, 606(b) and 609(a)(2). We support the proposed amendment to Rule 404 but are not in favor of a part of the proposed Amendment to Rule 408 and are opposed to the Proposed Amendments to 606(b) and 609(a)(2).

The College is a professional association of lawyers skilled and experienced in the trial of cases and dedicated to improvement and enhancement of the standards of trial practice, the administration of justice, and the ethics of the profession. Our Committee, which consists of twenty-four Fellows of the College engaged in trial practice throughout the United States, is charged with

the responsibility of monitoring the Federal Rules of Evidence, determining the adequacy of their operation, and studying – and making – recommendations concerning desirable changes.

**Proposed Amendment to Rule 404(a):**

The Proposed Amendment is intended to clarify the exclusion of the use of character evidence in civil cases and in this sense restore the Rule to its original scope. The relevant language and proposed changes are 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 is 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 or the accused offered by the prosecution;
>
> **(2) Character of alleged victim.** – – ~~Evidence~~ In a criminal case, and subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the alleged 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;

The Committee is in favor of this amendment to Rule 404(a).

**Proposed Amendment to Rule 408:**

The Proposed Amendment would make three substantive changes to Rule 408. The first would change the present law. This amendment is intended to provide that "…conduct and statements made in compromise negotiations" would be admissible in criminal cases. The relevant language and proposed changes are as follows:

**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:

• • •

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

The Committee opposes the proposed Amendment to Federal Rule of Evidence 408 that would admit "conduct or statements made in compromise negotiations" in a civil case in a subsequent criminal proceeding. This is precisely the outcome the Rules Committee seeks to achieve by the amendment. It seeks to have the decision in *United States v. Prewitt,* 34 F.3d 436, 439 (7th Cir. 1994), made the law nationwide notwithstanding opposition from several other circuit courts and scholars. *See, United States* v. Hays, 872 F.2d 582, 589 (5th Cir. 1989); *United States v. Bailey*, 327 F.3d 1131 (10th Cir. 2003); *see also, United States v. Skeddle*, 176 F.R.D. 254 (N.D. Ohio 1997). It is of the view of the Committee that this will reduce, not encourage compromise. We agree with the comment of the original Advisory Committee that an exception for factual admissions "…would hamper free communications between parties and … constitute an unjustifiable restraint upon efforts to negotiate settlements – the encouragement of which is the purpose of the rule." Moore's Federal Rules of Evidence, Pamphlet, Part II, Comment 408.4 [1]-[3].

We recognize that the Proposed Amendment reflects deference to the position of the Justice Department which wishes to obtain evidence for criminal cases. We believe, however, the Justice Department's view is short sighted. The logical outcome of such a change 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 as reducing the chance of a successfully negotiated settlement.

The proposed amendment draws a distinction between statements and conduct in compromise negotiations, which would be admissible in criminal proceedings under the amendment, and an offer or acceptance of a compromise, which would not. The Advisory Committee's Note to the proposed amendment reasons that "unlike a direct statement of fault, an offer or acceptance of a compromise is not very probative of the defendant's guilt." Amendment to Fed. R. Evid. 408 Advisory Committee's Note. The language of the amendment, however, allows admission into evidence in a criminal proceeding not only of "a direct statement of fault," but of any conduct or statement made in the course of settlement negotiations. 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. As acknowledged in *Goodyear Tire & Rubber Company v. Chiles Power Supply, Inc.*, 332 F.3d 976, 981 (6th Cir. 2003), "Settlement negotiations are typically punctuated with numerous instances of puffing and posturing since they are 'motivated by a desire for peace rather than from a concession on the merits of the claim.' What is stated as fact on the record could very well not be the sort of evidence which the parties would otherwise contend to be wholly true. That is, the parties may assume disputed facts to be true for the unique purpose of settlement negotiations." (Citations omitted).

Another likely outcome is a revision to the earlier practice of using hypothetical statements to avoid a factual admission, a practice the Rule was intended to avoid. On this very point, the Original Senate Report on the Rule noted "...[It] impair[ed] free communication between parties and ... constitute[d] an unjustifiable restraint on efforts to negotiate settlements – the encouragement of which is the purpose of the rule." *See* Moore's Federal Rules of Evidence, supra at p.3.

The Committee also notes that it will be difficult to admit statements made during settlement discussions without disclosing to the jury the context in which such statements were made. In addition, 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. *See* Fed. R. Evid. 408 Advisory Committee's Note (explaining that pre-existing common law rule, under which evidence of statements or conduct during compromise negotiations was admissible but evidence of an offer or acceptance of compromise was not, gave rise to "controversy over whether a given statement falls within or without the protected area").

The proposed amendment to Rule 408 is also inconsistent with other federal law that favors confidentiality of communications during settlement negotiations in order to promote the settlement of civil disputes. Pursuant to the Alternative Dispute Resolution Act of 1998, federal district courts are required to "provide litigants in all civil cases with at least one alternative dispute resolution process, including, but not limited to, mediation." 28 U.S.C. § 652(a). The statute further directs that "each district court shall, by local rule . . . provide for the confidentiality of the alternative dispute resolution processes and to prohibit disclosure of confidential dispute resolution communications." 28 U.S.C. § 652(d). Local rules existing in a number of jurisdictions provide broad guarantees of confidentiality for statements made in the course of court-sponsored alternative

disputes resolution proceedings. *See, e.g.,* E.D.N.Y. Local R. 83.11(d) (parties participating in mediation must sign an agreement that "all written and oral communications made by the parties and the mediator in connection with or during any mediation session are confidential and may not be disclosed or used for any purpose unrelated to the mediation"); N.D. Ga. Local R. 16.7(I)(5) ("The ADR neutral shall have the litigants and their attorneys sign a form agreeing that any statements made or presented during the ADR conference are confidential and may not be used as evidence in any subsequent administrative or judicial proceeding").

In addition, federal courts, pursuant to Federal Rule of Evidence 501, have begun to recognize federal common law privileges shielding communications made during settlement or mediation proceedings. *See, e.g., Goodyear Tire & Rubber Co.*, 332 F.3d at 979-83 (recognizing federal common law privilege precluding third party from taking discovery regarding communications in furtherance of settlement in related litigation); *Sheldone v. Pa. Turnpike Comm'n*, 104 F. Supp. 2d 511, 512-18 (W.D. Pa. 2000) (recognizing federal common law mediation privilege precluding discovery of communications, including alleged admission against interest, in mediation proceedings); *see also In re RDM Sports Group, Inc.*, 277 B.R. 415, 425-31 (Bankr. N.D. Ga. 2002) (following *Sheldone*).

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 the settlement negotiations.

The Proposed Amendment to Rule 408 would also prohibit the use of statements made in settlement negotiations when offered to impeach a witness through a prior inconsistent statement or

through contradiction and that party is barred from introducing its own statements and offers of compromise to prove its validity, invalidity or amount of a claim and make certain clarifying changes. The relevant language and proposed changes read as follows:

**Rule 408. Compromise and Offers to Compromise**

<u>**(a) General**</u> <u>Rule. –</u> ~~Evidence of~~ <u>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:</u>

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

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

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

The Committee is in favor of these amendments, which would apply to both civil and criminal matters as they further the larger purpose of the Rule which is to encourage compromise.

**Proposed Amendment to Rule 606(b)**

The Proposed Amendment would change the present rule to expressly allow a juror to testify on the issue of "... whether the verdict reported is the result of a clerical mistake". The present Rule and proposed changes are:

**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 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 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~~.

The current Federal Rule of Evidence 606(b) provides only two exceptions to the general rule prohibiting juror testimony: jurors may testify regarding "extraneous prejudicial information . . . improperly brought to the jury's attention" and "whether any outside influence was improperly brought to bear upon any juror." Fed. R. Evid. 606(b). The Advisory Committee Notes to the current rule explain that the first exception would encompass, for example, testimony that a radio newscast or a newspaper account reached the jury, while the second would encompass, for example, testimony that a juror's family was threatened. What is *not* permitted, however, is testimony regarding the deliberations or the views of the jury.

Since the adoption of Rule 606(b), a third exception to the general prohibition contained in the rule has been recognized by many Courts. Jurors have been permitted to testify regarding what may broadly be characterized as certain types of "mistakes" in the verdict-rendering process. *See* Weinstein's Fed. Evid. § 606.04 ("Rule 606(b) would not bar testimony by a juror that, through inadvertence, oversight, or mistake, the verdict announced was not the verdict on which the jury had agreed. This situation is distinguishable from that in which a juror is incompetent to testify that he or she was mistaken or unwilling in giving assent to the verdict.") (footnotes omitted) (collected cases).

The case law addressing this new exception is divergent. Some courts broadly construe the idea of mistake to include jurors' misunderstanding of instructions. In *Attridge v. Cencorp Div. of Dover Technologies Intern., Inc.*, 836 F.2d 113 (2d Cir. 1987), the Second Circuit was faced with a written jury verdict awarding the plaintiffs $150,000 and finding that they were 80% at fault. *Id.* at 115. The court was prepared to enter a judgment in plaintiffs' favor for a net recovery of $30,000—20% of $150,000. *Id.* But during post-verdict discussion with the courtroom deputy, several jurors indicated their belief that they had awarded a $150,000 net verdict—that is, that plaintiffs' total damages were $750,000, and had already been reduced by the jury to $150,000 (20% of $750,000). *Id.*

Over the defendants' objections, the trial court interviewed each of the jurors individually, determined that their understanding was that they awarded the plaintiffs a net recovery of $150,000, and then entered judgment against defendants for $150,000. *Id.* at 115-16. The Second Circuit affirmed, concluding that what transpired "involved correction of a clear miscommunication between the jury and the judge," and that "[t]he interviews were proper because they were designed

to ascertain what the jury decided and not why they did so." *Id.* at 117; *accord Eastridge Dev. Co. v. Halpert Assocs., Inc.*, 853 F.2d 772 (10th Cir. 1988).

A starkly different result was reached by the First Circuit on almost identical facts. In *Plummer v. Springfield Terminal Ry. Co.*, 5 F.3d 1 (1st Cir. 1993), the jury awarded plaintiff $78,000 and found him 88% at fault for his injuries. *Id.* at 2. The trial court reduced the verdict by the percentage of plaintiff's negligence as found by the jury – 88% – and entered judgment for $9,860—12% of $78,000. *Id.* Plaintiffs counsel interviewed the jury foreperson, however, and discovered that the $78,000 figure was supposed to represent the already-reduced sum. *Id.* at 2-3. (This accorded with the fact that Plaintiff had requested $650,000 in compensatory damages, and 12% of $650,000 is $78,000. *Id.* at 2.) The First Circuit affirmed the trial court's refusal to permit juror testimony regarding the correctness of the award:

> [T]he 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.

*Id.* at 4 (citations omitted); *accord Karl v. Burlington N. R.R. Co.*, 880 F.2d 68 (8th Cir. 1989).

Thus, the present state of the law is that there is a universally recognized unwritten exception to Rule 606(b), but the courts vary widely in their measurement of the length and breadth of that exception: the Second and Tenth Circuits have broader vision of what may constitute juror "mistake" than the First and Eighth Circuits.

The Evidence Rules Committee proposes to remedy the divergence in the case law with respect to the third exception to Rule 606(b) by (first) formally recognizing the exception, and (second) defining the exception to encompass "clerical mistakes." It seems clear that the first goal—recognition of an unwritten but universally-followed rule—is a salutary and unobjectionable end, unless one takes the position that the third exception is infirm from the outset and should be rejected in its entirety. Such a position has no support in the case law, however, and does not appear sensible from either a logical or public policy perspective.

Accordingly, once it is determined that an exception to Rule 606(b) for mistaken jury verdicts should be codified, the real question is what type of exception to codify. This debate does not question the proposition that the only thing to be inquired into is *what* the jury decided, not *why* it decided as it did. *See* Report of the Advisory Committee on Evidence Rules (May 15, 2004) at 5 ("the inquiry concerns what the jury decided, not why it decided as it did"); *See also Attridge*, 836 F.2d at 117 (court's interviews were proper because they were designed to ascertain what the jury decided and not why they did so").

Given this agreement on the general premise, the real dispute appears to be in the specific application of that general premise. In the Second and Tenth Circuits, a "mistake" remediable by inquiry of the jury apparently includes the jury's failure to follow instructions, while the First and Eighth Circuits apparently construe such "mistakes" to include only scrivener's errors—writing "guilty," for example, when the vote of the jury was for an acquittal.

The Advisory Committee clearly favors the latter approach, but two questions then emerge:

First, why does the Committee favor the so-called "narrower" view over the so-called "broader" view? The Committee's explanation is rather circular, amounting to simply a restatement of the general principles behind Rule 606(b):

> The Committee determined that a broader exception—permitting proof of juror statements whenever the jury misunderstood or ignored the court's instruction—would . . . intrude into juror deliberations and could undermine the finality of jury verdicts in a large and undefined number of cases. In contrast, an exception permitting proof of clerical mistakes in the rendering of a verdict would not intrude on the privacy of jury deliberations, as the inquiry concerns what the jury decided, not why it decided as it did.

Report of the Advisory Committee on Evidence Rules (May 15, 2004) at 5.

Yet is it not true that "what the jur[ies] decided" in *Attridge* and *Plummer* was to award the larger sums to the plaintiffs, and that they only misconveyed their intent to the court? Stated differently, 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 Advisory Committee provides no answer to this question.

Second, and closely related to the first issue, does the Committee's draft rule actually clarify? It is difficult to see why writing "Guilty" when everyone actually voted for an acquittal is any more a "clerical mistake" than intending to award a net amount of $78,000 but mistakenly writing the already-reduced figure ($78,000) on the form instead of the unreduced figure ($650,000).

The Advisory Committee Notes to the amendment would clarify the issue in that they reject the Second Circuit's decision and accept the Seventh Circuit's decision; judges and litigants could presumably read the cited cases to determine the contours of the new rule. A better approach, however, may be to explicate the meaning of "clerical mistake." Is it a mere scrivener's error (such as writing "guilty" when the entire jury voted to acquit)? That seems to be the approach of the First Circuit, which ruled that the recording of a $78,000 verdict was not a mistake about which jurors could testify because "the number that the jury chose is not in dispute." *Plummer*, 5 F.3d at 4. This

also seems to be the approach of the Committee, but the rationale for adopting such a rule has not been clearly explained.

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 than the case law upon which the Advisory Committee relies, and is likely to result in further definition through case law. For this reason, the Committee is not in favor of this Proposed Amendment. The Committee suggests adoption of "inadvertence, oversight or mistake" in place of "clerical mistake." This would follow Judge Weinstein's formulation, and would provide an added measure of guidance.

**Proposed Amendment to Rule 609(a)(2):**

The Proposed Amendment is intended to resolve the issue of how to determine whether a conviction involves dishonesty or false statement under Rule 609(a)(2). The present rule provides that, when others seek to impeach the credibility of any witness, including the accused, evidence of conviction of a crime shall be admitted "... if it involved dishonesty or false statement, regardless of the punishment."

The Advisory Committee has proposed amending Rule 609 to expand the class of prior convictions that are categorically admissible under 609(a)(2). The language of the proposed amendment is that evidence that the 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. The relevant language of the present Rule and the proposed change read as follows:

**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.

• • •

The Committee has grave reservations about this proposed amendment and opposes it.

By way of background, Rule 609 governs when a witness's credibility may be impeached by showing that the witness has previously been convicted of a crime. It is among the most complex of the Federal Rules of Evidence, containing a variety of standards for admission contingent on the nature of the witness's prior conviction, how long ago the witness was convicted, and whether the witness is a criminal defendant testifying at his or her own trial. These balancing tests range from a presumption of admissibility (*i.e.*, conviction may be used to impeach unless the potential for unfair prejudice "substantially outweighs" probative value) to a much more restrictive requirement in the case of older convictions proscribing use unless probative value substantially outweighs prejudicial effect.

Rule 609(a)(2), on the other hand, contains no balancing test at all. Rather, it *requires* the admission of prior convictions that "involved dishonesty or false statement," so long as less than ten

years has elapsed since the conviction[1], without *any* weighing of prejudice or probative value by the trial judge. The trial judge has no discretion to exclude such prior convictions regardless of the individual circumstances of the particular case and regardless of the relative balance between probative value and prejudicial effect. Rule 609(a)(2) is the only example in all of the Federal Rules of Evidence in which the judge has no discretion whatsoever to exclude evidence.

The question addressed by the proposed amendment is how to determine whether a conviction "involved dishonesty or false statement" such that the trial judge must admit it. Should one refer only to the elements of the crime, *i.e.*, the bare minimum the prosecution must show to prove its *prima facie* case, (which may easily be determined by reference to the relevant statute), or must one look "behind" the conviction to see what the facts of the particular case were. After "initially preferr[ing] an approach that would focus on the 'elements' of the witness's conviction," the Committee ultimately yielded to the Department of Justice's position "that convictions for some crimes should be admissible under Rule 609(a)(2) even though the elements of the crime do not always require deceit." The College believes that the Committee's initial skepticism about this amendment was warranted.

Foremost among the College's concerns is its fundamental belief that district judges are in the best position to assess whether evidence should be admitted in a particular case, as the courts have repeatedly recognized. Any rule which restricts that discretion – particularly one that eliminates it entirely – should be interpreted narrowly and viewed with caution. As former Chief Judge J. Skelly Wright (writing for a panel that included Judges David Bazelon and Aubrey

[1]The age of the conviction is measured from "the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date." FRE 609(b).

Robinson) emphasized shortly after the codification of the Federal Rules of Evidence, "... Rule 609(a)(2) is to be construed narrowly; . . . precisely because it involves no discretion on the part of the trial court, in the sense that all crimes meeting its stipulation of dishonesty or false statement must be permitted to be used for impeachment purposes, [and] Rule 609(a)(2) must be confined . . . to a 'narrow subset of crimes,' those that bear Directly upon the accused's propensity to testify truthfully..." (*sic*) *United States v. Fearwell*, 595 F. 2d 771, 777 (D.C. Cir., 1978) (internal quotations and citations omitted).

It is important to keep in mind that this is not a choice between categorically admitting prior convictions under (a)(2) and excluding them entirely. The judge retains broad discretion under Rule 609(a)(1) to admit virtually all prior felony convictions that are less than ten years old. So, even if a prior conviction does not qualify for mandatory admission under 609(a)(2), the judge may still allow its use under 609(a)(1) if the judge believes that the circumstances of the case warrant it. The College objects only to enlarging the cases in which the trial judge has no choice but to admit it.

An additional concern the College has is the difficulty in learning the "facts" of the prior conviction. 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. The facts of particular cases, many taking place many years in the past, are not nearly so easily obtained. The Advisory Committee states that a party may "offer information such as an indictment, a statement of admitted facts, or jury instructions to show that the witness was necessarily convicted of a crime of dishonesty or false statement." But an indictment can be a far different thing from "a statement of admitted facts." A defendant can be – and often is – convicted even when the prosecution fails to prove each fact charged in the indictment.

There is also the problem of efficient use of judicial time. If a party is allowed to introduce extrinsic evidence to demonstrate that a prior offense was committed in a "dishonest" manner, then in fairness the other party should and is likely to be allowed to contest the showing. The resulting "mini trials" will waste valuable judicial time.

Based on all of these factors, the College recommends against adopting the proposed amendment to Rule 609(a)(2).

These comments are respectfully submitted by the College for consideration by the Standing Committee.

Respectfully,

John J. Kenney
Chair
American College of Trial Lawyers
Committee on the Federal Rules of Evidence

cc: James W. Morris, III, Esq.
President
American College of Trial Lawyers

Michael A. Cooper, Esq.
President-Elect
American College of Trial Lawyers

The Committee on the Federal Rules of Evidence