TO: **Honorable David F. Levi, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **Honorable Jerry E. Smith, Chair**
Advisory Committee on Evidence Rules

DATE: **May 15, 2004**

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

I. Introduction

The Advisory Committee on Evidence Rules met on April 29th and 30th in Marina Del Rey, California. The Committee approved four proposed amendments to the Evidence Rules, with the recommendation that the Standing Committee approve them for release for public comment. The proposals are discussed as action items in this Report.

The Evidence Rules Committee also discussed proposals for amending Evidence Rules 410, 706, 803(3), 803(8), and 804(b)(3). After extensive discussion, the Committee decided not to propose any amendment to any of those rules. The Committee's decisions on those rules are discussed as information items in this Report.

Finally, the Committee reviewed some long-term projects that are summarized as information items in this Report. The draft minutes of the April meeting set forth a more detailed discussion of all the matters considered by the Committee. Those minutes are attached to this Report. Also attached are the proposed amendments recommended for release for public comment.

II. Action Items

A. Rule 404(a).

The proposed amendment to Evidence Rule 404(a) is intended to rectify a longstanding conflict in the courts about the admissibility of character evidence offered as circumstantial proof of conduct in a civil case. The original Rule was intended to establish a general rule that would bar the admission of character evidence when offered to prove a person's conduct. The rationale for this limitation was that the circumstantial use of character evidence can lead to a trial of personality and can cause a jury to decide the case on improper grounds. An exception to the general rule was made in criminal cases in deference to the possibility that an accused, whose liberty is at stake, might have nothing but his good character with which to defend himself. But some courts have permitted the circumstantial use of character evidence in civil cases as well. The amendment restores the Rule to its original scope. The Committee concluded that in civil cases, the substantial problems raised by character evidence outweigh the dubious benefit that such evidence might provide.

The Evidence Rules Committee unanimously approved the proposed amendment to Rule 404(a) and the proposed Committee Note. The proposed amendment and Committee Note are attached to this Report as Appendix A.

Recommendation: The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 404(a) be approved for release for public comment.

B. Rule 408

The proposal to amend Evidence Rule 408 would rectify three important and longstanding conflicts in the courts about the admissibility of statements and offers made in compromise negotiations. Those conflicts are resolved by the proposed amendment as follows:

1. *Admissibility in criminal cases:* Courts are in dispute over whether statements and offers made in compromise negotiations are admissible in subsequent criminal litigation. The proposed amendment provides that statements of fault made in the course of settlement negotiations would not be barred by Rule 408 in a subsequent criminal case. This position is taken in deference to the Justice Department's arguments that such statements can be critical evidence of guilt. In contrast, an offer or acceptance of a civil settlement would be excluded from criminal cases under the proposed Rule. This position recognizes that civil defendants may offer or agree to settle a litigation for reasons other than a recognition of fault.

2. *Scope of "impeachment" exception to the Rule:* Some courts have held that statements in compromise negotiations can be admitted at trial to impeach a witness by way of contradiction or prior inconsistent statement. Other courts disagree, noting that if statements in compromise could be admitted for contradiction or prior inconsistent statement, this would chill settlement negotiations, in violation of the policy behind the Rule. The proposed amendment would prohibit the use of statements made in settlement negotiations when offered to impeach a witness through a prior inconsistent statement or through contradiction. The Committee concluded that a limit on impeachment is more consistent with the goal of the Rule, which is to promote uninhibited settlement negotiations.

3. *Evidence excluded even if offered by the party who made the statement or offer of compromise:* Some courts hold that offers in compromise can be admitted in favor of the party who made the offer. Other courts hold that settlement statements and offers are never admissible to prove the validity or the amount of the claim. The proposed amendment would bar a party from introducing its own statements and offers, when offered to prove the validity, invalidity, or amount of the claim. The Committee concluded that the protections of Rule 408 cannot be waived unilaterally because the evidence would implicitly indicate that the adversary entered into compromise negotiations as well, and Rule 408 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.

The proposed amendment also reorganizes the Rule to make it easier to read and apply.

The Evidence Rules Committee approved the proposed amendment to Rule 408 and the proposed Committee Note by a vote of five to two. The proposed amendment and Committee Note are attached to this Report as Appendix B.

Recommendation: The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 408 be approved for release for public comment.

C. Rule 606(b)

The proposed amendment to Rule 606(b) would clarify whether statements from jurors can be admitted to prove some disparity between the verdict rendered and the verdict intended by the jurors. There are two basic reasons for an amendment to the Rule: 1) All courts have found an exception to the Rule permitting jury testimony to prove certain errors in the verdict, even though there is no language permitting such an exception in the text of the Rule; and 2) The courts have

long been in dispute about the breadth of that exception. Some courts allow juror proof whenever the verdict has an effect that is different from the result that the jury intended to reach. Other courts follow a narrower exception permitting juror proof only if the verdict reported was the result of some clerical mistake. The former exception is broader because it would permit juror proof whenever the jury misunderstood (or ignored) the court's instructions. For example, if the judge told the jury to report a damage award without reducing it by the plaintiff's proportion of fault, and the jury disregarded that instruction, the verdict reported would be a result different from what the jury actually intended, thus fitting the broader exception. But it would not be different from the verdict actually reached, and so juror proof would not be permitted under the narrow exception for clerical mistakes.

The proposed amendment to Rule 606(b) adopts the narrower exception, for clerical error. The Committee determined that a broader exception — permitting proof of juror statements whenever the jury misunderstood or ignored the court's instruction — would have intrude into juror deliberations and could undermine the finality of jury verdicts in a large and undefined number of cases. The broad exception therefore would be in tension with the policy of the Rule, which is to protect the confidentiality of juror deliberations. 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 only concerns what the jury decided, not why it decided as it did.

The proposed Committee Note emphasizes that Rule 606(b) does not bar the court from polling the jury and taking steps to remedy any error that seems obvious when the jury is polled.

The Evidence Rules Committee approved the proposed amendment to Rule 606(b) and the proposed Committee Note by a vote of six to one. The proposed amendment and Committee Note are attached to this Report as Appendix C.

Recommendation: The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 606(b) be approved for release for public comment.

D. Rule 609

Rule 609(a)(2) provides for automatic impeachment of all witnesses with prior convictions that "involved dishonesty or false statement." Rule 609(a)(1) provides a balancing test for impeaching witnesses whose felony convictions do not fall within the definition of Rule 609(a)(2). The courts have long been in conflict over how to determine whether a certain conviction involves dishonesty or false statement within the meaning of Rule 609(a)(2). Some courts determine "dishonesty or false statement" solely by looking at the elements of the conviction for which the witness was found guilty. Other courts look at any available information 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.

The proposed amendment resolves the dispute over how to determine whether a conviction involves dishonesty or false statement under Rule 609(a)(2). The Committee initially preferred an approach that would focus on the "elements" of the witness's conviction; but it was persuaded by the Justice Department 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. An example is a conviction for obstruction of justice. The Department argued, and the Committee agreed, that it in some cases the underlying act of deceit could be determined by readily available information — such as a charging instrument — and that in such cases the conviction would be so probative of the witness's character for untruthfulness that it should be automatically admissible under Rule 609(a)(2). On the other hand, the Department of Justice agreed that the court should not be required to hold a mini-trial to determine whether the witness committed some deceitful act some time during the course of committing a crime.

The compromise eventually reached by the Committee would permit automatic impeachment when an element of the crime required proof of deceit, and it would go somewhat further to permit automatic impeachment if an underlying act of deceit could be "readily determined" from such information as the charging instrument. The proposed amendment also deletes the indefinite term that described the crime as one that "involved" dishonesty or false statement. Under the amendment, the crime actually must be a crime of dishonesty or false statement; a conviction is not admissible under Rule 609(a)(2) merely because there was some act of deceit in committing the crime.

The Evidence Rules Committee approved the proposed amendment to Rule 609 and the proposed Committee Note by a unanimous vote. The proposed amendment and Committee Note are attached to this Report as Appendix D.

Recommendation: The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 609 be approved for release for public comment.

III. Information Items

A. Long-Term Project on Possible Changes to Evidence Rules

As part of long-range planning the Evidence Rules Committee has reviewed scholarship, case law, and other sources of evidence law to determine whether there are any evidence rules that might be in need of amendment. The Committee agreed that the problematic rules should be considered

over the course of four Committee meetings and that if any Rules are found in need of amendment, the amendment proposals would be delayed in order to package them as a single set of proposed amendments to the Evidence Rules.

The proposed amendments agreed upon by the Committee are set forth above as action items for this meeting of the Standing Committee. A number of other proposals have been considered, but they have not met the strict threshold of necessity set by the Evidence Rules Committee for any proposed amendment.

At the Spring 2004 meeting the Committee voted to reject the following proposals:

1. *Rule 410:* The Committee considered a proposed amendment to Rule 410 that would protect statements and offers made by prosecuting attorneys**,** to the same extent that the Rule currently protects statements and offers made by defendants and their counsel. The policy behind such an amendment would be to encourage a free flow of discussion during guilty plea negotiations. At the Spring 2004 meeting, a number of questions and concerns were raised about the merits of the proposed amendment to Rule 410. The most important objection was that the amendment did not appear necessary, because no reported case has ever held that a statement or offer made by a prosecutor in a plea negotiation can be admitted against the government as an admission of the weakness of the government's case. The Committee concluded that there is no conflict among the courts that would be rectified by an amendment; and a conflict in the courts has always been considered by the Committee to be a highly desirable justification for an amendment to the Evidence Rules. The Committee voted to take no further action on an amendment to Rule 410.

2. *Rule 706:* Judge Gettleman requested that the Committee consider an amendment to Rule 706 that would make stylistic changes and that also would dispense with the requirement of an order to show cause before an expert is appointed as a witness. In its review of Rule 706, the Committee observed that the Rule does not address some important issues concerning the appointment of expert witnesses. Among the open issues are: standards for appointment, method for selection, ex parte contacts, jury instructions, and allocation of the expert witness's fee. The Committee concluded, however, that an amendment to Rule 706 was not necessary at this time. Rule 706 is rarely invoked, and those few courts that appoint expert witnesses do not appear to be having problems in resolving the questions left open by the existing Rule. The Committee agreed that Judge Gettleman's suggestions would improve the Rule, but concluded that this stylistic improvement did not justify the costs of an amendment to the Evidence Rules.

3. *Rule 803(3):* The Evidence Rules Committee considered a proposed amendment to Rule 803(3)—the hearsay exception for a declarant's statement of his or her state of mind. The possible need for amendment of Rule 803(3) arises from a dispute in the courts about whether the hearsay exception covers statements of a declarant's state of mind when offered to prove the conduct of another person. The Committee determined, however, that the Supreme Court's recent decision in

Crawford v. Washington rendered any amendment to a hearsay exception inappropriate at this time. The Court in *Crawford* radically revised its Confrontation Clause jurisprudence. This has a direct bearing on the scope of Rule 803(3), because the use of the state of mind exception to prove the conduct of a non-declarant occurs almost exclusively in criminal cases, where the statement is offered to prove the conduct of the accused.

The *Crawford* Court left a number of open questions that will be the subject of case law development. The Committee will monitor that case law development.

4. *Rule 803(8):* The Committee considered a proposed amendment on Rule 803(8)—the hearsay exception for public reports. The possible need for amendment of Rule 803(8) arises from several textual anomalies in the Rule and a dispute in the courts about the scope of the Rule. The Committee noted (as with Rule 803(3)) that any amendment to a hearsay exception is premature in light of the Supreme Court's recent decision in *Crawford v. Washington*. The problems that the courts have had with the public records exception arise almost exclusively when a public record is offered against a criminal defendant. This is the very situation addressed by the Court in *Crawford*. The Committee resolved unanimously to defer consideration of any amendment to Rule 803(8).

5. *Rule 804(b)(3):* In 2003 the Evidence Rules Committee proposed an amendment to Evidence Rule 804(b)(3), the hearsay exception for declarations against interest. The amendment provided that statements against penal interest offered by the prosecution in criminal cases would not be admissible unless the government could show that they carried "particularized guarantees of trustworthiness." The intent of the amendment was to assure that statements offered by the prosecution under Rule 804(b)(3) would comply with the constitutional safeguards imposed by the Confrontation Clause. The amendment was approved by the Judicial Conference and referred to the Supreme Court.

The amendment to Rule 804(b)(3) essentially codified the Supreme Court's then-existing Confrontation Clause jurisprudence, which required a showing of "particularized guarantees of trustworthiness" for hearsay admitted under an exception that was not "firmly rooted." But while the amendment was pending in the Supreme Court, that Court granted certiorari and decided *Crawford v. Washington*. *Crawford* essentially rejected the Supreme Court's prior jurisprudence, which had held that the Confrontation Clause demands that hearsay offered against an accused must be reliable. The *Crawford* Court replaced the reliability-based standard with a test dependent on whether the proffered hearsay is "testimonial."

Shortly after the Supreme Court decided *Crawford*, it sent the proposed amendment back to the Judicial Conference for reconsideration in light of *Crawford.* Now that the governing standards for the Confrontation Clause have been changed, the proposed amendment did not meet its intended goal. It embraced constitutional standards that are no longer applicable.

In reconsidering the proposed amendment after the Supreme Court's action, the Evidence Rules Committee determined that it was prudent to defer any consideration of an amendment to a

hearsay exception until the courts are given some time to develop the implications of *Crawford.* Any attempt to bring Rule 804(b)(3) into line with *Crawford* standards at this point would be unwise given the fact that those standards have not yet been clarified.

I wish to emphasize that in regard to any rules or other items as to which the Committee has indicated possible interest, the Committee continues to be wary of recommending changes that are not considered absolutely necessary to the proper administration of justice.

B. Privileges

The Committee's Subcommittee on Privileges has been working on a long-term project to prepare a "survey" of the existing federal common law of privileges. The end-product is intended to be a descriptive, non-evaluative presentation of the existing federal law, and not a proposal for any amendment to the Evidence Rules. The survey is intended to help courts and lawyers in working through the existing federal common law of privileges, and when completed it will be published as a work of the Consultant to the Committee and the Reporter.

The Committee has determined that the survey of each privilege will be structured as follows:

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

2. The second section will be a commentary on existing federal law. This section would provide case law support for each aspect of the survey rule and an explanation of the alternatives, as well as a description of any aberrational case law. This commentary section is intended to be detailed but not encyclopedic

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

The Subcommittee to this point has prepared all three sections on the psychotherapist-patient privilege, and will complete all of the materials on the attorney-client privilege by the next meeting.

C. Civil Rules That Operate As Rules of Evidence

A number of Civil Rules — most importantly Rules 32 and 44 — operate as rules of admissibility. The Evidence Rules Committee and Civil Rules Committee have both indicated interest in a project that would provide better integration of such rules. The goal of such a project would be to make it easier for lawyers to find rules of evidence in one body of law.

D. Forfeiture of Privilege Through Inadvertent Disclosure

The Evidence Rules Committee has been notified that the Civil Rules Committee is proposing a rule concerning waiver (more precisely, forfeiture) of privilege by inadvertent disclosure during the course of discovery. The proposed rule would govern the procedure for making a claim that disclosure was inadvertent. The rule does not purport to set forth substantive standards for when a forfeiture should or must be found. The Civil Rules Committee justifiably was concerned that a rule setting forth legal standards for determining forfeiture could be a rule of privilege requiring direct enactment by Congress. Such a rule would also, of course, be a rule of evidence, and would therefore be of interest to the Evidence Rules Committee.

The Civil Rules Committee has indicated its interest in working with the Evidence Rules Committee on a rule concerning inadvertent disclosure of privileged material. The Evidence Rules Committee shares this interest in a project on this important subject.

IV. Minutes of the April 2004 Meeting

The Reporter's draft of the minutes of the Evidence Rules Committee's April 2004 meeting is attached to this Report. These minutes have not yet been approved by the Evidence Rules Committee.

Attachments:

Proposed Amendment to Evidence Rule 404(a) and Committee Note
Proposed Amendment to Evidence Rule 408 and Committee Note
Proposed Amendment to Evidence Rule 606(b) and Committee Note
Proposed Amendment to Evidence Rule 609 and Committee Note

Draft Minutes

PROPOSED AMENDMENT 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;

* * *

Committee Note

The Rule has been amended to clarify that in a civil case evidence of a person's character is never admissible to prove that the person acted in conformity with the character trait. The amendment resolves the dispute in the case law over whether the exceptions in subdivisions (a)(1) and (2) permit the circumstantial use of character evidence in civil cases. *Compare Carson v. Polley*, 689 F.2d 562, 576 (5th Cir. 1982) ("when a central issue in a case is close to one of a criminal nature, the exceptions to the Rule 404(a) ban on character evidence may be invoked"), *with SEC v. Towers Financial Corp.*, 966 F.Supp. 203 (S.D.N.Y. 1997) (relying on the terms "accused" and "prosecution" in Rule 404(a) to conclude that the exceptions in subdivisions (a)(1) and (2) are inapplicable in civil cases). The amendment is consistent with the original intent of the Rule, which was to prohibit the circumstantial use of character evidence in civil cases, even where closely related to criminal charges. *See Ginter v. Northwestern Mut. Life Ins. Co.,* 576 F.Supp. 627, 629-30 (D. Ky.1984) ("It seems beyond peradventure of doubt that the drafters

of F.R.Evi. 404(a) explicitly intended that all character evidence, except where 'character is at issue' was to be excluded" in civil cases).

The circumstantial use of character evidence is generally discouraged because it carries serious risks of prejudice, confusion and delay. *See Michelson v. United States,* 335 U.S. 469, 476 (1948) ("The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."). In criminal cases, the so-called "mercy rule" permits a criminal defendant to introduce evidence of pertinent character traits of the defendant and the victim. But that is because the accused, whose liberty is at stake, may need "a counterweight against the strong investigative and prosecutorial resources of the government." C. Mueller & L. Kirkpatrick, *Evidence: Practice Under the Rules*, pp. 264-5 (2d ed. 1999). See also Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U.Pa.L.Rev. 845, 855 (1982) (the rule prohibiting circumstantial use of character evidence "was relaxed to allow the criminal defendant with so much at stake and so little available in the way of conventional proof to have special dispensation to tell the factfinder just what sort of person he really is"). Those concerns do not apply to parties in civil cases.

The amendment also clarifies that evidence otherwise admissible under Rule 404(a)(2) may nonetheless be excluded in a criminal case involving sexual misconduct. In such a case, the admissibility of evidence of the victim's sexual behavior and predisposition is governed by the more stringent provisions of Rule 412.

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.

“Clean Copy” of Proposed Amendment To Rule 408

To assist the Committee in its evaluation of the proposed amendment, a “clean copy” of the Rule incorporating all of the proposed amendment is set forth below. If the Committee votes to refer the amendment to the Standing Committee, that Committee will be provided with a clean copy as well.

Rule 408. Compromise and Offers to Compromise

(a) General rule. – 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 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 the claim; and

(2) in a civil case, conduct or statements made in compromise negotiations regarding the claim.

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

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

(b) Inquiry into validity of verdict or indictment. — Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith~~, .except that~~ But a juror may testify ~~on the question~~ about (1) whether extraneous prejudicial

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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 error 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)).

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 dishonesty or false statement shall be admitted ~~if it~~

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

~~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 the criminal act was itself an act of dishonesty or false statement. 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.