

FINAL REPORT

Amendments to Pa.R.E. 408 and Comment

The language of Federal Rule of Evidence 408 was changed substantially. The changes were aimed at clarifying the meaning of the rule, and answering several questions that had arisen in the application of the rule. Prior to the amendment, Pa.R.E. 408 was identical to the federal rule. We recommended that we adopt some, but not all of the changes. First, we recommended the adoption of the changes aimed at clarifying the meaning of the rule. Essentially, this is accomplished by breaking up one long paragraph into several, and placing in the first paragraph some language that was previously in the middle of the paragraph. These changes have no substantive impact.

The second change in the rule is the language at the end of the first paragraph, prohibiting the use of the prohibited evidence to impeach through a prior inconsistent statement or contradiction. This had been a question in the federal courts. May a witness (usually a party) be impeached with a statement made during compromise negotiations that is arguably inconsistent with the witness's trial testimony? The federal courts had been split on this question. The federal drafters amended the rule, so that it now prohibits the use of statements made in negotiations as inconsistent statements. The drafters believed this was most consistent with the purpose of the rule, which is to encourage parties to engage in frank and open negotiations in order to compromise disputes. There is no authority on this question in Pennsylvania. We think that the federal drafter's approach is better, and, therefore, recommended adoption of this portion of the rule.

The federal rule in paragraph (a)(2) permits the use in criminal cases of statements made to government investigators, regulators, or enforcement authority in negotiations in civil cases. We did not recommend the adoption of this portion of the federal rule, because we believed it will deter parties in civil matters from frank and open negotiations with government regulators, if there is a risk that their statements will then be used in criminal prosecutions.

The last sentence of the proposed rule was deleted from the federal rule, because it was believed to be superfluous. We recommended its retention as a precaution against frivolous argument.