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OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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TO: Honorable Joseph F. Weis, Jr., Chairman
Standing Committee on Rules of Practice
and Procedure

FROM: Honorable Leland C. Nielsen, Chairman
Advisory Committee on Rules of Criminal
Procedure

SUBJECT: Report on *** Proposed Amendments to
Rules of Criminal Procedure and Evidence

DATE: January 12, 1990

I. INTRODUCTION

At its November 1989 meeting the Advisory Committee on Rules of Criminal Procedure acted upon amendments to six different rules. This report briefly addresses four of those changes and the recommendations to the Standing Committee. ***

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B. Rules Reconsidered at Request of Standing Committee.

At the Request of the Standing Committee the Advisory Committee reconsidered two rules and recommends that they be circulated to the bench and bar for comment:

1. Rule 16(a)(1)(A). Statement of Defendant.

2. Fed. R. Evid. 404(b). Notice Requirement.

C. Proposed Amendments to Rules 24 and 35.

The Committee recommends that proposed amendments in the following two rules be circulated for public comment by the bench and bar:

1. Rule 24(b). Peremptory Challenges.

2. Rule 35(b). Reduction of Sentence.

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III. RULES RECONSIDERED BY ADVISORY COMMITTEE.

At its July 1989 meeting the Standing Committee considered proposed amendments to Rule 16(a)(1)(A) and Federal Rule of Evidence 404(b).

A. Rule 16(a)(1)(A). Statement of Defendant.

The proposed amendment would expand the disclosure requirements of Rule 16(a) slightly; the prosecution would also be required to disclose to the defense any written record containing any relevant oral statements made by the defendant in response to interrogation. At its July 1989 meeting the Standing Committee expressed concern with the practical problems involved in disclosing oral statements. The Advisory Committee has reconsidered its proposed amendments to that Rule and has suggested new language which it believes meets the concerns of the Standing Committee. The introductory language of Rule 16(a)(1)(A) has also been redrafted to make it clear that in the case of either oral or written statements, disclosure is required. As is the case now, the Rule does not specify the manner of making that disclosure.

The Advisory Committee recommends that the redrafted Rule 16(a)(1)(A) be circulated for comment by the bench and bar. A copy of the Rule and its accompanying Committee Note are attached.

B. Federal Rule of Evidence 404(b). Other crimes, wrongs or acts.

The Advisory Committee has proposed that a notice requirement be added to Federal Rule of Evidence 404(b). At its July 1989 meeting the Standing Committee expressed concern that the proposed notice requirement might more appropriately fit with Federal Rule of Criminal Procedure

16, which already addresses pretrial discovery and includes sanctions for failure to provide the necessary information. The Advisory Committee carefully considered the issues raised by the Committee and believes that the notice provision should remain in Rule 404(b). As noted in the draft Committee Note, that would be entirely consistent with other evidence rules which contain disclosure or notice requirements. See, e.g., Fed. R. Evid. 412(c), 609, 803(24) and 804(b)(5). Further, counsel might reasonably expect to find any notice requirement within the Rule itself, and not in another procedural rule. With regard to sanctions, the Advisory Committee has redrafted the notice requirement to make it clear that absent the required notice, the 404(b) evidence is inadmissible.

The Advisory Committee recommends that the redrafted Rule 404(b) be circulated for comment by the bench and bar. The proposed rule and the accompanying draft Committee Notes are attached.

IV. PROPOSED AMENDMENTS TO RULES 24 AND 35

The Advisory Committee at its November 1989 meeting also adopted proposed amendments to two other Rules of Criminal Procedure:

A. Rule 24(b). Trial Jurors.

The issue of the number of peremptory challenges which should be available to each side has been the subject of debate for some time. The Advisory Committee has considered various proposed changes to Rule 24(b) for the last two years but was generally reluctant to consider any amendments, in part because of Congress' clear rejection of the amendments to Rule 24(b) adopted by the Supreme Court in 1976. As noted in the draft Committee Note to Rule 24(b)(attached), Congress is apparently considering an amendment to Rule 24(b) which would equalize the number of peremptory challenges to each side: 20 challenges in capital cases, 8 in felony cases, and 3 in misdemeanor cases. The judge would have the discretion to permit multiple defendants to exercise additional peremptory challenges but the number available to the prosecution could not exceed the total available to the defendants. See Senate Bill 1711, Sec. 79 (Drug Bill). The proposed change, which was suggested by the American Bar Association, has not been presented to the Advisory Committee for its consideration.

Given Congress' apparent inclination to revisit the issue of peremptory challenges, the Committee believed it to be appropriate to propose and circulate for public comment amendments to Rule 24(b). The Committee's proposal also equalizes the number of peremptory challenges: 20 for capital cases, 6 for felony cases, and 3 for misdemeanor cases. The trial judge would have the discretion to increase the number of peremptory challenges in cases involving multiple defendants. The Committee's reasons for the changes are set out in its draft Committee Note accompanying Rule 24(b).

The Committee recommends that the proposed amendments to Rule 24(b) be circulated to the bench and bar for comment. The rule and Committee Note are attached.

B. Rule 35(b). Reduction of Sentence.

At the request of the Department of Justice, the Committee adopted amendments to Rule 35(b) which permits the government to move the trial court to reduce a defendant's sentence in return for cooperation on other cases. The proposed amendment would permit the trial court to delay ruling on the government's motion filed within one year of the date of sentencing. It would also permit the government to file a motion to reduce the sentence one year or more after sentencing where the defendant's assistance depends on information or evidence which was not available earlier.

The Committee recommends that the proposed amendments to Rule 35(b) be circulated to the bench and bar for public comment. The rule and the accompanying Committee note are attached.

**PRELIMINIARY DRAFT
OF PROPOSED AMENDMENTS
TO THE
FEDERAL RULES OF CRIMINAL PROCEDURE***

Rule 16. Discovery and Inspection

(a) DISCLOSURE OF EVIDENCE BY THE GOVERNMENT.

(1) Information Subject to Disclosure.

(A) STATEMENT OF DEFENDANT. Upon request of a defendant the government shall ~~permit the defendant to inspect and copy or photograph~~ disclose to the defendant and make available for inspection, copying or photographing: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; any written record containing the substance of any relevant oral statement ~~which the government intends to offer in evidence at the~~

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

~~trial~~ made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. The government shall also disclose to the defendant the substance of any other relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known by the defendant to be a government agent if the government intends to use that statement at trial.

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COMMITTEE NOTE

The amendment to Rule 16(a)(1)(A) expands slightly government disclosure to the defense of statements made by the defendant. The rule now requires the prosecution, upon request, to disclose any written record which contains reference to a relevant oral statement by the defendant which was in response to interrogation, without regard to whether the prosecution intends to use the statement at trial. The change recognizes that the defendant has some proprietary interest in statements made during interrogation regardless of the prosecution's intent to make any use of the statements.

The written record need not be a transcription or summary of the defendant's statement but must only be some written reference which would provide some means for the prosecution and defense to identify the statement. Otherwise, the prosecution would have the difficult task of locating and disclosing the myriad oral statements

made by a defendant, even if it had no intention of using the statements at trial. In a lengthy and complicated investigation with multiple interrogations by different government agents, that task could become unduly burdensome.

The existing requirement to disclose oral statements which the prosecution intends to introduce at trial has also been changed slightly. Under the amendment, the prosecution must also disclose any relevant oral statement which it intends to use at trial, without regard to whether it intends to introduce the statement. Thus, an oral statement by the defendant which would only be used for impeachment purposes would be covered by the rule.

The introductory language to the rule has been modified to clarify that without regard to whether the defendant's statement is oral or written, it must at a minimum be disclosed. Although the rule does not specify the means for dislosing the defendant's statements, if they are in written or recorded form, the defendant is entitled to inspect, copy, or photograph them.

Rule 24. Trial Jurors

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(b) PEREMPTORY CHALLENGES. If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, ~~the government~~ each side is entitled to 6 peremptory challenges. ~~and the defendant or defendants jointly to 10 peremptory challenges.~~ If the offense charged is punishable by imprisonment for not more than one year or by

fine or by both, each side is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow each side additional peremptory challenges~~.~~, provided that the government shall not have more challenges than the total allocated to all defendants. The court may permit multiple defendants to exercise peremptory challenges separately or jointly.

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COMMITTEE NOTE

The amendment to Rule 24(b) equalizes the number of peremptory challenges normally available to the prosecution and defense in a felony case. Under the amendment the number of peremptory challenges available to the prosecution would remain the same; the number available to the defense would be reduced by four. The number of peremptory challenges available in capital and misdemeanor cases remains unchanged.

In 1976 the Supreme Court adopted and forwarded to Congress in accordance with the Rules Enabling Act amendments to Rule 24(b) which would have significantly reduced and equalized the number of peremptory challenges. Under that amendment, each side would have had 20, 5, and 2 peremptory challenges respectively in capital, felony, and misdemeanor cases. Order, Amendments to Federal Rules of Criminal Procedure, 44 U.S.L.W. 4549 (1976). The reasons for the amendments were three-fold. First, under the 1968 Jury Selection and Service Act, there were more representative panels which would reduce the need for the defense to have an advantage in the number of peremptory challenges. Second, the proposed change would make it more difficult to make systematic exclusions of a class of persons. And third, the reduction in the number of peremptory challenges would shorten the time spent on voir dire and also reduce jury costs. Congress ultimately rejected

the changes but recommended that the Judicial Conference study the matter further. The chief concern expressed by Congress was that in most federal courts, trial judges conduct the voir dire, thus making it difficult for counsel to identify biased jurors. S. Rep. 354, 95th Cong., 1st Sess. 9, reprinted in [1977] U.S. Code Cong. & Ad. News 1477, 1482-83. Congress however, has recently indicated a willingness to reconsider changes to the number of peremptory challenges. See Senate Bill No. 1711.

The Committee believes that the three reasons supporting the proposed amendments in 1976 are at least as valid today as they were then. In particular, the decision in Batson v. Kentucky, 476 U.S. 79 (1986), supports one of the reasons for the amendment, the need to reduce the opportunity for systematic exclusion of a class of persons. Although Batson addressed systematic exclusion by the prosecution, an argument could be made that under some circumstances systematic exclusion of classes of persons by the defense should also be limited. There is also growing concern about delays in disposing of cases in federal courts, and reduction of the number of peremptory challenges would be cost effective, both in terms of time and expense. On balance, the Committee believes that the reduction of the number of peremptory challenges available to a single defendant in a felony case would not unfairly deprive that defendant of a representative and unbiased jury.

The amendment expands the ability of the trial court to grant additional peremptory challenges where there are multiple defendants by permitting the court to grant additional challenges to the prosecution. Although the prosecution is potentially entitled to as many challenges as the total provided to the multiple defendants, the court is not required to equalize the number of challenges.

Rule 35. Correction or Reduction of Sentence

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(b) ~~CORRECTION~~ REDUCTION OF SENTENCE FOR CHANGED CIRCUMSTANCES. -- The court, on motion of

the Government, ~~made~~ may within one year after the imposition of the sentence, may reduce ~~lower~~ a sentence to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense, in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code. The court may consider a government motion to reduce a sentence made one year or more after imposition of the sentence where the defendant's substantial assistance involves information or evidence not known by the defendant until one year or more after imposition of sentence. The court's authority to reduce ~~lower~~ a sentence under this subsection includes the authority to reduce ~~lower~~ such sentence to a level below that established by statute as a minimum sentence.

COMMITTEE NOTE

Rule 35(b), as amended in 1987 as part of the Sentencing Reform Act of 1984, reflects a method by which the government may obtain valuable assistance from defendants in return for an agreement to file a motion to reduce the sentence, even if the reduction would reduce the sentence below the mandatory minimum sentence.

The title of subsection (b) has been amended to reflect that there is a difference between correcting an illegal or improper sentence, as in subsection (a), and reducing an otherwise legal sentence for special reasons under subsection (b).

Under the 1987 amendment, the trial court was required to rule on the government's motion to reduce a defendant's sentence within one year after imposition of the sentence. This caused problems, however, in situations where the defendant's assistance could not be fully assessed in time to make a timely motion which could be ruled upon before one year had elapsed. The amendment requires the government to make its motion to reduce the sentence before one year has elapsed but does not require the court to rule on the motion within the one year limit. This change should benefit both the government and the defendant and will permit completion of the defendant's anticipated cooperation with the government. Although no specific time limit is set on the court's ruling on the motion to reduce the sentence, the burden nonetheless rests on the government to request and justify a delay in the court's ruling.

The amendment also recognizes that there may be cases where the defendant's assistance or cooperation may not occur until after one year has elapsed. For example, the defendant may not have obtained information useful to the government until after the time limit had passed. In those instances the trial court in its discretion may consider what would otherwise be an untimely motion if the government establishes that the cooperation could not have been furnished within the one-year time limit. In deciding whether to consider an untimely motion, the court may, for example, consider whether the assistance was provided as early as possible.

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**PRELIMINARY DRAFT
OF PROPOSED AMENDMENTS
TO THE
FEDERAL RULES OF EVIDENCE**

Rule 404. Character Evidence not Admissable to Prove Conduct; Exceptions; Other Crimes

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(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissable to prove the character of a person in order to show action in conformity therewith. It may, however, be admissable for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identify, 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.

COMMITTEE NOTE

Rule 404(b) has emerged as one of the most cited Rules in the Rules of Evidence. See generally Immwinkleried, Uncharged Misconduct Evidence (1984). And in many criminal cases evidence of "uncharged misconduct" is reviewed as an important asset in the prosecution's case against an accused.

The amendment to Rule 404(b) adds a pretrial notice requirement in criminal cases and is intended to reduce surprise and promote early resolution on the issue of admissibility. The notice requirement thus places Rule 404(b) in the mainstream with notice and disclosure provisions in other rules of evidence. See, e.g., Rule 412 (written motion of intent to offer evidence under rule), Rule 609 (written notice of intent to offer conviction older than 10 years), Rule 803(24) and 804(b)(5) (notice of intent to use residual hearsay exceptions).

The Rule expects that counsel for both the prosecution and the defense will submit the necessary request and information in a reasonable and timely fashion. Other than requiring pretrial notice, no specific time limits are stated in recognition that what constitutes a reasonable request or disclosure will depend largely on the circumstances of each case. Compare Fla. Stat. Ann § 90.404(2)(b) (notice must be given at least 10 days before trial) with Tex. R. Evid. 404(b) (no time limit).

Likewise, no specific form of notice is required. The Committee considered and rejected a requirement that the notice satisfy the particularity requirements normally required of language used in a charging instrument. Cf. Fla. Stat. Ann § 90.404(2)(b) (written disclosure must describe uncharged misconduct with particularity required of an indictment or information). Instead, the Committee opted for a generalized notice provision which requires the prosecution to apprise the defense of the general nature of the evidence of extrinsic acts. The notice may, but need not, include information such as dates, times, and places. Thus, prosecution notice that it intended to use evidence that the accused had committed unrelated incidents of burglary would normally suffice to apprise the defense. In any event, once on notice that the prosecution intends to use extrinsic offense evidence, the defense may file appropriate motions in limine in an attempt to limit or bar use of that evidence. The Committee does not intend that the amendment will supercede other rules of admissibility or disclosure, such as the Jencks Act, 18 U.S.C. § 3500, et. seq. nor require the prosecution to disclose the names and addresses of its witnesses, something it is currently not required to do under Federal Rule of Criminal Procedure 16.

The amendment requires the prosecution to provide notice, regardless of how it intends to use the extrinsic act evidence at trial, i.e., during its case-in-chief, for impeachment, or for possible rebuttal.

The court in its discretion may, under the facts, decide that the particular request or notice was not reasonable, either because of the lack of timeliness or completeness. Although the amendment does not address specifically the issue of sanctions for failure to provide notice, the Court in its discretion may enter appropriate orders.

The amendment is not intended to redefine what evidence would otherwise be admissible under Rule 404(b). Nor is it intended to affect the role of the court and the jury in considering such evidence. See United States v. Huddleston, ----- U.S. -----, 108 S.Ct 1496 (1988).

PROPOSED AMENDMENTS 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 of a witness,

(1) evidence that ~~the~~ a witness other than an accused has been convicted of a crime shall be admitted, ~~if elicited from the witness or established by public record during cross-examination but only~~ subject to Rule 403, if the crime ~~(1)~~ 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 ~~defendant,~~ accused; ~~or~~ 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.

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

COMMITTEE NOTE

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. ___, ___ U.S. ___ (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 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); Czaka 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 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 prior 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.

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