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Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Administrative Office of the United States Courts
Washington, D.C. 20544

RE: Proposed Changes to Federal Rules of Evidence

Dear Mr. McCabe:

Thank you for the opportunity to comment on the pending proposed amendments to the Federal Rules of Evidence. I have had the opportunity to examine the proposals carefully in the process of incorporating them into my forthcoming evidence textbook. I wanted to pass my thoughts on to assist the Committee in clarifying the language of the amendments in a way that will make certain that their application by the courts will be consistent with what I believe to be the Committee's intent.

Federal Rule of Evidence 404

It is my understanding that the Committee's only purpose in amending Rule 404 is to make clear that the exceptions set forth in Rules 404(a)(1) and 404(a)(2) to Rule 404(a)'s general ban on evidence of a person's character or trait of character when offered to show action in conformity therewith are applicable only in criminal cases and never in civil cases. As I understand it, the amendment in no way prevents the use of evidence of other crimes, wrongs or acts in civil cases for "other purposes" as provided for in the second sentence of Rule 404(b).

While I believe the Committee's intent in this regard is clear, it is possible that the amendment, without clarifying language, might result in some confusion. This is particularly so in light of the 1991 amendment to Rule 404(b), which in the course of adding a pretrial notice requirement added the words "accused," "prosecution," and "criminal case." When considered in light of the citation in the 2004 Committee Note to *SEC v. Towers Financial Corp.*, 966 F.Supp. 203 (S.D.N.Y. 1997), this might lead one to conclude that the use of such words in Rule 404(b) implies its applicability only in criminal cases.

Federal Rule of Evidence 609

I have two comments with respect to the Committee's proposed amendment to Rule 609. First, notwithstanding the concerns expressed by the Justice Department, I believe that the

Committee's initial impulse—to draft an amendment that focused on the elements of the conviction—was a sounder approach than that followed in the proposed amendment. Courts will no doubt differ on the meaning of the phrase "readily can be determined," leading to inconsistent application of the rule. Moreover, the cost to proponents of convictions of the sort that the Justice Department contemplates will not be exclusion of the evidence (unless it is a crime punishable by imprisonment of one year or less), but merely the benefit of automatic admissibility. If the deceitful nature of the crime is apparent from an examination of the indictment or statement of admitted facts, that factor should weigh very strongly in favor of admissibility under Rule 609(a)(1).

My second comment has not so much to do with this specific amendment, but rather with the relationship between Rule 609(a)(2) and the hearsay rule. Lurking in the background of Rule 609 is a subtle hearsay problem. Under Rule 609, proof that the witness has been previously convicted of a crime is admitted to impeach his credibility as a witness. Yet the significance of the prior conviction lies not in the mere fact that the witness was convicted, but rather in crediting the truth of the matter asserted by the trier of fact in that case, to wit, that the witness committed the offense for which he was convicted. *See* Michael H. Graham, 3 Handbook of Fed. Evid. § 803.8 (5th ed. 2001 & Supp. 2005); Roger C. Park, Trial Objections Handbook 2d § 4:58 (2004).

Because evidence of a prior conviction is thus offered under Rule 609 to prove the truth of the matter asserted therein, it is hearsay. Indeed, it is hearsay within hearsay if what is offered is an official record reporting the trier of fact's verdict (as contrasted with the testimony of a person who has first-hand knowledge of the trier of fact's verdict). In most cases, evidence of the previous judgment of conviction would fall within the scope of Rule 803(22). Rule 803(22), however, specifically excludes judgments of conviction for crimes punishable by one year or less imprisonment.

How, then, can one offer evidence of a previous judgment of conviction for a crime of dishonesty or false statement punishable by one year or less imprisonment, which is clearly contemplated by Rule 609(a)(2)'s proviso indicating that evidence of such convictions is admissible "regardless of the punishment"? The answer given by most commentators is that Rule 609(a)(2) itself, by commanding that evidence of certain prior convictions *shall* be admitted, creates an implicit hearsay exception for judgments offered under that rule. *See* Christopher B. Mueller and Laird C. Kirkpatrick, 2 Federal Evidence § 143 (2d ed. 2004); Michael H. Graham, 3 Handbook of Fed. Evid. § 609.2 (5th ed. 2001 & Supp. 2005); Roger C. Park, Trial Objections Handbook 2d § 4:58 (2004). While I believe that it is reasonable to so interpret Rule 609(a)(2), clarification in this regard would in my view be beneficial.

Respectfully Yours,

Peter Nicolas
Associate Professor of Law