COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

June 15, 1989

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 Pending and Proposed Amendments to Rules of Criminal Procedure and Rules of Evidence

1. **Proposed Amendment to Rule 16(a)(1)(A):** At its May meeting the Advisory Committee on the Federal Rules of Criminal Procedure considered and approved an amendment to Rule 16(a)(1)(A) which would slightly expand the prosecution's duty to notify the defense of oral statements made by the accused pursant to an interrogation. The current rule only requires the prosecution to give notice of those oral statements which it intends to offer. The amendment would extend the notice requirement to those oral statements of which a written record has been made. The proposed amendment and accompanying Committee Note are attached and the Committee requests that the proposed amendment be circulated for public comment.

2. **Proposed Amendment to Federal Rule of Evidence 404(b):** At its May meeting the Committee also considered and adopted an amendment to Federal Rule of Evidence 404(b) which would require the prosecution, upon request by the defense, to give pretrial notice to the defense of its intent to use evidence of other crimes, wrongs, or acts committed by the accused. The Committee considered and tabled a proposal to amend 404(b) to overrule the Supreme Court's decision in United States v. Huddleston, 108 S.Ct 1496 (1988). The proposed amendment and accompanying Committee Note are attached and the Committee requests that it be circulated for public comment.

3. **Proposed Amendment to Federal Rule of Evidence 609(a):** At its meeting in January 1989 the Standing Committee approved a proposed amendment to Federal Rule of Evidence 609(a) but decided to hold the amendment pending the Supreme Court's decision in Green v. Bock Laundry Machine Company. In Green, a products liability case, the defendant impeached the plaintiff with proof that the plaintiff had been convicted of a burglary and a related felony. The Court of Appeals for the Third Circuit concluded that Rule 609(a)(1) left no room for discretion where a civil litigant was involved. Citing the lengthy and controverial history of the Rule, the Supreme Court agreed and concluded that as to a civil litigant the Rule uses mandatory language. The Court noted that an amendment to Rule 609 was pending but did not comment on whether it agreed with the amendment. The Committee requests that the Rule be forwarded to the Judicial Conference for approval. A copy of the Rule and the accompanying Committee Note (which has been amended to reflect the Court's decision in Green) are attached.

4. **Proposed Amendment to Rule 41(a) and New Rule 58:** At its January 1989 meeting the Standing Committee approved for circulation an amendment to Rule 41(a)(Authority to Issue Warrant) and new Rule 58 which contains the rules of procedure for trials of misdemenors and other petty offenses (formerly Magistrates' Rules). Hearings on the proposed amendments will be held on July 24th in Chicago, Illinois. The Committee will consider any public comments on the Rules at its November 1989 meeting. It should be noted that due to a transciption error in one of the earlier drafts, Rule 41(a)(3) contains an incorrect reference to authorizing searches of persons. Subsection (a)(3) is intended to apply only to searches of "property" overseas, as correctly reflected in the Committee Note.

5. The Minutes of the Committee's May 1989 meeting are attached.

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: 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 of due diligence may become known, to the attorney for the government; the substance of any oral statement ~~which the government intends to offer in evidence at the 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; (i) which the government intends to offer in evidence at trial or (ii) of which a written record has been made; and recorded testimony of the defendant before a grand jury which relates to the offense charged...

* * * * *

---

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

COMMITTEE NOTE

The amendment to Rule 16(a)(1)(A) expands slightly government disclosure to the defense of statements made by the defendant. In addition to disclosing the substance of oral statements made by the defendant which it intends to offer into evidence at trial, the prosecution under the amendment is also required to disclose the substance of any oral statements made by the defendant of which a written record has been made, without regard to possible use at trial. The change recognizes that the defendant has some proprietary interest in statements made during interrogation regardless of the prosecution's intent to use the statements.

The written record need not be a transcription or summary of the 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 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.

FEDERAL RULES OF EVIDENCE*

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

* * * * *

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Upon request by the accused in a criminal case, the prosecution shall provide reasonable notice in advance of trial of the intent to introduce evidence of other crimes, wrongs or acts committed by the accused, describing the general nature of such evidence.

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 viewed 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 Rule expects that counsel for both the prosecution and the defense will submit the necessary request and information in a reasonable and timely fashion. No specific time limits are

---

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

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 provide an opportunity for counsel or the court to sidestep other rules of admissibility or disclosure, such as the Jencks Act, 18 U.S.C. § 3500, et. seq. nor to 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 timliness 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).

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.

* * * * *

---

* 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. 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,

See Green v. Bock Laundry Machine Co., 109 S. Ct. ___, ___ U.S. ___ (1989).

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 unnecessry 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

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). 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 arguably take an unduly broad view of "dishonesty."

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.

Thus facilitating retrieval in law computerized research programs which distinguish the two provisions.

Current

Subsection (a)(2) continues to apply to any witness, including a criminal defendant.