SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE COMMITTEE

ON RULES OF PRACTICE AND PROCEDURE

The Committee on Rules of Practice and Procedure recommends that the Judicial Conference take the following action:

The remainder of the report is for information and the record.

Agenda E-20
Rules of Practice
and Procedure
September 1989

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES, CHAIRMAN; AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

Your Committee on Rules of Practice and Procedure met in Boston, Massachusetts, on July 17 and 18, 1989. All members of the Committee attended the meeting, except Gael Mahony, who was unavoidably absent. Also present were the Chairman and Reporter of the Appellate Rules Advisory Committee, the Chairman and Reporter of the Civil Rules Advisory Committee, the Chairman of the Criminal Rules Advisory Committee, and the Chairman and Reporter of the Bankruptcy Rules Advisory Committee. Judge J. Frederick Motz, District of Maryland, attended the first day of the meeting. Dean Daniel R. Coquillette of Boston College Law School, Reporter to the Committee; James E. Macklin, Jr., Secretary to the Committee; Joe S. Cecil, Research Division, Federal Judicial Center; David N. Adair, Jr., Assistant General Counsel of the Administrative Office; and Mary P. Squiers, Director of the Local Rules Project, were also in attendance.

I. Amendments to the Rules of Evidence

The Advisory Committee on the Federal Rules of Criminal Procedure has submitted to your Committee proposed amendments to Evidence Rule 609, which

deals with impeachment by evidence of conviction of a crime. The first amendment would remove from the rule the limitation that the conviction may only be elicited during cross-examination. The other amendment would clarify the approach to impeachment of witnesses in civil cases and Government witnesses in criminal cases by resolving the ambiguity as to the relationship of Rules 609 and 403. The amendment does not disturb the special balancing test for the criminal defendant who chooses to testify, but applies the general balancing test of Rule 403 to protect all other litigants against unfair impeachment of witnesses. Although the amendments had been previously submitted for public comment and were approved by your Committee in January 1989, they were held pending the Supreme Court's decision in Green v. Bock Laundry Machine Company, No. 87-1816. Now that that case has been decided, your Committee is sending these amendments forward.

The above proposed amendments to Federal Rule of Evidence 609(a) are set out in the Appendix and are accompanied by Advisory Committee Notes and Report explaining their purpose and intent.

Recommendation:

That the Judicial Conference approve amendments to Rule 609 of the Federal Rules of Evidence and transmit them to the Supreme Court for its consideration with a recommendation that they be approved by the Court and transmitted to Congress pursuant to law.

II. Publication of Proposed Amendments to the Rules of Practice and Procedure

The following proposed amendments to the Rules of Practice and Procedure were approved by your Committee for circulation to the bench and bar for comment.

A. Federal Rules of Civil Procedure

The Advisory Committee on the Federal Rules of Civil Procedure has submitted to your Committee a proposal to amend Civil Rules 4, 5, 12, 14, 15, 16, 24, 26, 28, 30, 34, 35, 38, 41, 44, 45, 47, 48, 50, 52, 53, 56, 63, 72, 77, and Admiralty Rules C and E. The Advisory Committee also has submitted a new Rule 4.1. Most of these amendments have been under consideration by the Advisory Committee for the last several years and were before your Committee previously in January 1989, at which time your Committee made a number of suggestions, which were then considered by the Advisory Committee and are reflected in the proposed amendments approved by your Committee for publication. Other proposed amendments were suggested by the local rules project. The proposed amendments include, inter alia, a complete rewrite of Civil Rule 4 and significant revisions to Rules 45 and 56.

B. Local Rules Project - Federal Rules of Civil Procedure

At its January 1989 meeting, your Committee approved for public comment a new Rule 84 of the Federal Rules of Civil Procedure, which would permit the Judicial Conference to promulgate a practice manual, consisting of administrative rules and forms. After receipt of a substantial amount of public comment and discussion by your Committee, it was decided that the proposed new Rule 84 would be submitted to your Advisory Committee on Civil Rules for further study and consultation with the circuit representatives.

C. Federal Rules of Appellate Procedure

The Advisory Committee on the Rules of Appellate Procedure has submitted to your Committee a proposal to amend Rule 4 to allow a district judge to reopen the time for appeal upon a finding that (a) notice of entry of judgment was not timely

received and (b) no party would be prejudiced by the reopening. Since this change will arguably be in conflict with the current provisions of the fourth paragraph of 28 U.S.C. § 2107, appropriate notice of the proposed change will be made to Congress so that it may take whatever action it deems appropriate. The Advisory Committee also suggested an amendment to Rule 28 that would require the parties to include a jurisdictional statement in their briefs and that would designate the party who files the first notice of appeal as appellant. A proposed amendment to Rule 30 would require a cross-appellant to serve the appellant with a statement of the issues to be explored in the cross-appeal and an amendment to Rule 34 would conform that rule to the amendment to Rule 30.

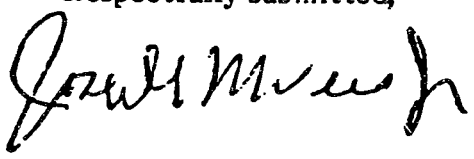
The Advisory Committee also noted an inconsistency between the current Appellate Rules and 28 U.S.C. § 2107. The third paragraph of that section sets the times within which Admiralty appeals must be filed. Federal Rule of Appellate Procedure 4(a)(1) sets out conflicting time periods. Although it is clear that the Rule supersedes the statute, in order to avoid confusion, your Committee voted to recommend that the Judicial Conference request that Congress repeal the third paragraph of section 2107 at such time as the above-noted amendment to Rule 4 is before the Conference.

D. Federal Rules of Bankruptcy Procedure

The Advisory Committee on the Federal Rules of Bankruptcy Procedure has submitted to your Committee a substantial revision of the Federal Rules of Bankruptcy to take into consideration new legislation. Most significantly, the rules have been amended to provide for the United States Trustee System, which was made national and permanent by the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554. The amendments also take into consideration new chapter 12 dealing with bankruptcies of family farms, which was

enacted by that Act, and the amendments made by the Retiree Benefits Bankruptcy Protection Act, Pub. L. No. 100-3361.

Respectfully submitted,



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PRELIMINARY DRAFT OF 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.

* * * * *

*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.