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02/15/2005 03:12 PM

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cc
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Subject Comments re 609

04-EV-016

I am also faxing the comments with my signature. Professor Myrna Raeder, Southwestern Univ. School of

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February 15, 2005

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
One Columbus Circle, NE
Washington, DC 20544

Re: Comment on Proposed Amendments to Federal Rule of Evidence 609

Dear Mr. McCabe:

Thank you for providing an opportunity to comment on the proposed amendments to the Federal Rules of Evidence. I have several thoughts about the proposed amendments to Rule 609. First, I agree that "character for truthfulness" should be substituted for "credibility." However, I question the soundness of an approach that permits evidence other than the elements of the conviction to be used in determining whether the crime is one of "dishonesty or false statement." While the Committee Notes indicate that a mini-trial is not contemplated, any procedure that is not limited to statutory elements is likely to result in wide variation among trial courts.

In his article, *Deceit and the Classification of Crimes: Federal Rule of Evidence 609(a)(2) and the Origins of Crimen Falsi*, 90 J.Crim. L. & Criminology 1087, 1122-23 (2000), Stuart P. Green discussed a number of reasons why restricting proof to statutory elements has substantial policy justifications. He mentions the creation of administrative burdens and legal uncertainties of any other standard, as well as the likelihood for 609(a)(2) to be expansively interpreted in a way that would make it the rule, rather than the exception, "even though the probative versus prejudicial weighing approach . . . is more representative of the Federal Rules' approach generally." Similarly, Professors Saltzburg, Martin and Capra note that construing Rule 609(a)(2) narrowly by focusing on the elements of the crime that proved deceit is consistent with the legislative history and is "sound policy" for these same reasons. 3 Federal Rules of Evidence Manual at 609-13 (8th ed. 2002).

Professor Green also argues that the most compelling reason for rejecting evidence of how the crime was committed is to "allow a court to look to underlying facts in determining whether to admit a prior conviction as a crime of deceit is thus to invite a

circumvention of the reasonable doubt standard itself." In other words, "[t]o admit conviction evidence is to tell the jury nothing more than that the elements of the crime of which the witness was convicted were proven beyond a reasonable doubt." In cases where deception plays a part in the underlying crime, those facts would not have been found by the jury beyond a reasonable doubt. Issues of fairness and ease of administration also were the rationale why the 1999 revision of the Uniform Rules confined proof of 609(a)(2) crimes to statutory elements.

Ultimately, the importance of limiting the nature of the necessary proof as to whether a crime falls within Rule 609(a)(2) relates to the problematic standard of "dishonesty or false statement" provided by the rule. In other words, that definition is so ambiguous that 30 years after the adoption of the rule, courts are still in disagreement about what it means. Despite the 1990 Advisory Committee Note disapproving the broad use of dishonesty to encompass bank robbery or bank larceny, today, nearly 15 years later, prosecutors and trial judges are still admitting theft and robbery crimes under 609(a)(2) and appellate judges are inappropriately referring to the rule. *See, e.g., United States v. Johnson,* 388 F.3d 96 (3d Cir. 2004) (1995 felony purse snatching conviction for theft admitted under 609(a)(2); remanded for balancing test); *United States v. Thomas*, 116 Fed.Appx. 727, 2004 WL 2756834 (6th Cir. 2004) (appellate court referenced 609(a)(2) as support for impeachment where crime was robbery), *certiorari granted, judgment vacated on other grounds* ---S.Ct. ---, 2005 WL 126642 (2005) (reconsideration in light of *Booker*).

The Uniform Rules and Vermont tackled this problem directly by changing the 609(a)(2) wording to "untruthfulness or falsification" as originally suggested in a report by the American Bar Association Criminal Justice Section Committee on Rules of Criminal Procedure and Evidence Federal Rules Of Evidence: A Fresh Review And Evaluation, 120 FRD 299 at Rule 609 (1988). The Reporters Notes to the revision of U.R.E. 609(a)(2) indicate that the change was intended to facilitate greater uniformity throughout the several States in the types of crimes admissible for impeachment purposes and more nearly focus upon the purpose for which prior convictions are admissible to impeach the testimony of a witness.

The current Committee Note to the proposed rule makes liberal use of the words "deceit" and "crimen falsi." Regardless of the exact wording of a more appropriate standard, as long as the Rule 609(a)(2) includes dishonesty, it is subject to expansive interpretation, made more likely by the possibility of looking at charging documents or other records that were not necessarily proved at trial or by the plea allocution. As to the Justice Department's concern that some obstructions of justice may involve deceit, in a specific case, this argument would likely be successful when made to the judge under 609(a)(1) test balancing whether the conviction's probative value outweighs it prejudicial effect to the accused.. What 609(a)(2) provides is an automatic admit, which should be reserved for convictions where the statutory elements provide the necessary proof.

I would also like to raise one other issue not addressed by the proposed revision: the uneasy relationship between Rules 608(b) and 609. Currently, there are several different ways to interpret the interplay between these rules. For example, the court could permit a cross-examiner to question a witness about the conduct underlying a conviction pursuant to Rule 608(b), and then separately to impeach the witness subject to Rule 609. The court could make the cross-examiner choose which rule to proceed under, or could view 609 as the only appropriate rule for conduct resulting in a conviction. There does not appear to be any definitive resolution of the issue in the courts. While I do not suggest a particular approach at this time, I believe that this is a matter worthy of the Committee's consideration. The inconsistencies in the case law are discussed in Mueller & Kirkpatrick, Evidence § 6.34 (3d ed. 2003).

Again, I appreciate your willingness to consider these comments.

Very truly yours,

Myrna S. Raeder
Professor of Law

The following individuals, speaking in their individual capacity, agree with the substance of the above letter and wish to join in it.

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