SMU
DEDMAN SCHOOL OF LAW

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Public Comment on Proposed Federal Rule of Evidence 609

I recently chronicled the federal courts' longstanding misinterpretation of Rule 609, see *Circumventing Congress: How the Federal Courts Opened the Door to Impeaching Criminal Defendants with Prior Convictions*, 42 U.C. DAVIS L.R. 289 (2008), and submit this comment out of concern that Proposed Rule 609 will exacerbate this unfortunate situation by subtly altering the substance of the Rule.

Out of concern for the extreme prejudice that a defendant's criminal record can create in the eyes of the jurors, Rule 609 as originally enacted stated that the district court "shall" allow this type of impeachment "*but only if*" the court determined that the rigorous balancing test fashioned exclusively for criminal defendants who sought to testify was met. (See *Green v. Bock Laundry Mach. Co*, 490 U.S. 504, 519-520 (1989)). As the phrasing suggests, this provision was intended as a *limit* on the admissibility of such impeachment. (Prior to Rule 609's enactment, impeachment of criminal defendants had generally been allowed without restriction). Through the years, this language has been changed to the present – "shall . . . if the court determines" – but no alteration of the original meaning was intended.

The Proposed Rule, primarily through the replacement of "shall" with the term "must," but also by eliminating the "court determines" language and separating the modifying "if" from the rigorous balancing test that is the key limitation to prior conviction impeachment, reverses the rhetorical thrust of Rule 609. The Proposed Rule does not read like a limit on impeachment. Rather, the Proposed Rule suggests a primary intent to prod reluctant district courts to *allow* impeachment when the balancing test is met, and even leaves open the possibility that the courts may still permit impeachment when the balancing test is not met (something that is clearly not permitted under current law). A plausible reading of the Proposed Rule is that a district court "must" allow the impeachment if the balancing test is satisfied, and may allow the impeachment, in its discretion, if the test is not satisfied.

Due to the possibility that the restyled language will (inadvertently) push the courts further from Congress's intent, I urge that a revision incorporate the language of current Rule 609(a)(1) and, preferably, add "only" for further clarity as follows:

> **(1)** for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:
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> **(A)** shall be admitted, subject to Rule 403, if the witness is not a defendant in a criminal case; and
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> **(B)** if the witness is a defendant in a criminal case, shall only be admitted if the probative value of admitting this evidence outweighs its prejudicial effect to the accused;
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> . . .

Sincerely,

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