



LISA MONET WAYNE
Executive Director

Sept. 30, 2026

The Honorable Jesse M. Furman, Chair
Professor Dan Capra, Reporter
Advisory Committee on Evidence Rules
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544

Re: Proposed Amendment to Federal Rule of Evidence 609(a)(1)(B)

Dear Judge Furman:

On behalf of the National Association of Criminal Defense Lawyers (NACDL), we write to express our deep concern upon learning that the proposed amendment to Federal Rule of Evidence 609(a)(1)(B) may be in jeopardy. NACDL has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates, including private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. Our members confront the consequences of Rule 609 every day, and NACDL has supported this amendment since it came before the Advisory Committee, most recently in our written comments of February 15, 2026.¹

For the criminal defense bar, this amendment is among the most important the Advisory Committee on Evidence Rules has considered. Its purpose is straightforward: a testifying defendant's prior conviction for an offense not involving dishonesty or false statement should be admitted only when its probative value *substantially* outweighs its prejudicial effect. The need for it is equally clear. Courts throughout the country are not performing the balancing test as

¹ See Letter from the National Association of Criminal Defense Lawyers to the Advisory Committee on Evidence Rules, Re: Amendment to Evidence Rule 609 Proposed for Comment (Feb. 15, 2026); Letter from NACDL to the Advisory Committee on Evidence Rules, Re: Proposed Amendment to Rule 609(a)(1) (June 18, 2024) (Rules Suggestion 24-EV-H).

Congress intended.² Inflammatory convictions, convictions nearly identical to the charged offense, and multiple convictions are being admitted to impeach testifying defendants. The consequence is that people with prior records are kept off the witness stand and, too often, pressured away from trial altogether. If the amendment fails, that problem will go unaddressed.

As NACDL explained in 2024, the current rule burdens rights at the core of a fair trial. The right to testify in one's own defense is "essential to due process of law in a fair adversary process."³ Yet the threat of impeachment by prior conviction silences defendants, including innocent ones. In a study of 152 DNA exonerees, nearly one in four did not testify at trial, and 91 percent of those who stayed silent had prior convictions that could have been used against them.⁴ Defendants make that choice because they understand what the research confirms: jurors, despite their best intentions, draw propensity inferences from prior convictions—particularly convictions similar to the charged offense—and are substantially more likely to convict when they learn of one.⁵ The practice erodes the presumption of innocence and dilutes the government's burden of proof.

The current rule also compounds racial disparities in the criminal legal system. People with felony convictions account for an estimated 8 percent of all adults and 33 percent of African American adult men.⁶ Those figures reflect over-policing and systemic bias, and they are further shaped by prosecutorial discretion. Decisions about whether to charge, whether to pursue a felony or a misdemeanor, and whether to offer a plea mean that the same conduct can produce an impeachable conviction for one person and not for another. A rule that treats those outcomes as a reliable measure of truthfulness carries the system's disparities directly into the jury room—all the more so because the empirical evidence does not support the premise that a non-falsity conviction says much about whether a witness is telling the truth.

² See Memorandum from Daniel Capra, Reporter, to the Advisory Committee on Evidence Rules, at 12 (Sept. 18, 2026); Memorandum from Daniel Capra, Reporter, to the Advisory Committee on Evidence Rules, at 5 (Apr. 1, 2025).

³ *Rock v. Arkansas*, 483 U.S. 44, 51 (1987) (quoting *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975)).

⁴ John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted*, 5 J. Empirical Legal Stud. 477, 489–90 (2008).

⁵ See Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 Cornell L. Rev. 1353, 1361 (2009).

⁶ Sarah K. S. Shannon et al., *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948–2010*, 54 Demography 1795, 1806 (2017).

Finally, the current rule feeds the trial penalty. In 2023, fewer than 3 percent of federal convictions resulted from trial.⁷ When a defendant knows the jury will hear about a prior conviction if they testify, the calculus shifts further toward a guilty plea. As Melody Brannon, Chief Federal Defender for the District of Kansas, has put it, the rule affects not only the right to testify, but “really the right to go to trial.”⁸

These concerns have been thoroughly documented in multiple memoranda prepared by the Committee’s Reporter, Professor Daniel Capra.⁹ Those memoranda collect cases from multiple jurisdictions, at both the district and appellate levels, in which the misapplication of the balancing test is significant, resulting, for instance, in the admission of multiple convictions or of highly inflammatory ones. The cases have been presented to the Committee repeatedly, and no one, including the government, has challenged Professor Capra’s reading of them. His analysis deserves due weight.

It bears emphasis how modest this amendment is. NACDL has urged the Committee to go further—to bar impeachment of criminal defendants with prior convictions that do not satisfy the ordinary standard of Rule 608(b) for conduct actually probative of truthfulness.¹⁰ The Committee chose a narrower course: adding a single word, “substantially,” to a balancing test, drawing on a standard federal judges already apply elsewhere in the Rules. The amendment already represents a significant compromise. If even this measured reform cannot advance, the defendants most harmed by the current rule will be left with nothing.

We understand that the Executive Committee of the Judicial Conference has expressed concerns about the proposed amendment. We believe those concerns are misplaced. But the more fundamental problem is one of process. The Advisory Committee studied this issue over a significant period and across multiple meetings before proposing a narrow amendment. That amendment was published for public comment, and the comments were overwhelmingly favorable.¹¹ The Standing Committee then approved it. In August 2026, however, after the Executive Committee raised concerns about the proposed amendment, the Standing Committee withdrew its recommendation and returned the amendment to the Advisory Committee for

⁷ U.S. Sent’g Comm’n, *2023 Sourcebook of Federal Sentencing Statistics* tbl. 11 (2023); see also NACDL, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It* (2018).

⁸ Quoted in Cara Salvatore, *Panel Voices Concern Over Prior-Convictions Evidence Rule*, Law360 (Apr. 29, 2024).

⁹ See, e.g., Memorandum from Daniel Capra, Reporter, to the Advisory Committee on Evidence Rules, at 2 (Apr. 1, 2024).

¹⁰ NACDL Letter of June 18, 2024, *supra* note 1.

¹¹ See Memorandum from Daniel Capra, Reporter, to the Advisory Committee on Evidence Rules, at 3 (Apr. 1, 2026).

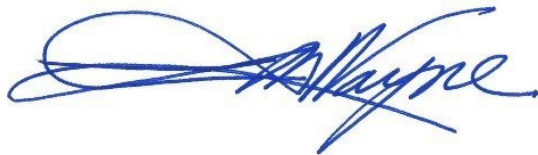
further consideration.¹² That departure from the ordinary course of rulemaking is highly unusual, and it risks eroding the credibility of the Advisory Committee's work and of the Rules Enabling Act process itself.

We also note that the Department of Justice has agreed to the amendment. Nothing about the substance of the Rule has changed since then; only the Executive Committee's position has. We expect the Department to maintain its position. A reversal now would suggest that the rulemaking process is being driven by considerations other than the merits.

NACDL cannot overstate the importance of this amendment to the people our members represent. For it to stall after years of careful study, public comment, and approval by the Standing Committee would be widely viewed as a blow to the legitimacy of the rulemaking process. We respectfully urge the Committee to do all it can to see the amendment through.

Thank you for your leadership and for your attention to this important matter.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "L. Wayne", with a stylized, flowing script.

Lisa M. Wayne, Esq.
Executive Director
National Association of Criminal Defense Lawyers

A handwritten signature in black ink, appearing to read "C. Melissa Owen", with a cursive, flowing script.

C. Melissa Owen
President
National Association of Criminal Defense Lawyers

¹² See Committee on Rules of Practice and Procedure, Federal Rules of Evidence: Rules Recommended for Approval and Transmission 23–24 (rev. Aug. 27, 2026) (reporting that, in August 2026, the Executive Committee raised concerns regarding the proposed Rule 609 amendments and requested further examination, and that the Standing Committee subsequently voted unanimously to withdraw its recommendation and return the proposal to the Advisory Committee).