

**PROPOSED AMENDMENT TO THE
FEDERAL RULES OF EVIDENCE***

**Rule 608. Evidence of Character and Conduct of
Witness**

1 **(a) Opinion and reputation evidence of character.** — The
2 credibility of a witness may be attacked or supported by
3 evidence in the form of opinion or reputation, but subject to
4 these limitations: (1) the evidence may refer only to character
5 for truthfulness or untruthfulness, and (2) evidence of truthful
6 character is admissible only after the character of the witness
7 for truthfulness has been attacked by opinion or reputation
8 evidence or otherwise.

9 **(b) Specific instances of conduct.** — Specific instances of
10 the conduct of a witness, for the purpose of attacking or
11 supporting the witness' ~~credibility~~ character for truthfulness,
12 other than conviction of crime as provided in rule 609, may
13 not be proved by extrinsic evidence. They may, however, in
14 the discretion of the court, if probative of truthfulness or

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

2 FEDERAL RULES OF EVIDENCE

15 untruthfulness, be inquired into on cross-examination of the
16 witness (1) concerning the witness' character for truthfulness
17 or untruthfulness, or (2) concerning the character for
18 truthfulness or untruthfulness of another witness as to which
19 character the witness being cross-examined has testified.

20 The giving of testimony, whether by an accused or by
21 any other witness, does not operate as a waiver of the
22 accused's or the witness' privilege against self-incrimination
23 when examined with respect to matters ~~which~~ that relate only
24 to ~~credibility~~ character for truthfulness.

COMMITTEE NOTE

The Rule has been amended to clarify that the absolute prohibition on extrinsic evidence applies only when the sole reason for proffering that evidence is to attack or support the witness' character for truthfulness. See *United States v. Abel*, 469 U.S. 45 (1984); *United States v. Fusco*, 748 F.2d 996 (5th Cir. 1984) (Rule 608(b) limits the use of evidence "designed to show that the witness has done things, unrelated to the suit being tried, that make him more or less believable per se"); Ohio R.Evid. 608(b). On occasion the Rule's use of the overbroad term "credibility" has been read "to bar extrinsic evidence for bias, competency and contradiction impeachment since they too deal with credibility." American Bar Association Section of Litigation, *Emerging Problems Under the*

Federal Rules of Evidence at 161 (3d ed. 1998). The amendment conforms the language of the Rule to its original intent, which was to impose an absolute bar on extrinsic evidence only if the sole purpose for offering the evidence was to prove the witness' character for veracity. *See* Advisory Committee Note to Rule 608(b) (stating that the Rule is “[i]n conformity with Rule 405, which forecloses use of evidence of specific incidents as proof in chief of character unless character is in issue in the case . . .”).

By limiting the application of the Rule to proof of a witness' character for truthfulness, the amendment leaves the admissibility of extrinsic evidence offered for other grounds of impeachment (such as contradiction, prior inconsistent statement, bias and mental capacity) to Rules 402 and 403. *See, e.g., United States v. Winchenbach*, 197 F.3d 548 (1st Cir. 1999) (admissibility of a prior inconsistent statement offered for impeachment is governed by Rules 402 and 403, not Rule 608(b)); *United States v. Tarantino*, 846 F.2d 1384 (D.C. Cir. 1988) (admissibility of extrinsic evidence offered to contradict a witness is governed by Rules 402 and 403); *United States v. Lindemann*, 85 F.3d 1232 (7th Cir. 1996) (admissibility of extrinsic evidence of bias is governed by Rules 402 and 403).

It should be noted that the extrinsic evidence prohibition of Rule 608(b) bars any reference to the consequences that a witness might have suffered as a result of an alleged bad act. For example, Rule 608(b) prohibits counsel from mentioning that a witness was suspended or disciplined for the conduct that is the subject of impeachment, when that conduct is offered only to prove the character of the witness. *See United States v. Davis*, 183 F.3d 231, 257 n.12 (3d Cir. 1999) (emphasizing that in attacking the defendant's character for truthfulness “the government cannot make reference to Davis's forty-four day suspension or that Internal Affairs found that he lied about” an incident because “[s]uch evidence would not only be hearsay to the extent it contains assertion of fact, it would

be inadmissible extrinsic evidence under Rule 608(b)"). *See also* Stephen A. Saltzburg, *Impeaching the Witness: Prior Bad Acts and Extrinsic Evidence*, 7 *Crim. Just.* 28, 31 (Winter 1993) ("counsel should not be permitted to circumvent the no-extrinsic-evidence provision by tucking a third person's opinion about prior acts into a question asked of the witness who has denied the act").

For purposes of consistency the term "credibility" has been replaced by the term "character for truthfulness" in the last sentence of subdivision (b). The term "credibility" is also used in subdivision (a). But the Committee found it unnecessary to substitute "character for truthfulness" for "credibility" in Rule 608(a), because subdivision (a)(1) already serves to limit impeachment to proof of such character.

Rules 609(a) and 610 also use the term "credibility" when the intent of those Rules is to regulate impeachment of a witness' character for truthfulness. No inference should be derived from the fact that the Committee proposed an amendment to Rule 608(b) but not to Rules 609 and 610.

Changes Made After Publication and Comments. The last sentence of Rule 608(b) was changed to substitute the term "character for truthfulness" for the existing term "credibility." This change was made in accordance with public comment suggesting that it would be helpful to provide uniform terminology throughout Rule 608(b). A stylistic change was also made to the last sentence of Rule 608(b).