

**TO: Honorable Anthony J. Scirica, Chair
Standing Committee on Rules of Practice
and Procedure**

**FROM: Honorable Milton I. Shadur, Chair
Advisory Committee on Evidence Rules**

**DATE: May 1, 2002 (Revised to account for action taken
by Standing Committee at its June 10-11
meeting)**

**RE: Report of the Advisory Committee on Evidence
Rules**

I. Introduction

The Advisory Committee on Evidence Rules met on April 19, 2002, in Washington, D.C. At the meeting the Committee approved a proposed amendment to Evidence Rule 608(b), with the unanimous recommendation that the Standing Committee approve the proposed amendment and forward it to the Judicial Conference. Part II of this Report summarizes the discussion of this proposed amendment. An attachment to this Report includes the text, Committee Note, GAP report, and summary of public comment for the proposed amendment to Rule 608(b).

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II. Action Items

A. Recommendation To Forward the Proposed Amendment to Evidence Rule 608(b) to the Judicial Conference

At its June 2001 meeting the Standing Committee approved the publication of a proposed amendment to Evidence Rule 608(b). The Committee received 12 written comments from the public on this proposed amendment. Public hearings were cancelled because nobody expressed an interest in testifying. A complete discussion of the Committee's consideration of the public comments respecting Rule 608(b) can be found in the draft minutes attached to this Report. The following discussion briefly summarizes the proposed amendment to Rule 608(b).

The proposed amendment to Evidence Rule 608(b) is intended to bring the text of the Rule into line with the original intent of the drafters. The Rule was intended to prohibit the admission of extrinsic evidence when offered to attack or support a witness' character for truthfulness. Unfortunately the text of the Rule is phrased as prohibiting extrinsic evidence when offered to attack or support a witness' "credibility"—a less precise locution. The term "credibility" can be read to prohibit extrinsic evidence when offered for non-character forms of impeachment, such as to prove bias, contradiction or prior inconsistent statement. *United States v. Abel*, 469 U.S. 45 (1984) held that the Rule 608(b) extrinsic evidence prohibition does not apply when it is offered for a purpose other than proving the witness' character for veracity. But even though most case law is faithful to the drafters' original intent, a number of cases continue to misapply the Rule to preclude extrinsic evidence offered to impeach a witness on grounds other than character. *See, e.g.*,

Becker v. ARCO Chem. Co., 207 F.3d 176 (3d Cir. 2000) (stating that evidence offered for contradiction is barred by Rule 608(b)); *United States v. Bussey*, 942 F.2d 1241 (8th Cir. 1991) (stating that the “plain language” of the Rule bars the use of extrinsic evidence to impeach a witness by way of contradiction); *United States v. Graham*, 856 F.2d 756 (6th Cir. 1988) (Rule 608(b) bars extrinsic evidence when offered to prove that the witness is biased).

The proposed amendment substitutes the term “character for truthfulness” for the overbroad term “credibility,” thereby limiting the extrinsic evidence ban to cases in which the proponent’s sole purpose is to impeach the witness’ character for veracity. This change is consistent with the Court’s construction of the Rule in *Abel*. The Committee Note to the proposed Rule clarifies that the admissibility of extrinsic evidence offered to impeach a witness on grounds other than character is governed by Rule 402 and Rule 403, not by Rule 608(b).

The public comments on the proposed amendment uniformly praised the Advisory Committee’s deletion of the overbroad term “credibility” and agreed that the Rule should be limited to its original intent, which was to exclude extrinsic evidence only when it is offered to prove a witness’ character for truthfulness, and to leave all other uses of extrinsic evidence to be regulated by Rules 402 and 403.

One public commentator noted that there are other places in the Evidence Rules where the term “credibility” is probably used to mean “character for truthfulness.” He suggested that the Committee use the occasion of the proposed amendment to address other provisions in the Evidence Rules where the term “credibility” is arguably misused. The Committee considered this comment carefully. It unanimously determined that the proposed amendment

should be revised slightly to replace the term “credibility” with the term “character for truthfulness” in the last sentence of Rule 608(b). The Committee also revised the proposed Committee Note to refer to this slight change in the text and to explain that the change was made to provide uniform terminology throughout Rule 608(b).

The Evidence Rules Committee further considered whether the term “credibility” should be changed in other Evidence Rules. The Committee determined that the term need not be changed in Rule 608(a), because that Rule already limits impeachment to evidence pertinent to a witness’ character for truthfulness. The Committee also determined that the use of the term “credibility” in Rules 609 and 610 has not created the same problems for courts and litigants as has the use of that term in Rule 608(b). The Committee found no reason to delay or withdraw the amendment to Rule 608(b) simply because the term “credibility” is used in other Evidence Rules.

Recommendation — The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 608(b), as modified following publication, be approved and forwarded to the Judicial Conference.

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Attachment[]:

Proposed Amendment to Evidence Rule 608(b) and Committee Note (recommended for approval and forwarding to the Judicial Conference).

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