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Federal Rule of Evidence 608(b): A Proposed Revision

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FEDERAL RULE OF EVIDENCE 608(b): A PROPOSED REVISION

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INTRODUCTION

The question of when counsel may use extrinsic evidence[1] of specific acts to attack the credibility of a witness has generated considerable confusion in the case law. The confusion stems in large part from the loose usage of the words "credibility" and "impeachment" and the consequent failure of counsel and the courts to distinguish between a multiplicity of distinct modes of attack on the believability of a witness's testimony. Federal Rule of Evidence 608(b)[2] has not clarified the confusion. On the contrary, by adopting murky language from earlier proposed uniform rules,[3] Federal Rule of Evidence 608(b) has only added to the unclear statements of law on this issue.

It is the thesis of this article that under the federal rules there are basically only two limitations on the use of extrinsic evidence to attack the credibility of a witness.

First, the basic rules of relevance and considerations of judicial efficiency give the judge discretion to exclude evidence of irrelevant or "collateral" matters under Federal Rule of Evidence 401[4] and 403[5]. Second, Rule 608(b) limits the use of extrinsic evidence of specific acts tending to show that the witness has the character

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[1] Black's Law Dictionary defines extrinsic evidence as follows:

> External evidence, or that which is not contained in the body of an agreement, contrat, and the like. Extrinsic evidence is also said to be evidence not legitimately before the tribunal in which the determination is made.

BLACK'S LAW DICTIONARY (5th ed. West 1979).

In the context of impeachment extrinsic evidence refers generally to evidence other than that which is spoken from the witnesses mouth while he or she is on the stand. The evidence may be anther's testimony, a written document, physical object, or documentation of previous testimony.

[2] All further references will be to the Federal Rules of Evidence unless otherwise specified.

[3] Compare 1953 Rules of Evidence, Rule 22 and 1974 Revised Uniform Rules of Evidence 608(b).

[4] "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401.

[5] Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time. "Although

of a liar or a truthteller. The first of these limitations is discretionary while the second is not. Except for these two limitations, federal courts can and do consider extrinsic evidence on a host of matters relating to the credibility of a witness.

This article will review the history and the case law surrounding Rule 608(b), and will summarize permissible uses of extrinsic evidence to attack the credibility of a witness. The authors recommend that the law be clarified by deleting the word "credibility" from the first sentence of Rule 608(b), and further recommend that the rule be amended by substituting the phrase "for the purpose of proving character for truthtelling or falsification" in lieu of the phrase "for the purpose of attacking or supporting the witness's credibility." The reason for the suggested amendment is that the word "credibility" is too broad and therefore misleading because it appears to exclude extrinsic evidence such as that pertaining to bias or competence of a witness which is clearly admissible under the existing case law. The authors propose a narrower rule which clearly articulates how the law is in fact applied, i.e., as an extension of the general rule that the character of a person may not be used to prove conduct on a particular occasion.[6] In other words, the rule should only limit extrinsic evidence tending to show that the witness has a propensity to lie or tell the truth because he has the character of a liar or a truthteller.

EVOLUTION OF THE PRESENT PROVISION: FEDERAL RULE OF EVIDENCE 608(b)

As presently drafted, Federal Rule of Evidence 608(b) provides:

> (b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.
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> The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.[7]

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relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

[6] Fed. R. Evid. 404(a) states "Character Evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving that action in conformity therewith on a particular occasion . . . ."

[7] FED. R. EVID. 608(b).

Rule 608(b) has its genesis in the English common law tradition of "cross-examination to credit" which permits a barrister to inquire into a witness's history and associations, including any misconduct which would tend to discredit his character, even though he has not been convicted of a crime.[8] In American courts, this mode of attacking the credibility of a witness became known under the general rubric of "impeachment by prior bad acts."[9]

The allowance of impeachment by prior bad acts has always raised dual problems of relevance and judicial efficiency. Whenever counsel are afforded an opportunity to attack the character of a witness, there is a danger they will stray into areas of conduct which are marginally relevant or remote in time. A witness on the stand may deny committing the prior bad act, leaving counsel with the desire to bring forth extrinsic evidence to prove that the witness did indeed commit the act. So also, a witness whose character has been besmirched may demand the opportunity to produce evidence of extenuating circumstances or an explanation of events. All such evidence has the potential to divert attention from the main issues of the case, to confuse matters and to result in undue consumption of time. It was therefore inevitable that some limitations were placed on the use of prior bad acts for impeachment.[10]

In England, the courts trusted the gentlemanly discretion of the members of the bar to avoid abuses of the tradition.[11] This gentlemanly approach to the problem is still reflected in some of the canons of ethics limiting counsel's right to attack the "honor and reputation" of a party.[12] Americans however have always been less proper and restrained than their British colleagues and so it was that American courts felt compelled to develop a variety of rules limiting the use of prior bad acts for impeachment. These rules are confusing and often in conflict, even in the same jurisdiction.

Some courts have permitted wide-ranging attacks by allowing counsel to inquire on cross-examination concerning acts which showed bad moral character but only had a tenuous relationship to the witness's ability to tell the truth.[13] Other courts have altogether prohibited cross-examination concerning prior bad acts for impeachment purposes.[14] Presently, a majority of courts follow the practice of limiting cross-examination concerning prior bad acts to those which have some relation to the

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[8] C. MCCORMICK, MCCORMICK ON EVIDENCE § 42, at 90 (E. Cleary 3d ed. (1984)).

[9] *Id.* at 90.

[10] Hale, *Specific Acts and Related Matters As Affecting Credibility*, 1 HASTINGS L.J. 89 (1950).

[11] C. MCCORMICK, *supra* note 8, at 90.

[12] *See, e.g.*, CAL. BUS. & PROF. § 6068 (Deering 1987): "To abstain from all offensive personality, and to advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he is charged."

[13] *E.g.*, State v. Jones, 215 Tenn. 206, 385 S.W.2d 80 (1964); People v. Sorge, 301 N.Y. 198, 93 N.E.2d 637 (1950); 98 C.J.S. *Witnesses* § 515d (1957). *See* Annotation, 90 A.L.R. 870 (1934).

[14] *E.g.*, Christie v. Brewer, 374 S.W.2d 908 (Tex. Civ. App. 1964); Sparks v. State, 366 S.W.2d 591 (Tex.

witness's capacity to tell the truth.[15]

Although the authorities are divergent and difficult to categorize, it appears that before the Federal Rules of Evidence were enacted in 1975, most federal circuits held that a witness could not be impeached by prior bad acts which were not the subject of a criminal conviction.[16] This placed the federal law in conflict with that of most states which permitted some form of impeachment by prior bad acts.[17] Most jurisdictions permitting such questions to be put to the witness held that no extrinsic evidence concerning the prior bad acts could be admitted.[18] Federal Rule of Evidence 608(b) represented an attempt to adopt the majority view of the states and the minority federal view that prior bad acts could be inquired into on cross-examination, with the limitation that extrinsic evidence could not prove bad acts. Rule 608(b) adopted the further limitation that the prior bad acts -- or, to use the language of the rule, the "specific instances of conduct" -- must be probative of truthfulness or untruthfulness.

The legislative history of Rule 608(b) is unremarkable. Congress enacted the Rule proposed by the Supreme Court with only minor changes clarifying the fact that inquiry was to be allowed "in the discretion of the court" and otherwise clarifying the meaning of the second sentence of subdivision (b).[19] Prior bad act impeachment was the product of little debate and may have escaped the attention of many members of Congress who had a fixation on Rule 609.[20]

One of the more interesting aspects of Rule 608(b) is the mix of discretionary and nondiscretionary limitations on the use of prior bad acts impeachment. As an initial proposition, the judge has the discretion to determine whether or not to allow cross-examination concerning the prior bad acts. However, once the discretion is exercised, the Rule prohibits the use of extrinsic evidence to contradict or support the witness's answer on cross-examination. While it is sometimes said that the questioner "must take the witness's answer" and abandon his inquiry once a "no" is given,[21] this is not exactly the case. Counsel may pursue the investigation by pressing the witness for an admission as long as the questioning is reasonable under Federal Rule of Evidence 611(a).[22] However, except for the conviction of a crime,[23]

Cr. App. 1963); Commonwealth v. Ornato, 191 Pa. Super. 581, 159 A.2d 223 (1960), *aff'd*, 400 Pa. 626, 163 A.2d 90, *cert. denied*, 364 U.S. 912.

[15] C. MCCORMICK, *supra* note 8, at 90.

[16] S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 494 (4th ed. 1986).

[17] *Id.*

[18] *Id.*

[19] Fed. R. Evid. 608 advisory committee's note; 56 F.R.D. 183, 268 (1972); H.R. Rep. No. 650, 93d Cong., 1st Sess. pt. 1 at 10, *reprinted in* 1974 U.S. CONG. CODE & AD. NEWS 7075, 7084.

[20] S. SALTZBURG & K. REDDEN, *supra* note 16, at 494.

[21] *See, e.g.*, Hug v. United States, 329 F.2d 475, 483 (6th Cir. 1964), *cert. denied*, 379 U.S. 818 (1964) (witness denied he had been fired for stealing; "cross examiner . . . not free to bring in independent proof to show that the answer was untrue.")

[22] C. MCCORMICK, *supra* note 8, at 92.

[23] FED. R. EVID. 609.

counsel may not call other witnesses or produce exhibits to prove the prior bad act. Such evidence is deemed extrinsic because it is external to or "outside of" the testimony of the witness who is being impeached with the prior bad act.[24]

Problems of Definition

Considerable confusion has been generated in the case law by the imprecise use of the words "extrinsic" and "collateral" when referring to specific acts evidence. In everyday usage, the two words have similar meanings and therefore it is not surprising that lawyers and judges have tended to equate the two. In the technical sense however, extrinsic evidence refers merely to evidence other than the testimony of the witness being impeached or enhanced, i.e., the testimony of other witnesses or evidence introduced in the form of exhibits.[25] In evidentiary terminology, the word collateral refers to a problem of relevance. Collateral matters are those which are marginally relevant to an issue in the case or to a witness's credibility, but the relevance of which may be so weak that the admission of the evidence may not be justified.[26] Courts frequently exclude collateral evidence on the grounds that it may tend to confuse the jury or to result in an undue consumption of time.[27]

It is sometimes said that a matter is collateral if its only relevance is to impeach or contradict a witness and that it is not collateral if it is relevant to any of the substantive issues in the case.[28] Analytically this is not correct. As discussed in the following sections, there are numerous instances in which evidence relevant solely to an issue of credibility is deemed not collateral, including evidence of bias, mental illness, inability to perceive and the like. Moreover, evidence which is marginally relevant to a substantive issue in the case may be deemed collateral because it is too remote in time or requires a trier of fact to draw attenuated inferences.[29]

A time-worn test for determining whether a matter is collateral is to inquire whether the facts would be independently provable by extrinsic evidence apart from a contradiction to impeach or disqualify a witness. If so, they are deemed not collateral.[30] Although this test is still followed in some federal courts,[31] it is frankly not helpful and requires the judge to engage in a series of circular mental gymnastics.

The better approach is to recognize that the term collateral can refer both to

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[24] *See supra*, note 1.

[25] C. MCCORMICK, *supra* note 8, at 92.

[26] *See generally* C. MCCORMICK *supra* note 8, at 110-113. *Compare* FED. R. EVID. 403.

[27] FED. R. EVID. 403.

[28] G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 307 (West 1978).

[29] *E.g.*, Livergood v. S.J. Groves & Son Co., 361 F.2d 269, 273 (3rd Cir. 1966) (testimony of witness who passed truck approximately 1/4 mile before accident deemed collateral as to substantive issue of whether truck was on wrong side of highway at the time of the accident).

[30] C. MCCORMICK, *supra* note 8, at 110-112.

[31] United States v. Pisari, 636 F.2d 855, 858 (1st Cir. 1981).

issues of credibility and substance. The determination of whether a matter is material, as distinguished from being collateral, is one of degree and not kind.[32] This is apparently the approach of the Federal Rules of Evidence. Under Rule 401, the judge has the practical discretion to exclude collateral matters by determining that they are irrelevant[33] and under Rule 403 he has the official discretion to exclude them because their probative value is outweighed by dangers of prejudice, confusion, or undue delay.[34]

It is important to understand that any evidence, whether intrinsic or extrinsic, may be deemed collateral in a given case. Conversely, extrinsic evidence may or may not be collateral in nature. Once this distinction is drawn, it can be seen that Rule 608(b) specifically preserves the judge's discretionary power to exclude collateral matters, while simultaneously limiting the judge's discretion concerning the admission of extrinsic evidence. In other words, Rules 401, 403, and 608(b) permit the judge to make the initial decision whether or not he will allow cross-examination concerning specific instances of conduct for purpose of attacking a witness's character for truthtelling, but once he does so he has no discretion to admit extrinsic evidence to contradict or support the witness's answer.

Lack of Clarity in Federal Rule of Evidence 608(b)

Because the exclusion of extrinsic evidence is nondiscretionary, Rule 608(b) has become a powerful tool of strategy, particularly in criminal cases. It is not uncommon for defense counsel to be placed in a position of needing to call as witnesses for their clients persons of questionable backgrounds. Similarly, prosecutors are frequently required to call snitches, cohorts in crime, and other unsavory characters in order to prove their case. Thus, the extent to which a witness may be cross-examined and other evidence introduced concerning his past, becomes an important strategic consideration in most criminal cases. Federal judges are confronted on a daily basis with attempts to exclude evidence on the grounds that it is extrinsic evidence of specific instances of conduct offered to show a witness's credibility. Because the problem arises with such frequency, it is critical that the applicable Rule be clear.

As presently drafted, Rule 608 is far from clear. The major problem lies in the use of the word "credibility" in the first sentence of 608(b). Black's Law Dictionary defines "credibility" as: worthiness of belief; that quality of a witness which renders his evidence worthy of belief.[35]

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[32] Ladd, *Some Observations on Credibility: Impeachment of Witnesses*, 52 CORNELL L.Q. 239, 253 (1967); G. LILLY, *supra* note 28, at 307.

[33] FED. R. EVID. 401; *see supra* note 4 and accompanying text.

[34] FED. R. EVID. 403; *See supra* note 5 and accompanying text; C. MCCORMICK *supra* note 8, at 113 (citing C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5165 (1977)).

[35] BLACK'S LAW DICTIONARY 330 (5th ed. 1979).

An instruction on credibility of witnesses often given to Federal juries is as follows:

> You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and *every matter* in evidence which tends to show whether a witness is worthy of belief. Consider each witness's intelligence, *motive*, and *state of mind*, and demeanor and manner while on the stand. Consider the witness's *ability to observe the matters as to which he has testified*, and whether he impresses you as having an *accurate recollection* of these matters. Consider also *any relation each witness may bear to either side of the case*; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.
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> After making your own judgment, you will give the testimony of each witness credibility, if any, as you may think it deserves.[36]

As can be seen from Black's and from the Federal Jury Instruction, the meaning of the word "credibility" is broad indeed. Credibility can encompass anything which affects whether a witness's testimony is "worthy of belief." A witness's "motive" for testifying affects his credibility. A witness's "ability to observe" affects his credibility. His ability to accurately recall events affects whether or not his testimony will be deemed worthy of belief as do his personal biases. It is precisely because the definition of the word "credibility" is so broad, so inclusive, that its use in the first sentence of Rule 608(b) makes the rule confusing. Because the word "credibility" encompasses evidence of bias, motive, prejudice, state of mind, and perception, the first sentence of Federal Rule of Evidence 608(b) appears to unequivocally prohibit proof of specific instances of conduct for the purpose of attacking or supporting the bias, motive, prejudice, state of mind, or perception of a witness by extrinsic evidence. But as will be seen, Rule 608(b) was never intended and has never been interpreted by the federal courts to prohibit any such thing. On the contrary, specific instances of a witness's bias, motive, prejudice, state of mind, or perception, for the purpose of determining whether that witness's testimony is "worthy of belief" have always been provable by extrinsic evidence.

UNDERSTANDING THE BASIC MODES OF IMPEACHMENT AS THEY RELATE TO RULE 608(b)

It is helpful to a clear understanding of Rule 608(b) to recognize that there are at least five major ways of impeaching or attacking the credibility of a witness.[37] The

[36] E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS §17.01 at 519-520 (3d ed. 1977).

[37] *See generally*, C. MCCORMICK, supra note 8, at 72-73; G. LILLY, supra note 28, at 279-280.

first and most commonly used method of impeachment is to show that the witness lacked the ability to perceive, observe, remember, or recount the matters about which he testified. The second is impeachment by self contradiction, i.e., an attack by proof that the witness's testimony is internally inconsistent or that the witness on a previous occasion has made statements inconsistent with his present testimony. The third method of impeachment is contradiction by others, i.e., proof by other witnesses or exhibits that material facts are otherwise than as testified to by the witness. Fourth is a showing that the witness is biased or influenced in the case by emotional considerations, such as fear or prejudice, or motives of pecuniary interest. The fifth mode of impeachment is an attack on the character of a witness by showing (a) a criminal conviction, (b) reputation for untruthfulness, (c) bad character generally, (d) prior dishonest acts, showing bad character for truthfulness.

Federal Rule of Evidence 608(b) does not apply at all to the first four modes of impeachment, and extrinsic evidence may be used to accomplish these modes of attack so long as the extrinsic evidence is relevant and not collateral. Where the examiner seeks to introduce extrinsic evidence of a prior inconsistent statement of a nonparty, he must comply with the requirements of Rule 613 and offer the witness an opportunity to explain or deny the inconsistency.[38] Otherwise, there are no limitations on the use of extrinsic evidence in the first four modes of impeachment.

Rule 608(b) only comes into play with respect to the fifth mode of impeachment. In the case of a criminal conviction, Rule 609 governs the use of extrinsic evidence.[39] Rule 608(a) governs the use of reputation and opinion concerning the veracity of the witness. Rule 608(b) does not permit the showing of a general bad character where the sole relevance of such evidence is the credibility of the witness. Instead, the rule specifically provides that the attack on the witness's character must be limited to a showing of the witness's character for untruthfulness. Similarly, any evidence intended to rehabilitate the witness must be probative of truthfulness. Extrinsic evidence will be excluded only when it is offered to show that the witness has the character of a liar or the character of a truthteller.

Part of the reason for the exclusion of this evidence lies in an underlying belief that character is a poor predictor of conduct[40] and therefore of weak probative value in establishing how someone will act on a particular occasion. Interestingly, each

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[38] (a) *Examining witness concerning prior statement.* In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel. (b) *Extrinsic evidence of prior inconsistent statement of witness.* Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).
FED. R. EVID. 613.

[39] FED. R. EVID. 609.

[40] *See* FED. R. EVID. 404(a).

of the first four modes of impeachment looks to the present and is designed to show that the witness is lying or distorting with respect to the present occasion.[41] The fifth mode of impeachment looks to the past and requires the trier of fact to add another link in the chain of inferences which must be drawn, i.e., that because the witness has lied or been dishonest on previous occasions, he has the character of a liar and therefore must be lying on this occasion. When the weak probative value of such evidence is weighed in light of the concomitant dangers of distracting or confusing the trier of fact as well as causing the undue consumption of judicial time, it becomes clearer why Congress and the courts have chosen to limit the fifth mode of impeachment, while never intending to limit the use of extrinsic evidence to accomplish the first four modes of impeachment.

USE OF EXTRINSIC EVIDENCE

Ability to Perceive and Mental Incapacity Provable by Extrinsic Evidence

The ability of a witness to accurately observe, recall, and narrate events has always been fertile ground for cross-examination at trial. A witness's credibility in this regard can be attacked by demonstrating that, either at the time the event took place, or at time of trial, the witness's capacity to observe, recall, or narrate was impaired. The justification for permitting such an attack is clear. A witness who cannot accurately perceive or remember cannot testify truthfully in court, despite a willingness to do so. Consequently, evidence exposing inaccurate perception or memory lapses goes to a witness's "mental capacity for truthtelling" and not to "his moral inducements for truthtelling."[42] Rule 608 is applicable to the latter. It is not applicable to the former.

While there is authority for the proposition that extrinsic evidence is not admissible to prove a witness's incapacity in observing or remembering specific events,[43] such an approach has never been advanced under the Federal Rules. Where evidence of mental incapacity is relevant to the issue of credibility, the admission of extrinsic evidence in support of mental incapacity rests in the discretion of the trial judge.[44]

The courts have generally admitted extrinsic evidence of alcoholic indulgence as probative of a witness's mental incapacity.[45] In most jurisdictions, the rule is that

[41] *E.g.*, that because he is being paid he is lying, or because he is prejudiced he is shading his testimony or because he could not observe, he is distorting the events that took place.

[42] 3 J. WEINSTEIN, EVIDENCE ¶ 607(04), 607-44 (1987).

[43] 3 J. WIGMORE, EVIDENCE § 993 (3d ed. 1940). *Cf* United States v. Rosenberg, 108 F. Supp. 798, 806 (S.D.N.Y. 1952), *aff'd*, 200 F.2d 666 (2d Cir. 1952), *cert. denied*, 345 U.S. 965 (1953) *reh'g denied* 345 U.S. 1003 (1953).

[44] *Compare* 6 CALIF. LAW REV'N COMM., A STUDY RELATING TO THE WITNESS ARTICLE OF THE UNIFORM RULES OF EVIDENCE 725, 765 (1964).

[45] *See* Annotation, *Importance of Witness with Respect to Intoxication*, 8 A.L.R.3d 749 (1966); Rheaume v. Patterson, 289 F.2d 611, 614 (2d Cir. 1961).

"extrinsic evidence is always admissible to show that the witness was under the influence of drink at the time of the events to which he testifies or at the time of his testimony."[46] In *Rheaumar v. Patterson*,[47] the trial court's refusal to charge the jury that the witness had been drinking during the morning and afternoon preceding the accident was held to be reversible error. Such testimony was relevant to the important issue of the witness's credibility, for if the jury believed plaintiff's testimony on deposition, they might conclude that at the time of the accident the witness's capacity to observe was impaired, and hence refuse to credit his version of how the accident occurred.[48] Similarly, in *Order of United Commercial Travelers v. Tripp*,49 the trial court excluded evidence of a witness's out of Court statement that he had been drinking before the accident.[50] On appeal, it was held error to exclude the evidence since it bore directly on the witness's ability to accurately observe.[51]

Federal courts permit extrinsic evidence of narcotic usage as it relates to a witness's ability to perceive, recall, and narrate. In *Chicago & N.W. Ry. Co. v. McKenna*,[52] the court reversed a judgment where the defendant had not been permitted to show by extrinsic evidence that the plaintiff was a habitual user of morphine.[53] The 8th Circuit's reversal rested on the theory that habitual users of morphine (or other like narcotics) are unable to distinguish between images and facts, between illusions and realities.[54] Habitual users of narcotics suffer impairment to their respective capacities to observe, remember, and narrate.

Federal courts have also deemed extrinsic evidence of a witness's prior commitment for mental illness admissible as probative of a witness's credibility. Federal District Court judges have permitted both direct and cross-examination of a witness concerning his previous mental history. In *Ramseyer v. General Motors Corporation*,[55] the 8th Circuit stated, "the courts, particularly those in the federal system, recognize that a witness's previous mental incapacity serves as a proper subject for cross-examination to determine credibility."[56] Similarly, in *United States v. Allegretti*,[57] the 7th Circuit held that cross-examination and redirect examination on a witness's history of mental incapacity was probative on the issue of the witness's credibility.[58] In *Coffin v. Reichard*,[59] the 6th Circuit held hospital records showing appellant's psychopathic personality admissible in determining the credi-

[46] J. WEINSTEIN, *supra* note 42, at 607-47.
[47] 289 F.2d 611 (2d Cir. 1961).
[48] *Id.* at 614.
[49] 63 F.2d 37 (10th Cir. 1933).
[50] *Id.* at 41.
[51] *Id.*
[52] 74 F.2d 155 (8th Cir. 1934).
[53] *Id.* at 159.
[54] *Id.*
[55] 417 F.2d 859 (8th Cir. 1969).
[56] *Id.* at 863.
[57] 340 F.2d 254 (7th Cir. 1964), *cert. denied*, 381 U.S. 911, *reh'g denied*, 381 U.S. 956 (1965).
[58] 340 F.2d at 257.
[59] 148 F.2d 278 (6th Cir.), *cert. denied*, 325 U.S. 887 (1945).

bility of his testimony.[60] These cases demonstrate that the federal courts recognize that a witness's previous mental incapacity serves as a proper subject for cross-examination to determine credibility and that extrinsic evidence is admissible on this issue.

Impeaching a Witness by Prior Inconsistent Statement

Impeachment by prior inconsistent statement is a device recognized in federal court whereby a prior statement inconsistent with a witness's present testimony is brought to the attention of the trier of fact. It permits a party to suggest to the jury that it should not place much credence in a witness who contradicts himself.[61]

By definition, a prior inconsistent statement is extrinsic evidence, and where the requirements for admissibility are met, the evidence is admitted.[62] It is important to realize that these requirements for admissibility have nothing to do with the extrinsic nature of the statement. Rather, the requirements exist only to determine whether there is a real inconsistency between the prior statement and the in-court testimony of the witness.

In order to insure that the self-contradiction is an actual one and not illusory, Federal Rule of Evidence 613 provides that the inconsistent statement must be provided to counsel on request.[63] This provision is designed to protect against unwarranted insinuations that a statement has been made when the fact is to the contrary.[64] Extrinsic evidence of a prior inconsistent statement will not be admitted unless the witness is afforded an opportunity to explain or deny the statement. [65] The provision does not apply to the admissions of a party-opponent as defined in Rule 801(c)(2).[66] The usual foundation is unnecessary because the party admissions exception to the hearsay rule applies, giving the extra-judicial statement independent value as substantive evidence of the facts asserted. The statement would be admissible at any juncture in the proceedings even if the opposing party does not take the stand. This independent source of admissibility dispenses with the need for the foundation which is required for the use of prior inconsistent statements by a nonparty.[67] Moreover, as a practical matter, a party is present either in person or

[60] *Id.* at 280.

[61] J. WEINSTEIN, *supra* note 42, ¶ 607(06) at 607-73.

[62] *Id.* at 607-74, 75.

[63] In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel. FED. R. EVID. 613(a).

[64] FED. R. EVID. 613 Advisory Committee's Note.

[65] Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness theron, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2). FED. R. EVID. 613(b).

[66] G. LILLY, *supra* note 28, at 302.

[67] Some writings and some forms of prior testimony, such as grand jury testimony, will be self-authenticating. FED. R. EVID. 902.

through counsel at all phases of the proceeding and has ample opportunity to explain or deny the inconsistency.

Proof of an inconsistent statement may take a variety of forms. If, on cross-examination the witness admits making the inconsistent statement, the proof is intrinsic and the introduction of extrinsic evidence is merely cumulative and in the sound discretion of the judge. On the other hand, if the witness denies the statement or disclaims any memory of it, extrinsic evidence may become necessary. In the case of an oral inconsistent statement, the extrinsic evidence usually consists of the testimony of a witness who heard the statement or to whom it was directed. In the case of a written inconsistency, the extrinsic evidence consists of the writing which must be authenticated and introduced. In the case of sworn testimony, the extrinsic evidence usually consists of portions of the relevant transcript which must be authenticated and introduced or read into the record.[68] Unless the inconsistent statement falls within one of the hearsay exceptions, it will not be admitted for full substantive value.[69] It may be considered for a non-hearsay purpose such as circumstantial evidence of the declarant's state of mind, effect on the hearer, or the like.[70] Most frequently, the inconsistent statement is offered not as evidence of the fact asserted, but only to show the asserter's inconsistency on the theory that a witness who talks one way on the stand and another way previously is talking out of both sides of his mouth, raising a doubt as to the truthfulness of both statements.[71]

Intrinsic or extrinsic evidence of irrelevant or collateral inconsistencies will not be allowed.[72] In other words, the inconsistency must be material to an issue in the case or to the witness's credibility, or the court will not permit either intrinsic cross-examination concerning the inconsistent statement or the introduction of extrinsic contradictory documents or the production of attacking witnesses to prove the inconsistency. [73] However where the court determines that the prior statement goes to challenge directly the truth of what a witness has said in matters crucial or material to the issues on trial, the prior statement (extrinsic evidence) is freely admissible.

Impeaching a Witness by Contradiction

Impeachment by contradiction or specific error is a device whereby specific

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[68] FED. R. EVID. 901(a) and 801(d)(1).

[69] *See generally* FED. R. EVID. 801, 802, 803 and 804.

[70] C. MCCORMICK, *supra* note 8, at 73.

[71] For a discussion of the use of "collateral" inconsistencies *see generally* J. WEINSTEIN, *supra* note 42, at ¶ 607, 106-110, J. WIGMORE, *supra* note 43, at 692.

[72] C. MCCORMICK, *supra* note 8, at 110-113.

[73] Utility Control Corp. v. Prince William Construction Co., 558 F.2d 716 (4th Cir. 1977); United States v. Miles, 401 F.2d 65 (7th Cir. 1968); Schoepflin v. United States, 391 F.2d 390 (9th Cir.), *cert. denied*, 393 U.S. 865, (1968); Burrows v. United States, 371 F.2d 434 (10th Cir. 1967); Jarrell v. Ford Motor Company, 327 F.2d 233 (5th Cir. 1964); United States v. Warren, 453 F.2d 738, 742 (2d Cir.), *cert. denied*, 406 U.S. 944, (1972); United States v. Calles, 482 F.2d 1155 (5th Cir. 1973).

errors in the witness's testimony are brought to the attention of the trier of fact.[74] As a method of impeachment, it is well accepted in federal courts. Impeachment by contradiction may raise two possible inferences: first, if the impeachment relates to a material fact concerning a substantive issue in the case, the contradiction raises the inference that the witness is in error and that the material fact is otherwise than the witness has testified. Second, regardless of the materiality of the contradiction, the inference is raised that if a witness made a mistake on one fact, perhaps he made mistakes on other facts and therefore all of his testimony may be untrustworthy.[75]

Historically, the only limitation on the use of extrinsic evidence to impeach a witness by contradiction was if the impeachment went to an issue the court classified as collateral.[76] Otherwise extrinsic evidence has been freely admissible to impeach. As already noted, there is conflicting case law concerning the appropriate definition of the term collateral, and it is in the area of impeachment by contradiction that the judicial pronouncements on this topic have proven most confusing.

Where an attempt is made to show that a witness has made trivial mistakes unrelated to an issue in the case, for the sole purpose of showing that the witness is the type of person who makes mistakes and must therefore be mistaken in his present testimony, courts have had little difficulty in excluding such evidence as irrelevant or collateral. On the other hand, if the contradiction concerns a material fact, courts have no difficulty admitting the extrinsic evidence. The problem has arisen in cases where the contradiction has a weak dual relevance both to a substantive issue in the case and to a witness's credibility. In such cases, the courts have tended to admit the extrinsic evidence as "not collateral for impeachment purposes."

An example of this type of reasoning can be seen in *Livergood v. S.J. Groves and Sons Company.*[77] *Livergood* involved a collision between two vehicles. The issue of liability hinged on which of the vehicles had crossed over the center of the highway at the time the accident occurred.[78] Plaintiff and defendant were the only eyewitnesses to the actual collision.[79] However, plaintiff offered a witness at trial who testified that he had passed defendant's truck approximately a quarter mile before the accident and had been forced off the road by defendant's vehicle.[80] The witness stated the truck had crossed over the highway centerline and that defendant

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[74] Note, *Specific Contradiction as a Mode of Impeachment*, 1 IDAHO L. REV. 104, 105 (1964).

[75] Wigmore has noted in reference to what makes a fact collateral:

The only test in vogue that has the qualities of a true test -- definitiveness, concreteness and ease of application -- is that laid down in Attorney-General v. Hitchcook: Could the fact, as to which error is predicted, have been shown in evidence for any purpose independently of the contradiction?

3A J. WIGMORE, EVIDENCE § 1003 at 961.

[76] *Livergood*, 361 F.2d at 271.

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.* at 272.

was carrying too wide a load at the time.[81] Defendant objected to this testimony and it was heard outside the hearing of the jury when given.[82]

Thereafter defendant's driver took the witness stand. On cross-examination he was asked by plaintiff whether he had forced any driver off the highway or whether his load was too wide. Defendant's driver answered no to both questions.[83] Thereafter, the court permitted the plaintiff to read the previously excluded testimony of his witness (extrinsic evidence) to the jury.[84] The trial court ruled that the witness's testimony was inadmissible as collateral on the issue of whether the truck was on the wrong side of the highway at the time of the accident. [85] The court reasoned that the witness/driver encounter was too remote in time from the plaintiff/driver accident to be of any probative value.[86] However, the court ruled that this disability did not apply where such testimony was offered for its impeachment value. The Third Circuit Court of Appeals stated that defendant's driver ... ''said that he was operating his truck along the highway on 'the extreme right side.' Hence [the witness's] testimony, although it may have been inadmissible at the time he testified, became admissible, at least, for the purpose of rebutting [the driver's] testimony, as well as attacking his credibility.''[87]

Livergood is a clear example of the admissibility of extrinsic evidence in federal courts to impeach the testimony of a witness by contradiction. However, the reasoning of the court appears strained. Under Rule 403, a better analysis would be that although the contradiction's probative value on the substantive issue of whether the truck was on the wrong side of the highway was weak, the evidence also had probative value concerning the credibility of the truck driver as a witness. Because the evidence was probative on both issues, it was admissible in the sound discretion of the judge for both its substantive and impeaching value. This is also true because its presentation would not tend to confuse the jury and did not require the undue consumption of time. The weight to be accorded the evidence, due to its remoteness in time from the accident, was a matter counsel was free to raise in closing argument.

There is some authority suggesting that a factor to be considered in whether a witness may be contradicted by extrinsic evidence is whether the point was raised first on direct or cross-examination.[88] A few courts, reasoning along similar lines, have made the unfortunate and sweeping pronouncement that even on a collateral issue, contradiction by extrinsic facts will be allowed if a defendant has falsely stated

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[81] *Id.*
[82] *Id.*
[83] *Id.* at 273.
[84] *Id.*
[85] *Id.*
[86] *E.g.*, G. LILLY, *supra* note 28, at 308; J. WIGMORE, *supra* note 43, at § 1007; *See also* United States v. Green, 648 F.2d 587 (9th Cir. 1981).
[87] J. WEINSTEIN, *supra* note 42, ¶ 607(05) at 607-66.
[88] United States v. Benedetto, 571 F.2d 1246 (2d Cir. 1978).

a fact on direct.[89]

United States v. Benedetto,[90] involved the prosecution of a meat inspector for receiving a bribe. After defendant testified on direct examination that he had never taken bribes from anyone the government introduced extrinsic evidence of defendant having accepted other bribes. The Second Circuit Court of Appeals stated "[o]nce a witness (especially a defendant witness) testifies as to any specific fact on direct testimony, the trial judge has broad discretion to admit extrinsic evidence tending to contradict the specific statement, even if such statement concerns a collateral matter in the case."[91] The *Benedetto* court relied on *Walder v. United States*,[92] a prosecution for possession of heroin. The court permitted impeachment by extrinsic evidence of heroin possession two years earlier, after the defendant made a "sweeping claim" on direct examination that he had never had the drug in his possession.[93] The Supreme Court of the United States affirmed defendant's conviction, stating "there is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the government's disability to challenge his credibility."[94]

The *Benedetto* case appears wrongly decided for a number of reasons including its confusing dictum about collateral matters. First, it is clear that the extrinsic evidence of the taking of other bribes was inadmissible under Federal Rule of Evidence 404(b) because there was nothing sufficiently unique about the bribe-taking to suggest a signature crime. Secondly, if the evidence was being offered to rebut evidence of defendant's good character, it was improper under Rule 405 which precludes the use of extrinsic specific acts evidence to make such a showing. Finally, if the evidence was offered solely for the purpose of showing that the witness was a liar, the acceptance of bribes usually does not relate to the witness's ability to tell the truth and in any event may not be proved by extrinsic evidence under 608(b).[95]

The Second Circuit's reliance on *Walder* appears misplaced because *Walder* was decided long before the passage of the Federal Rules of Evidence.[96] Congress's adoption of those rules to some extent places in question *Walder's* underlying rationale. In limiting the use of extrinsic evidence on certain issues, Rules 405 and 608 make no distinction as to whether a point is raised first on direct or on cross-examination. Although the *Walder* rationale is superficially appealing, it makes no

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[89] *Id.* at 1250.
[90] 571 F.2d 1246 (2d Cir. 1978).
[91] *Id.* at 1250.
[92] 347 U.S. 62 (1954).
[93] *Id.* at 65.
[94] *Id.*
[95] *But see* United States v. Billups, 692 F.2d 320 (4th Cir. 1982) *cert. denied* 464 U.S. 820 (1983) (labor official who testified on direct that he had never accepted "anything" from waterfront employees opened the door to government rebuttal evidence showing that he had received gratuities over the course of several years). *See also* United States v. Babbitt, 683 F.2d 21 (1st Cir. 1982).
[96] The Federal Rules of Evidence were first enacted in 1974. Pub. L. No. 93-595, 88 Stat. 1926-1937 (1974).

sense to say that we will be bound by a witness's perjury if he makes it on cross-examination, but not if he makes it on direct. In the interests of judicial efficiency and the avoidance of prejudice and confusion, Congress has adopted a policy of limiting extrinsic evidence in certain areas. If perjury results from these limitations, the perjury may become the subject of a separate prosecution regardless of whether it was committed on direct or cross-examination, but this is not a sufficient reason to set aside the legislative determination that such evidence should be excluded.

The problem with the *Benedetto* case is that the contradiction was really relevant for only two purposes, both related to character, i.e., showing that the witness had a propensity to take bribes or that he had the character of a liar. Rules 404 and 405 prohibit the use of the extrinsic evidence for the first purpose, while Rule 608 prohibits it for the latter. However, in many cases, like *Liverwood*, the issues presented are quite different and the contradiction is either relevant to a noncharacter issue or demonstrates that the witness is mistaken. Sometimes evidence of contradiction will also be relevant to the witness's ability to observe and remember.[97] In such cases, extrinsic evidence is properly admissible in federal court to impeach the testimony of a witness by contradiction. The only limitations on the introduction of such evidence are those inherent in Federal Rules of Evidence 401 and 403.

Bias Provable by Extrinsic Evidence

Impeachment by showing the witness to be biased rests on two assumptions: "(1) that certain relationships and circumstances impair the impartiality of a witness and (2) that a witness who is not impartial may -- sometimes consciously but perhaps unwittingly -- shade his testimony in favor of or against one of the parties."[98]

Evidence of bias is always provable by extrinsic evidence.[99] The rationale for this rule is based on the fact that bias evidence is never being offered to establish the general propensity of a witness to lie.[100] Rather, evidence of bias focuses solely on the relationship of the witness to the *particular* cause of action in which he is currently testifying. Evidence of bias is introduced to show that the witness is likely to shade or color his testimony in accordance with his particular bias *in this case only*. Because bias evidence does not violate the propensity rule, it is freely provable by extrinsic evidence.

In *United States v. Abel*,[101] it was held that the impeachment of a witness for bias is permissible under the Federal Rules of Evidence. The Court held further that

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[97] *See, generally* Advisory Committee's Note, FED. R. EVID. 607, 608, 610, 611(b).

[98] I.e., bias evidence is almost never being offered to establish that the witness is a liar by nature and therefore must be lying on the witness stand.

[99] United States v. Abel, 469 U.S. 45 (1984).

[100] *Id.* at 51 (citations omitted).

[101] 469 U.S. 45 (1984).

the testimony at issue in the case was sufficiently probative of the defense witness's possible bias toward the defendant to warrant its admission into evidence, *regardless of whether the testimony was inadmissible under Rule 608(b) as extrinsic evidence of the witness's past conduct bearing on his veracity.*[102] The case involved a criminal prosecution in which the defendant's cohort testified for the prosecution. The cohort testified that the defendant and defense witness belonged to a secret prison gang and that the tenets of the gang required its members to lie for one another (clearly extrinsic evidence). The prosecution offered this extrinsic evidence to impeach the defense witness's testimony. Justice Rehnquist, expressing the unanimous view of the court, stated that such evidence was sufficiently probative on the issue of the witness's possible bias toward the defendant to warrant its admission into evidence under Rules 401, 402, and 403 of the Federal Rules of Evidence, regardless of whether the testimony is inadmissible under Rule 608(b) as extrinsic evidence of the witness's past conduct bearing on his veracity. Justice Rehnquist went on to say that:

> [t]he Courts of Appeals have upheld use of extrinsic evidence to show bias both before and after the adoption of the Federal Rules of Evidence. ... We think the lesson to be drawn from all of this is that it is permissible to impeach a witness by showing his bias under the Federal Rules of Evidence just as it was permissible to do so before their adoption.
>
> Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony. The "common law of evidence" allowed the showing of bias by extrinsic evidence, while requiring the cross-examiner to "take the answer of the witness" with respect to less favored forms of impeachment.[103]

It is clear from *Abel* that just as the "common law of evidence" allowed the showing of bias by extrinsic evidence, so now do the codified Federal Rules of Evidence. As one learned scholar notes "if the witness on cross-examination denies or does not fully admit the facts claimed to show bias, the attacker has the right to prove those facts by extrinsic evidence ... the cross-examiner is not required to 'take the answer' of the witness but may call other witnesses to prove them."[104] There are many similar circuit court holdings under the Federal Rules of Evidence.[105]

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[102] *Id.* at 56 (citations omitted).

[103] *Abel*, 469 U.S. at 51-52.

[104] C. MCCORMICK, *supra* note 8, at 92. *See also* Smith v. United States, 283 F.2d 16 (6th Cir. 1960), *cert. denied* 365 U.S. 847 (dictum); 3A J. WIGMORE, EVIDENCE § 1005(b), (c) (Chadbourn rev. 1970); Smith v. Hornkohl, 166 Neb. 702, 90 N.W. 2d 347 (1958) (dictum); 3A J. WIGMORE, EVIDENCE § 943 (Chadbourn rev. 1970); 98 C.J.S. *Witnesses* §§ 563, 565 (1955).

[105] United States v. Harvey, 547 F.2d 720 (2d Cir. 1976); United States v. Jones, 609 F.2d 36 (2d Cir. 1979), *cert. denied* 445 U.S. 905; United States v. Frankenthal, 582 F.2d 1102 (7th Cir. 1978); United States v. Brown, 547 F.2d 438 (8th Cir.) *cert. denied sub nom*; Hendrix v. United States, 430 U.S. 937 (1977).

Extrinsic Evidence of Specific Acts Not Admissible to Prove Untruthful or Truthful Character

The one area in which the courts have been relatively consistent in excluding extrinsic evidence of specific instances of conduct is where such evidence is offered for the sole purpose of demonstrating that the witness has a propensity to lie or to tell the truth.[106] Under Rule 608(a) such evidence may be offered only in the form of opinion or reputation.[107] When the evidence is limited to conclusory statements about the witness's reputation, delay is minimized and 608(b) prohibits proof of the underlying events which produced the opinion or reputation. Thus, the danger of distracting the trier of fact with side issues is avoided.[108]

It is important to understand that where the extrinsic evidence has a dual relevance, one being to show that the witness has the character of a liar or a truthteller and the other to a material issue in the case, the extrinsic evidence will be admitted for the latter purpose. In *United States v. Opager*,[109] one of the reasons the Fifth Circuit reversed defendant's drug convictions was because the trial court erroneously excluded extrinsic evidence in reliance on Rule 608(b). In *Opager* a government informant testified that he saw the defendant engage in drug transactions while the two worked together in a beauty salon. The defendant offered the salon's records to show that the informant never worked there. The Court of Appeals held that the records were not extrinsic evidence of specific instances of conduct relating to credibility, but "were introduced to disprove a specific fact material to Opager's defense."[110]

Thus the limitation imposed on the introduction of extrinsic evidence is quite specific and narrow. The scope of 608(b) is particularly well stated in a recent North Carolina case analyzing that state's equivalent of the federal rule.

> Rule 608(b) addresses the admissibility of specific instances of conduct (as opposed to opinion or reputation evidence) only in the very narrow instance where (1) the *purpose* of producing the evidence is to impeach or enhance credibility by proving that the witness' conduct indicates his character for truthfulness or untruthfulness; and (2) the conduct in question *is in fact probative* of truthfulness or untruthfulness and is not too remote in time; and (3) the conduct in question *did not*

[106] *E.g.*, United States v. Espinal, 757 F.2d 423 (1st Cir. 1985). United States v. Oxman, 740 F.2d 1298 (3d Cir. 1984); United States v. Blackshire, 538 F.2d 569 (4th Cir.), *cert. denied*, 429 U.S. 840 (1976); United States v. Reed, 715 F.2d 870 (5th Cir. 1983); United States v. Marvin, 720 F.2d 12 (8th Cir. 1983); United States v. Bosley, 615 F.2d 1274 (9th Cir. 1980); United States v. Edwards, 696 F.2d 1277 (11th Cir.), *cert. denied*, 461 U.S. 909 (1983).

[107] The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation. FED. R. EVID. 608(a).

[108] G. LILLY, *supra* note 28, at 295.

[109] 589 F.2d 799 (5th Cir. 1979), *cert. denied*, 100 S. Ct. 1082 (1979).

[110] *Id.* at 801.

> *result in a conviction*; and (4) the inquiry into the conduct *takes place during cross- examination.* If the proffered evidence meets these four enumerated prerequisites, before admitting the evidence the trial judge must determine, in his discretion, pursuant to Rule 403, that the probative value of the evidence is not outweighed by the risk of unfair prejudice, confusion of issues or misleading the jury, and that the questioning will not harass or unduly embarrass the witness. Even if the trial judge allows the inquiry on cross-examination, extrinsic evidence of the conduct is not admissible.[111]

Thus, the authorities make clear that the true intent of Rule 608(b) is to limit the use of extrinsic specific acts evidence only when it is being used in violation of the propensity rule, i.e., to establish that the witness is either a liar or a truthteller by nature and therefore must be lying or telling the truth on the stand.

CONCLUSION

As has been demonstrated, the bias of a witness and the mental capacity of a witness to observe, remember, and narrate may all be proved by extrinsic evidence. Similarly, extrinsic evidence may be used to impeach a witness by contradiction or by use of prior inconsistent statements. Interestingly enough, however, all of the authorities cited within whether they be treatises, jury instructions, or case law, justify the admission of extrinsic evidence on grounds that it goes to the credibility of the witness. The reference, then, is to the very same word used in the first sentence of Rule 608(b), which emphatically states that specific instances of conduct of a witness, for the purpose of attacking or supporting the credibility of the witness. . . may not be proved by extrinsic evidence.

The broad meaning that the treatises, jury instructions, and case law have given to the term "credibility" (as encompassing bias, perception, motive, state of mind, as well as capacity for truthfulness or untruthfulness), points to its improper use by the drafters in the first sentence of Rule 608(b). The drafters did not intend to prohibit proof of bias, motive, perception, or state of mind through use of extrinsic evidence. Indeed, the drafters of the military counterpart to Rule 608 decided that impeachment by bias was acceptable under Rule 608 and added a subsection (c) to the Rule which dealt with bias and motive.[112] Military Rules of Evidence 608(c) provides as follows: "Evidence of Bias. Bias, prejudice, or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or *by evidence otherwise adduced.*"[113]

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[111] State v. Morgan, 315 N.C. 626, 633-34, 340 S.E.2d 84, 89-90 (1986) (citations omitted).

[112] The drafters of the Military Rules of Evidence apparently felt that a provision allowing for impeachment by bias had been accidently omitted.

[113] S. SALTZBURG, MILITARY RULES OF EVIDENCE MANUAL 287 (1981).

Federal Rule 608(b) is a rule of exclusion. Because its language is overbroad, there has been inevitable pressure to create exceptions to the rule of exclusion, as has happened with the hearsay rule. This is in essence what courts are doing when they say they will exclude extrinsic evidence of specific instances of conduct except where they are relevant to a matter which is not collateral, or except when relevant to show bias. Rather than create a series of exceptions to the rule, it seems preferable to narrow and refine the rule itself so that the exceptions are no longer needed.

What is called for is a term much narrower in its meaning: one which excludes bias, motive, perception, and state of mind from its ambit but which retains capacity for truthfulness or untruthfulness within its control. It is the purpose of this article to suggest that a more proper understanding of Rule 608(b) would result if the phrase ''character for truthtelling or falsification'' were substituted for the word ''credibility'' in the first sentence of Rule 608(b). The substituted phrase would avoid the overbroad, overinclusive problem already discussed with respect to the use of the present word credibility. Use of the proposed substituted phrase would have the distinct advantage of creating internal consistency within the Rule itself. In this manner, greater clarity and less confusion will result among federal practitioners and courts alike.