Alabama Rules of Evidence

Article VI. Witnesses

Rule 608.

Evidence of character and conduct of witness.

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

(b) *Specific Instances of Conduct*. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's character for truthfulness, other than conviction of crime as provided in Rule 609, may not be inquired into on cross-examination of the witness nor proved by extrinsic evidence. They may, however, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

[Amended 8-15-2013, eff. 10-1-2013.]

Advisory Committee's Notes

Alabama Rule of Evidence 404(a) establishes a general rule excluding character evidence when it is offered to prove that an individual is of a particular character and acted in conformity therewith on the occasion in question. A major exception to this general exclusionary rule permits the admission of specified character evidence when it goes to the credibility of witnesses. See Ala.R.Evid. 404(a)(3). Rules 607, 608, and 609 illustrate this exception. The Rule 404(a) provision generally excluding evidence of character, and the impeachment exception, are both consistent with traditional Alabama evidence law. See C. Gamble, Character Evidence: A Comprehensive Approach 56 (1987).

Section (a). Opinion and reputation evidence of character. As under preexisting Alabama law, a witness (referred to herein as the principal witness) may be impeached by the testimony of a character witness regarding the principal witness's general reputation in the community for untruthfulness. *Sussex Fire Ins. Co. v. Barton*, 225 Ala. 570, 144 So. 439 (1932); *Smitherman v. State*, 521 So.2d 1050 (Ala.Crim.App.1987), cert. denied, 521 So.2d 1062 (Ala.1988). See C. Gamble, McElroy's Alabama Evidence § 140.01 (4th ed. 1991). Rule 608 is in no way intended to affect Alabama case law regarding foundational issues, such as the evolving definition of "community," the character witness's prerequisite contacts with the community, and the principal witness's contacts with the community. See, e.g., *Baer & Co. v.*

Mobile Cooperage & Box Mfg. Co., 159 Ala. 491, 49 So. 92 (1909); *Kilgore v. State*, 124 Ala. 24, 27 So. 4 (1899). When reputation testimony is offered, it must relate only to truthfulness or untruthfulness. Alabama case law has long embraced the same concept. See *Sweatt v. State*, 156 Ala. 85, 47 So. 194 (1908); *Dolan v. State*, 81 Ala. 11, 1 So. 707 (1887). However, Rule 608(a) departs from the preexisting Alabama position in that it does not permit the character witness to testify to the principal witness's general reputation as a whole; rather, reputation must be limited to the specific trait of truthfulness or untruthfulness. See *Grammer v. State*, 239 Ala. 633, 196 So. 268 (1940); *Holloman v. State*, 349 So.2d 131 (Ala.Crim.App.1977).

A second form of impeachment evidence authorized by Rule 608(a), through which the character witness may impeach the credibility of the principal witness, is the character witness's opinion regarding the principal witness's untruthfulness. Although Alabama courts historically permit the character witness to impeach the principal witness by offering opinion evidence through testimony as to whether the character witness would believe the principal witness under oath, this treatment of opinion evidence as equal with reputation evidence is new to Alabama. See *Pitts v. State*, 261 Ala. 314, 74 So.2d 232 (1954); *Crawford v. State*, 112 Ala. 1, 21 So. 214 (1896). When opinion evidence is used for impeachment, it must be confined to the trait of truthfulness or untruthfulness, and a foundation must be established to show that the character witness's knowledge of the principal witness is sufficient to justify such an opinion. See Ala.R.Evid. 701(a); Ala.R.Evid. 602.

The same evidence as to reputation or opinion that Rule 608(a) authorizes for impeachment likewise may be admitted for rehabilitation of witnesses. That evidence, of course, must be limited to the specific trait of truthfulness. The recognition of these two mediums, through which one may rehabilitate witnesses, differs from prior Alabama law in two respects. First, preexisting Alabama authority recognized the admissibility of the character witness's opinion that he or she would believe the principal witness under oath, but opinion evidence generally was not allowed as a medium for supporting credibility. *Prater v. State*, 107 Ala. 26, 18 So. 238 (1895). Second, Rule 608(a) abandons the historic right in Alabama to rehabilitate via evidence of a witness's good general reputation as a whole, without regard to a pertinent trait. *Dickson v. Dinsmore*, 291 Ala. 353, 122 So. 437 (1929).

Rule 608(a) expressly provides that impeachment via evidence of reputation or opinion opens the door to the rehabilitation of the witness through positive evidence of reputation or opinion. Except for the admission of opinion evidence, this is consistent with the traditional practice in Alabama. See *Bill Steber Chevrolet-Oldsmobile, Inc. v. Morgan*, 429 So.2d 1013 (Ala.1983) (impeachment via evidence of bad general reputation held to justify rehabilitation by evidence of good general reputation). Beyond this, however, Rule 608(a) does not attempt to stipulate what forms of attack upon credibility will open the door for the calling party to rehabilitate the impeached witness by way of evidence of reputation or opinion for truthfulness. The phrase "or otherwise" in Rule 608(a) is intended to leave much to the discretion of the trial judge. If that discretion is exercised consistent with traditional common law, it is reasonable to expect that generally rehabilitation via Rule 608(a) will be allowed when it is clear that the witness's credibility has been attacked. This generally would be the case when there has been impeachment by evidence of reputation (or opinion) as authorized under Rule 608(a), by evidence of convictions (Rule 609), or by evidence of inconsistent statements. See, e.g., *Snead v. Jones*, 169 Ala. 143, 53 So. 188 (1910) (evidence of conviction as authorizing rehabilitation); *Dickson v. Dinsmore*, 219 Ala. 353, 122 So. 437 (1929) (self-contradiction as authorizing rehabilitation); C. Gamble, McElroy's Alabama Evidence § 176.01 (4th ed. 1991).

As a general rule, only if a witness's bias is so strong as to imply corruption on the part of the witness will it authorize rehabilitation evidence under Rule 608(a). See *Gratton v. State*, 455 So.2d 189 (Ala.Crim.App.1984); *Tilley v. State*, 167 Ala. 107, 52 So. 732 (1910). Likewise, mere contradiction of a witness's testimony does not constitute a sufficient attack upon credibility to warrant the admission of Rule 608(a) rehabilitation evidence. See *Babcock v. Smith*, 285 Ala. 557, 234 So.2d 573 (1970). Other attacks upon credibility are to be treated on a case-by-case basis, in a manner consistent with the general rule stated above and with the trial court's discretion.

Nothing in Rule 608 is intended to affect the evolving case law governing forms of rehabilitation other than evidence of reputation and opinion as authorized in Rule 608(a). Consistent with that authority and with a clear reading of Rule 608(a), however, it would continue to be the law that impeachment by evidence of general reputation or opinion does not entitle the calling party to rehabilitate his or her witness through evidence of prior statements that are consistent with the witness's present testimony. *Luther v. State*, 47 Ala.App. 647, 259 So.2d 857, cert. denied, 288 Ala. 745, 259 So.2d 862, cert. denied, 409 U.S. 877 (1972). See C. Gamble, McElroy's Alabama Evidence § 177.01(1) (4th ed. 1991).

The touchstone of rehabilitation, of course, is that no such evidence is admissible unless and until the principal witness's character for truthfulness has been attacked. The traditional Alabama rule likewise provides that a witness's credibility may be supported only after it first has been attacked. See *Clark v. State*, 56 Ala.App. 67, 318 So.2d 813 (1974), cert. quashed, 294 Ala. 493, 318 So.2d 822, cert. denied, 423 U.S. 937 (1975); *Bill Steber Chevrolet-Oldsmobile, Inc. v. Morgan*, 429 So.2d 1013 (Ala.1983).

Section (b). Specific instances of conduct. Rule 608(b) establishes the general principle that a witness's specific acts that have not been the basis of a criminal conviction may not be asked about or proved by extrinsic evidence when evidence of them is offered to attack or to support credibility. This bar to "specific conduct" evidence of character is consistent with the general exclusionary principle found in Alabama Rule of Evidence 404(a).

The witness's own conduct. Rule 608 precludes evidence of acts for which there has been no conviction when it is offered upon the theory that such character evidence is probative of whether the witness committing the acts is telling the truth. Contra Fed.R.Evid. 608(b). This rule continues preexisting Alabama law. See *Grooms v. State*, 228 Ala. 133, 152 So. 455 (1934) (witness could not be asked about his prior acts of thievery); C. Gamble, McElroy's Alabama Evidence § 140.01(10) (4th ed. 1991). Compare Or.R.Evid. 608(b); Tex.R.Evid. 608(b). The corresponding federal principle, permitting such acts to be inquired about on cross-examination, is hereby rejected. See Fed.R.Evid. 608(b)(1).

Rule 608 does not preclude cross-examination calling for evidence of conduct, or exclude extrinsic evidence of conduct, when that evidence is sought or offered for purposes sanctioned by other rules. If the conduct goes to show the witness's bias, for example, then it may be inquired about on cross-examination or proven extrinsically after the witness denies that it occurred. Ala.R.Evid. 616. See State v. Garceau, 370 N.W.2d 34 (Minn.Ct.App.1985). See also *United States v. Corbin*, 734 F.2d 643 (11th Cir.1984) (if the act reflects bias, then the cross-examiner may introduce extrinsic evidence); *United States v. Ray*, 731 F.2d 1361 (9th Cir.1984) (an act revealing bias may be proven by extrinsic evidence; questioner does not have to accept the witness's negative answer). By way of further illustration, this rule will not

affect the cross-examiner's ability to ask about a witness's own acts that are self-contradictory. See *United States v. Merida*, 765 F.2d 1205, reh'g denied en banc, 770 F.2d 164 (5th Cir.1985); *United States v. Opager*, 589 F.2d 799 (5th Cir. 1979). Proof of such acts also may be admissible when offered for purposes other than impeachment. See *United States v. Cutter*, 676 F.2d 1245 (9th Cir. 1982) (extrinsic evidence could be admitted via Rule 404(b) to prove that the witness had a "motive" to commit the crime for which the accused is being prosecuted). If the witness denying the conduct is a party, then the cross-examiner may offer extrinsic evidence under the rule permitting proof of an admission. See, e.g., *United States v. Calle*, 822 F.2d 1016, 1020-21 (11th Cir.1987). See also Ala.R.Evid. 801(d)(2).

Cross-examination of character witness. Rule 608(a) permits impeachment of a principal witness by a character witness's testimony in the form of reputation for, or opinion of, character for untruthfulness. The character witness offering impeachment testimony may, under Rule 608(b), be asked on cross-examination about any act of the principal witness that is inconsistent with the trait of untruthfulness that was testified to on direct examination. Preexisting Alabama practice required that such a question, asked to impeach the character witness, be prefaced with the phrase "Have you heard?" Compare *Watson v. State*, 181 Ala. 53, 61 So. 334 (1913). No such preface is required under Rule 608(b).

Additionally, Rule 608(a) permits rehabilitation of a principal witness by a character witness's relating his or her opinion of the principal witness's character for, or general reputation for, truthfulness. The character witness offering rehabilitation testimony may, under Rule 608(b), be asked on cross-examination if he or she knows or has heard of the principal witness's having committed any act that is inconsistent with the trait of truthfulness as testified to by the character witness on direct examination. Again, under prior Alabama law, only the "have you heard" question was permitted. See *Crowe v. State*, 333 So.2d 902 (Ala.Crim.App.), cert. denied, 333 So.2d 906 (Ala.1976).

Unlike Fed.R.Evid. 608, Ala.R.Evid. 608 contains no provision dealing with the extent to which a witness waives the privilege against self-incrimination by giving testimony. It leaves that question to preexisting and currently evolving constitutional law relating to criminal procedure.

Advisory Committee's Notes to Amendment to Rule 608(b) Effective October 1, 2013

Rule 608(b) has been amended by replacing the word "credibility" with the phrase "character for truthfulness," thereby tracking the 2003 amendment to Fed. R. Evid. 608(b). This amendment is not intended to bring any substantive change to Alabama's general rule, codified in Rule 608(b), which precludes asking a witness about, or offering extrinsic proof of, the witness's own unconvicted conduct. See *Hathcock v. Wood*, 815 So. 2d 502, 508 (Ala. 2001); *J.B. Hunt Transp., Inc. v. Credeur*, 681 So. 2d 1355, 1361 (Ala. 1996). Rather, the amendment conforms Rule 608(b) to its original intent and reaffirms and clarifies that this preclusion applies only when the misconduct is offered under Rule 608(b) on the theory that some unconvicted misconduct possesses probative value upon the witness's character for truthfulness. As observed in the advisory committee's notes to the 2003 amendment to the federal rule, the preclusion applies "only when the sole reason for proffering that evidence is to attack or support the witness's character for truthfulness." See also James E. McDaniel, *Alabama Rule of Evidence 608(b): The Call for Amendment to Prevent Abuse of the*

Protections Within the Rule, 57 Ala. L. Rev. 1105 (2006) (arguing that the term "credibility" in Ala. R. Evid. 608(b) should be removed and replaced with the phrase "character for truthfulness" to make it clear that the testifying witness may be asked about prior unconvicted bad acts that qualify under some other ground of impeachment and noting that this change has already been made to Federal Rule of Evidence 608(b)).

Nothing precludes asking a witness about or offering extrinsic evidence to prove misconduct when it is relevant under some other rule either to impeach or as substantive evidence. As noted in the original Advisory Committee's Notes to this rule, "Rule 608 does not preclude cross-examination calling for evidence of conduct, or exclude extrinsic evidence of conduct, when that evidence is sought or offered for purposes sanctioned by other rules." Ala. R. Evid. 608(b) (Advisory Committee's Notes). For example, if evidence is proffered to show the witness's bias, self-contradiction, or sensory defect, the prohibition in Rule 608 does not apply. See *Griffin v. State*, 790 So. 2d 267, 331-32 (Ala. Crim. App. 1999) (cross-examination about unconvicted misconduct to show self-contradiction not barred by Ala. R. Evid. 608(b)). See also *United States v. Brown*, 547 F.2d 438, 445 (8th Cir. 1977) (extrinsic evidence to show bias); *Lewy v. Southern Pacific Transp. Co.*, 799 F.2d 1281, 1298 (9th Cir. 1986) (same); *Carson v. Polley*, 689 F.2d 562, 574 (5th Cir. 1982) (extrinsic evidence to contradict); *Kasuri v. St. Elizabeth Hosp. Med. Ctr.*, 897 F.2d 845, 854 (6th Cir. 1990) (extrinsic evidence of prior inconsistent statement); and *United States v. Lindstrom*, 698 F.2d 1154, 1162 n.6 (11th Cir. 1983) (noting that Rule 608(b) is not controlling when credibility is attacked by showing impaired capacity to observe, remember, or narrate). Further illustrations are set out in the original Advisory Committee's Notes to Rule 608. See generally 1 C. Gamble & R. Goodwin, *McElroy's Alabama Evidence* § 140.01(9)-(10) (6th ed. 2009); C. Gamble, *Gamble's Alabama Rules of Evidence* § 608(b) (2d ed. 2002).

Note from reporter of decisions: The order amending Rule 404(a), Rule 405(a), Rule 407, Rule 408, Rule 412, Rule 510, Rule 608(b), Rule 703, Rule 801(d), Rule 803(6), Rule 804(b), and Rule 1103, Ala. R. Evid., and adopting Rule 902(11) and (12), Ala. R. Evid., and the Advisory Committee's Notes to the amendment or adoption of these rules, effective October 1, 2013, is published in that volume of *Alabama Reporter* that contains Alabama cases from ___ So. 3d.