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 the witness, for the purpose of attacking or supporting the witness' character for truthfulness, 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.

(c) Criminal cases. The prosecutor in a criminal case may not cross-examine the accused or defense witness under subdivision (b) unless (1) the prosecutor has given the defense notice of intent to cross-examine pursuant to the rule; (2) the prosecutor is able to provide the trial court with sufficient evidentiary support justifying the cross-examination; and (3) the prosecutor establishes that the probative value of the cross-examination outweighs its potential for creating unfair prejudice to the accused.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility.

(Amended effective January 1, 1990; amended effective September 1, 2006.)

Committee Comment - 1977

The rule permits impeachment by means of reputation or opinion evidence. Traditionally, Minnesota has distinguished between opinion and reputation when dealing with the issue of credibility. Reputation testimony has been permitted but personal opinion has been excluded. See Simon v. Carroll, 241 Minn. 211, 220, 221, 62 N.W.2d 822, 828, 829 (1954); State v. Kahner, 217 Minn. 574, 582, 15 N.W.2d 105, 109 (1944). However, since the Minnesota courts permit the witness to testify as to whether he would believe the testimony which the impeached witness would give under oath, Minnesota courts come very close to permitting opinion testimony as to credibility.

Evidence of truthful character is only admissible for rehabilitation purposes after the character of the witness is attacked. What is meant by "otherwise" in the rule is left for case-by-case analysis. The United States Supreme Court Advisory Committee Note indicates that impeachment of a witness by introducing evidence of bias is not an attack on the character of the witness sufficient to justify rehabilitation. It is further suggested that evidence of misconduct admitted under Rule 608(b) or 609 is such an attack. Impeachment in the form of contradiction may justify rehabilitation, depending on the circumstances. See United States Supreme Court Advisory Committee Note.

This subdivision (b) considers the use of specific conduct to attack or support the credibility of a witness. (See Rule 609 for the admissibility of a criminal conviction.) The rule corresponds to existing practice in Minnesota. It is permissible to impeach a witness on cross-examination by prior misconduct if the prior misconduct is probative of untruthfulness. See State v. Gress, 250 Minn. 337, 343, 84 N.W.2d 616, 621 (1957); Note 36 Minn.L.Rev. 724, 733 (1952). However, because this is deemed an inquiry into a collateral matter the cross-examiner may not disprove an answer

by extrinsic evidence. State v. Nelson, 148 Minn. 285, 296, 181 N.W. 850, 855 (1921). In criminal cases the courts have been somewhat reluctant to permit such evidence if it tends to involve matters that might prejudice the jury. See State v. Haney, 219 Minn. 518, 520, 18 N.W.2d 315, 316 (1945).

The last sentence in Rule 608 preserves the rights of an accused or other witness to assert the Fifth Amendment privilege as to those questions which relate only to credibility. If the question relates to matters other than credibility this rule has no application.

Committee Comment - 2006

Rule 608(b)

The amendment in Rule 608(b) comes from the amendment to Fed. R. Evid. 608(b), which was added in 2003. The language clarifies that the restriction on extrinsic evidence applies only if the witness is being impeached on the issue of character for truthfulness. If the witness is impeached by evidence of bias the denial may be contradicted by extrinsic evidence. For example, if a witness denies the plaintiff is her son, the denial may be challenged by extrinsic evidence. If the witness denies that she lied on a job application, the denial may not be disproved by extrinsic evidence.

The limitation on extrinsic evidence applies only to evidence that requires testimony from another witness. Counsel may contradict the witness with evidence offered through the testimony of the witness being impeached. For example, if the witness denies lying on a job application, counsel may try to refresh the witness' recollection by showing the witness the application. Counsel may offer the job application if the foundation for admitting it can be established through the testimony of the witness being impeached. If the witness denies lying on a job application, and the lie cannot be established through cross-examination of that witness, counsel may not disprove the denial by calling another witness. Because this is an inquiry into a collateral matter counsel may not call a rebuttal witness to lay the foundation for admitting the job application and proving the lie. Compare Carter v. Hewitt, 617 F.2d 961, 969-70 (3d Cir. 1980) (admitting, as non-extrinsic evidence, a letter that defendant admitted authoring) with United States v. Martz, 964 F.2d 787, 788 (8th Cir. 1992) (precluding defendant from introducing witness' plea agreements after witness denied making any agreement stating that documents are not admissible under rule 608(b) "merely to show a witness' general character for truthfulness"). See generally ROGER C. PARK, DAVID P. LEONARD & STEVEN H. GOLDBERG, EVIDENCE LAW: A STUDENT'S GUIDE TO THE LAW OF EVIDENCE AS APPLIED IN AMERICAN TRIALS 485 (2d ed. 2004).

Rule 608(c)

Rule 608(c) incorporates the holding in State v. Fallin, 540 N.W.2d 518, 522 (Minn. 1995) (placing burden on the prosecutor before allowing cross-examination of defendant or defense witnesses about acts of misconduct reflecting on truthfulness). The balancing test taken from Fallin is not the Rule 403 test favoring admissibility unless probative value is "substantially outweighed" by unfair prejudice. Under this test the court should not allow the cross-examination if probative value and unfair prejudice are closely balanced. Fallin, 540 N.W.2d at 522. The evidence should not be allowed unless probative value on the issue of credibility outweighs the potential for unfair prejudice.

The rule follows the holding in Fallin. Neither the rule nor the Court's opinion addresses the issue of whether the accused or a party in a civil case must provide notice and satisfy the same evidentiary standard if counsel attempts to impeach a witness under this rule. Ethical requirements in Minn. R. Prof. Cond. 3.4(e) would be applicable in all cases to restrict lawyers from alluding "to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence." Nothing in this rule would limit the rights and obligations in discovery. The Committee recognizes that in some circumstances Minn. R. Crim. P. 9 provides for differing

obligations of discovery between the prosecutor and the defense. See also State v. Patterson, 587 N.W.2d 45, 50 (Minn. 1998) ("Discovery rules are 'based on the proposition that the ends of justice will best be served by a system of liberal discovery which gives both parties the maximum possible amount of information with which to prepare their cases and thereby reduces the possibility of surprise at trial' and are 'designed to enhance the search for truth'") (citations omitted).