ALABAMA RULE OF EVIDENCE 608(B): THE CALL FOR AMENDMENT TO PREVENT ABUSE OF THE PROTECTIONS WITHIN THE RULE*

I. INTRODUCTION

Fundamental to the rules governing evidentiary standards in any proceeding is the tension between providing the trier of fact with information essential to ensure a just result and the dangers of exposing the trier of fact to information that may be unfairly prejudicial. In seeking to balance the relevancy of evidence with the potential for prejudice, rule drafters strive to implement mechanisms within the rules to prohibit harsh prejudices and maintain the utmost standard of fairness. One such protection lies in Rule 608(b) of the Alabama Rules of Evidence,[1] which concerns the cross-examining of a witness for purposes of supporting or impeaching the witness's "credibility."[2] This rule expressly prohibits cross-examination with regard to prior bad acts for which there have been no convictions when the testimony is sought either to undermine or support the witness's "credibility."[3] Further, Alabama's Rule 608(b) does not allow specific instances of such conduct to be proved through extrinsic evidence when evidence of those instances is offered to support or attack the witness's credibility.[4]

Despite this rule's protections against unfair prejudice, in its current form, the rule is susceptible to abuse, and the danger exists that an Alabama court will misconstrue its scope. As demonstrated in federal courts, courts misinterpret the protections within Rule 608(b) to exclude evidence offered for purposes other than an attack on the witness's "credibility."[5] This result is contrary to the drafters' intent in implementing Alabama Rule 608(b)[6] and opens the door for abuse of the protections embodied within the rule. This Comment begins by outlining the problem of potential misapplication

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1. ALA. R. EVID. 608(b) provides, in pertinent part: "Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, 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." The scope of this Comment is limited to instances when evidence is offered arguably to impeach a witness's "credibility," even though Rule 608(b) applies equally to instances when an attorney offers evidence to bolster a witness's "credibility."

2. *Id.*

3. *Id.*

4. *Id.*

5. *See* discussion *infra* Part III.

6. *See* ALA. R. EVID. 608(b) advisory committee's notes.

of the protections set forth in Alabama Rule 608(b). Further, this Comment demonstrates that the threat of misapplication exists in Alabama courts as evidenced by the abuse and misapplication of the federal version of Rule 608(b) in federal courts.[7] Finally, in light of the federal and Ohio responses to the misuse of those respective versions of Rule 608(b), this Comment prescribes a remedy to the dangers lurking within the current version of Alabama Rule 608(b).

II. THE PROBLEM: MISAPPLICATION OF ALABAMA RULE OF EVIDENCE 608(B) TO EVIDENCE OFFERED FOR PURPOSES OTHER THAN AN ATTACK ON THE WITNESS'S "CREDIBILITY"

A simple hypothetical suffices to illustrate the potential for misapplication of the absolute bar against the cross-examination of a witness to attack a witness's "credibility" under Alabama Rule of Evidence 608(b).[8] Consider a criminal case in an Alabama state court where the accused is on trial for the sale of narcotics. The defense calls an alibi witness to offer testimony that the defendant was not at the scene of the drug transaction that is the subject of the prosecution. Assume that the prosecuting attorney has knowledge indicating that the alibi witness and the accused were arrested together for possession of stolen property on a previous occasion. On cross-examination, the prosecution seeks to ask the alibi witness if he has ever been accused of committing theft. Of course, defense counsel would raise an objection under Rule 608(b), arguing that the prosecutor is attacking the alibi witness's "credibility" and that Rule 608(b) proscribes such cross-examination and any extrinsic evidence that could go toward proving the act. However, the prosecution would argue that he is seeking the testimony not to attack the witness's credibility, but to show that the alibi witness's testimony suffers from bias because the witness and the defendant had engaged in illegal activity together and are cohorts. Since this testimony is sought for a purpose other than attacking the witness's credibility, Rule 608(b) should not apply in theory.[9] Rule 608(b) purports *only* to apply when the *sole* reason for offering the evidence on cross-examination is to attack or support the witness's credibility.[10]

The potential for abuse stems from the usage of the term "credibility" in the first sentence of Rule 608(b).[11] As the next section details, there has been much confusion among federal courts in applying the extrinsic evi-

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7. The relationship between the federal and Alabama versions of Rule 608(b) is discussed *infra* Part III.

8. The following hypothetical is loosely based upon the facts in *United States v. Robinson*, 530 F.2d 1076 (D.C. Cir. 1976). In *Robinson*, the court admitted the testimony of the alibi witness. *Id.* at 1078.

9. ALA. R. EVID. 608(b) advisory committee's note; *see also* ALA. R. EVID. 616; *infra* note 136.

10. ALA. R. EVID. 608(b) advisory committee's note.

11. *See* 28 CHARLES ALLEN WRIGHT & VICTOR J. GOLD, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 6113 (1993).

dence prohibition in Rule 608(b) due to uncertainty as to the scope of the term as it was used in the federal version of the rule.[12]

It should be noted that Alabama's Rule 608(b) differs from its federal counterpart in that it is more restrictive. While Alabama Rule 608(b) does not allow cross-examinations for purposes proscribed by the rule, the federal version allows such inquiry.[13] Yet, the Alabama and federal versions are similar in that neither rule allows for extrinsic evidence to prove an act subject to the protections of the rule.[14] Therefore, a cross-examining attorney in federal court, after inquiring about specific instances of conduct falling within the protection of Rule 608(b), cannot prove the alleged misconduct through sources outside the testimony and is bound to "take [the witness's] answer."[15]

Nevertheless, the potential for controversy and confusion is the same in federal court and Alabama courts with respect to the interpretation of the word "credibility" used in both rules because the term is the operative word invoking the protections within the rule. The Federal Rules of Evidence have been in place longer than the Alabama Rules of Evidence; consequently, this confusion has not yet manifested itself in Alabama caselaw. Therefore, discussing examples of the misapplication of the term "credibility" in federal courts demonstrates possible situations where an Alabama state court may misapply Alabama's current Rule 608(b).

III. THE PROBLEM AS MANIFESTED IN FEDERAL COURTS

Federal courts have taken two basic approaches when construing the term "credibility" and determining the applicability of the absolute bar against extrinsic evidence. Many federal courts have held that the extrinsic evidence protection is limited only to evidence offered to attack the witness's character for truthfulness, which is the correct interpretation of Rule 608(b).[16] Conversely, some courts have erroneously extended the scope of

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12. FED. R. EVID. 608(b) provides:

> 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 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'[s] 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.

To resolve its misapplication in federal courts, the term "credibility" in FED. R. EVID. 608(b) was changed by a 2003 Amendment to the phrase "character for truthfulness." *See* discussion *infra* Part IV. When "credibility" is discussed with respect to the federal rule, the reference is to the pre-2003 version of the rule, which included the term "credibility."

13. *Compare* ALA. R. EVID. 608(b), *with* FED. R. EVID. 608(b).

14. *Compare* ALA. R. EVID. 608(b), *with* FED. R. EVID. 608(b).

15. United States v. Capozzi, 883 F.2d 608, 615 (8th Cir. 1989) (quoting United States v. Cohen, 631 F.2d 1223, 1226 (5th Cir. 1980)).

16. *See* United States v. Abel, 469 U.S. 45, 51 (1984) (explaining that Rule 608(b) does not apply to evidence of bias); United States v. Lindemann, 85 F.3d 1232, 1243 (7th Cir. 1996) (same); United States v. Higa, 55 F.3d 448, 452 (9th Cir. 1995) (holding that Rule 608(b) does not apply to impeachment by

the prohibition to cases involving instances of evidence offered for purposes other than attacks on "credibility," such as bias,[17] contradiction,[18] and lack of capacity.[19] The following two subparts outline how federal courts have interpreted the exclusion, both in a narrow and broad sense, to demonstrate how confusion with respect to Rule 608(b) has developed in federal courts.

A. *Applying the Extrinsic Evidence Ban in Rule 608(b) to Evidence Offered Only to Attack Character for Truthfulness*[20]

1. *Evidence Offered to Show Bias Is Not Precluded Under Rule 608(b)*

In construing 608(b) in the manner intended by the drafters of the rule, courts should not proscribe evidence offered to demonstrate a witness's bias. The seminal case standing for this proposition, which correctly interprets the term "credibility" as used in Rule 608(b), is *United States v. Abel*.[21] In *Abel*, the defendant and two other individuals were indicted for bank robbery.[22] The two other individuals pled guilty, but the defendant went to trial.[23] One of the individuals, Ehle, agreed to testify against the defendant.[24] Defense counsel informed the district court that he intended to call another individual, Mills, as a witness to counter Ehle's testimony.[25] The defense counsel contended that Mills would testify that Ehle had admitted to him, while the two were together in prison, that Ehle planned to implicate the defendant falsely so that Ehle would receive favorable treatment from the prosecution.[26]

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contradiction); United States v. Chu, 5 F.3d 1244, 1249 (9th Cir. 1993) (explaining that Rule 608(b) does not address evidence offered for impeachment by contradiction); United States v. Fusco, 748 F.2d 996, 998 (5th Cir. 1984) (explaining that Rule 608(b) does not apply to bias evidence); United States v. Ray, 731 F.2d 1361, 1364 (9th Cir. 1984) (holding that 608(b) does not apply to evidence of bias); United States v. Opager, 589 F.2d 799, 801-02 (5th Cir. 1979) (holding that the application of Rule 608(b) is reserved for attacks on character for truthfulness and does not apply to contradiction evidence); United States v. James, 609 F.2d 36, 46 (2d Cir. 1979) (refusing to apply Rule 608(b) when there is evidence of bias); United States v. Rios Ruiz, 579 F.2d 670, 674 (1st Cir. 1978) (holding that Rule 608(b) is inapplicable to evidence of bias).

17. *See, e.g.*, United States v. Martz, 964 F.2d 787, 789 (8th Cir. 1992) (extending the Rule 608(b) protections to evidence offered to show bias); United States v. Graham, 856 F.2d 756, 759 (6th Cir. 1988) (same).

18. *See* Becker v. ARCO Chem. Co., 207 F.3d 176, 204 (3d Cir. 2000) (applying Rule 608(b) to evidence offered to show contradiction); United States v. Bussey, 942 F.2d 1241, 1253 (8th Cir. 1991) (same); United States v. Greschner, 802 F.2d 373, 383 (10th Cir. 1986) (same); United States v. Green, 648 F.2d 587, 596 (9th Cir. 1981) (same); United States v. Batts, 558 F.2d 513, 517 (9th Cir. 1977) (same), *withdrawn*, 573 F.2d 599 (9th Cir. 1978).

19. *See, e.g.*, United States v. Banks, 520 F.2d 627, 631 (7th Cir. 1975) (applying Rule 608(b) to exclude evidence that witnesses used drugs during trial that could have affected their testimony).

20. The following decisions were rendered under the version of FED. R. EVID. 608(b) existing prior to the 2003 Amendment.

21. 469 U.S. 45 (1984).

22. *Id.* at 47.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

The prosecutor, in response to the defense's plan to call on Mills, disclosed to the court that he planned to inquire into Mills's membership in a prison gang during cross-examination.[27] The prosecutor explained that the gang required its members to deny the existence of the gang and to protect other gang members through any means possible, including perjury.[28] The district court decided to allow the prosecutor to inquire into Mills's involvement with the prison gang during cross-examination.[29] Further, the prosecutor informed the court that he intended to recall Ehle to testify about Ehle's and Mills's membership in the prison gang in the event that Mills denied his own membership in the gang.[30] It was the prosecutor's theory that Mills's membership in the gang would discredit his testimony inasmuch as it would be evidence that Mills's testimony would be biased in favor of Ehle due to their mutual membership in the prison gang.[31]

At trial, Mills denied that he and Ehle were members of any prison gang.[32] The prosecutor then called Ehle to the stand and questioned him as to his and Mills's membership in the prison gang.[33] Ehle testified that he and Mills were members of a prison gang that required its members to go to any lengths possible to protect other members.[34] The jury convicted the defendant.[35]

The court of appeals reversed the decision of the district court.[36] In reaching this holding, the court of appeals reasoned that Ehle's rebuttal testimony was admitted for two reasons.[37] First, the court of appeals noted that the evidence was admitted to show that Mills's and Ehle's membership in a gang of this type could cause Mills's testimony to be biased.[38] However, the court of appeals also found that the evidence was admitted to show that Mills's membership in the gang, requiring acts such as perjury for the protection of fellow members, would lead to the inference that Mills would testify falsely.[39] Under this last finding, the court of appeals reasoned that Ehle's rebuttal testimony should not have been admitted.[40]

Upon the grant of a petition for certiorari to the United States Supreme Court, the defendant argued that the admission of Ehle's rebuttal testimony was a violation of the extrinsic evidence prohibition contained in Rule 608(b).[41] In advancing this argument, the defendant contended that the

27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.* at 48.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.* at 49.
41. *Id.* at 54.

prosecutor did not question Mills about his involvement with the prison gang to show bias, but to attack his character for truthfulness.[42] Therefore, the defendant argued, the extrinsic evidence concerning Mills's membership in the gang could not be admitted.[43] The Court disagreed, holding that the proffered testimony with regard to Mills's membership in the gang was probative of the potential for bias in his testimony and therefore admissible notwithstanding the prohibitions against extrinsic evidence in Rule 608(b).[44] The Court acknowledged that the inquiry may call into question Mills's veracity as well as his potential bias.[45] However, the Court explained that "there is no rule of evidence which provides that testimony admissible for one purpose and inadmissible for another purpose is thereby rendered inadmissible."[46] Further, the Court noted that "[i]t would be a strange rule of law which held that relevant, competent evidence which tended to show bias on the part of a witness was nonetheless inadmissible because it also tended to show that the witness was a liar."[47]

2. *Evidence Offered to Support a Defense Is Outside the Scope of Rule 608(b)*

In *United States v. Opager*,[48] the defendant sold a pound of cocaine to three individuals, two of whom were law enforcement personnel and the third being a government informant.[49] The defendant was subsequently convicted by a jury "of knowingly and intentionally possessing cocaine with the intent to distribute and knowingly and intentionally distributing cocaine."[50]

At trial, the defendant raised the defense of entrapment.[51] She testified that she had never sold cocaine before and she was induced to do so by the informant, who was present at the transaction giving rise to her arrest.[52] The informant, in turn, testified that the defendant was predisposed to selling cocaine and that he had previously witnessed her soliciting and dealing cocaine.[53] During cross-examination, the informant testified that he had worked with the defendant at a beauty salon in 1974 and in 1976, and it was during this time that the informant had witnessed the defendant using and selling cocaine.[54] To rebut the informant's testimony, the defendant questioned five witnesses and sought to admit business records to show that she

42. *Id.*
43. *Id.*
44. *Id.* at 56.
45. *Id.*
46. *Id.*
47. *Id.*
48. 589 F.2d 799 (5th Cir. 1979).
49. *Id.* at 800.
50. *Id.*
51. *Id.* at 801.
52. *Id.*
53. *Id.*
54. *Id.*

and the informant did not work together at the beauty salon in 1974.[55] However, the district court would not allow the business records to be admitted under Rule 608(b) because the court reasoned that the records constituted "extrinsic evidence of a specific instance of conduct introduced to discredit the witness's testimony."[56]

The court of appeals held that the district court erred in denying the admission of the business records.[57] In reaching this holding, the court reasoned that "[t]he application of Rule 608(b) to exclude extrinsic evidence of a witness's conduct is limited to instances where the evidence is introduced to show a witness's general character for truthfulness."[58] Further, the court explained that the purpose of evidence falling within the scope of Rule 608(b) "is to show that if a person possesses 'certain inadequate character traits—as evidenced in a variety of ways including that he has acted in a particular way—he is more prone than a person whose character, in these respects, is good, to testify untruthfully.'"[59] The court held that the business records were not offered for any such purpose.[60] In reaching this conclusion, the court noted that the business records did more than show that the informant was capable of lying[61]—the records would go toward disproving a fact important to the defendant's entrapment defense.[62] Therefore, the court held that Rule 608(b) did not apply to the business records.[63]

B. Misapplication of Rule 608(b) to Evidence Offered for Non-608(b) Purposes

1. Evidence of Bias Held to Be Inadmissible Under Rule 608(b)

Contrary to the Supreme Court's holding in *Abel*, the court of appeals in *United States v. Graham*[64] extended the protections of Rule 608(b) to exclude evidence offered to demonstrate the potential bias of a witness.[65] In *Graham*, several individuals developed a plan to open a nightclub in White County, Tennessee.[66] Under this plan, the nightclub would provide its patrons with opportunities for gambling, consumption of alcoholic beverages, and prostitution—all of which were prohibited in that jurisdiction.[67] The key to the success of this plan was the defendant's close connections with the

55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* (quoting 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 608[01] (Joseph M. McLaughlin ed., 1975)).
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.* at 802.
64. 856 F.2d 756 (6th Cir. 1988).
65. *Id.* at 759.
66. *Id.* at 758.
67. *Id.*

White County Sheriff.[68] Through the defendant, the original group of three investors bargained with the sheriff.[69] In exchange for certain payments, the sheriff agreed that he would not enforce the prohibitive laws against the nightclub.[70] However, the three investors chose not to pursue the plans for opening the nightclub.[71] After deciding not to go through with the plan, one of the three original potential investors informed the FBI of the relationship between the sheriff and the defendant.[72] After receiving this information, the FBI used a special agent to expose this relationship.[73] The special agent doubled as a wealthy investor interested in pursuing the nightclub idea, and the defendant arranged a similar deal between the agent and the sheriff.[74] A grand jury eventually returned a nine-count indictment against the defendant, including six counts of using interstate telephone calls with the intent to bribe a law enforcement officer.[75]

At trial, the defendant proffered the testimony of another witness.[76] This testimony was set to include details of a conversation between the witness and two of the original potential investors.[77] The witness planned to testify that, in that conversation, the three outlined a plan to build a bomb to assassinate one of the investor's union rivals.[78] The defendant contended that "[the witness's] testimony would provide a possible motive for [one of the potential investor's] cooperation with the FBI and would lend credence to his claim that [the potential investor's] testimony was not credible and that he possessed ulterior motives for aiding the FBI in this particular investigation."[79] The trial court excluded this testimony due to its finding that the testimony would constitute extrinsic evidence under Rule 608(b).[80] The court of appeals affirmed, explaining that "Fed. R. Evid. 608(b) specifically prohibits a party from introducing extrinsic evidence to prove specific instances of conduct of a witness for the purpose of attacking or supporting his credibility."[81] In so holding, the court erroneously extended the Rule 608(b) ban on extrinsic evidence to evidence proffered to show bias. The witness's testimony would go towards shedding light on the potential investor's possible bias as his involvement in the plan to murder the union rival provided him a reason to cooperate with the prosecution and testify against the defendant.[82]

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68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.* at 759.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. Daniel J. Capra, *Use of Extrinsic Evidence for Impeachment*, N.Y.L.J., May 12, 2000, at 3.

2. *Evidence of Contradiction Held to Be Inadmissible Under Rule 608(b)*

In interpreting the scope of Rule 608(b) prior to the 2003 Amendment, another distinct area of confusion among courts appears when evidence of a prior bad act is offered to show contradiction. *United States v. Bussey*[83] presents an occasion where a court applied the Rule 608(b) ban on extrinsic evidence to evidence offered to show contradiction. In *Bussey*, the defendant was convicted of failing to file income tax returns and filing false returns on several occasions.[84] The defendant had been involved in a partnership to build and maintain an apartment complex.[85] As provided in the partnership agreement, the defendant received a guaranteed payment, which was to be noted as gross income on the defendant's personal income tax return pursuant to 26 U.S.C. § 707(c).[86] The guaranteed payment was listed on the Schedule K-1 form of the partnership's tax return.[87] This section indicates each partner's share of the partnership's income.[88] Yet, in 1984, the defendant failed to report the guaranteed payment on his personal income tax return.[89] The defendant told his accountant that the guaranteed payment listed on the K-1 was incorrect because the funds had been appropriated to another company; yet, it was later determined that the alleged recipient of the funds had ceased to exist.[90] The accountant told the defendant that if the information on the K-1 was incorrect that it would need to be amended so that it would match the defendant's income tax return.[91] The accountant also told the defendant that he would have to pay additional taxes if the two documents were not reconciled.[92]

At trial, the accountant testified that he had informed the defendant that he would need to amend the K-1 to comport with his personal income tax return or he would be subject to increased taxes.[93] On cross-examination, the defendant asked the accountant about a checklist prepared by other accountants responsible for inspecting the accountant's work on the defendant's tax returns.[94] Generally, such checklists noted items and tasks that needed to be completed for each respective client.[95] The checklist for the defendant's tax returns contained one item stating, "[i]f no amended form 1065 with K-1s was filed . . . we should suggest this to avoid a problem

83. 942 F.2d 1241 (8th Cir. 1991).
84. *Id.* at 1245.
85. *Id.* at 1243.
86. *Id.* at 1244 (citing 26 U.S.C. § 707(c) (2000)).
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.* at 1252.
94. *Id.*
95. *Id.*

with guaranteed payments."[96] Although the accountant contended on cross-examination that he informed the defendant of this possible issue, the accountant conceded that the item was not checked-off on the checklist.[97] There were six points to check off on the list, and five of the six had been checked.[98]

The defendant proffered the testimony of an accounting expert.[99] The expert would have testified that using such checklists prepared by another accountant who had reviewed the initial work was a standard accounting procedure.[100] Further, the expert would have testified that the failure to clear a point on the checklist was a violation of accounting procedures and an indication that the point was never cleared.[101] The defendant sought to have this testimony admitted to contradict the accountant's testimony that he had informed the defendant that the K-1 should be amended to avoid problems.[102] Yet, the court held that such testimony was meant to attack the accountant's credibility, and the admissibility of the testimony was governed by Rule 608(b).[103] Further, the court found that the expert's testimony would constitute extrinsic evidence, which is expressly prohibited under Rule 608(b).[104] In so doing, the court mistakenly applied Rule 608(b) to evidence offered to show contradiction.

IV. THE FEDERAL SOLUTION: 2003 AMENDMENT TO RULE 608(B)

As demonstrated in Parts II and III, the first sentence of the pre-amendment version of federal Rule 608(b) created "[c]onsiderable misunderstanding . . . on the pertinence of Rule 608(b) to the use of extrinsic evidence of bad acts to impeach witnesses."[105] That sentence provided that "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness'[s] *credibility,* other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence."[106] Because of the use of the term "credibility" in the rule, if "[r]ead literally, the first sentence of (b) could bar extrinsic evidence for bias, competency and contradiction impeachment since they too deal with 'credibility.'"[107] As discussed above, several federal courts have interpreted the rule in such a broad manner.[108] Therefore, the use of the term "credibility" in the first sen-

96. *Id.* (quoting 3 Transcript of Record at 220, *Bussey*, 942 F.2d 1241 (No. 90-2112EM)).
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.* at 1253.
102. *Id.*
103. *Id.*
104. *Id.*
105. AM. BAR ASS'N SECTION OF LITIG., EMERGING PROBLEMS UNDER THE FEDERAL RULES OF EVIDENCE 161 (3d ed. 1998).
106. FED. R. EVID. 608(b) (1988) (amended 2003) (emphasis added).
107. AM. BAR ASS'N SECTION OF LITIG., *supra* note 105, at 161.
108. *See* discussion *supra* Part III.

tence of the rule "undermine[d] [the] conclusion that the scope of Rule 608 is limited to character evidence."[109]

In response to the abuses and the overextension of the extrinsic evidence ban in Rule 608(b), the Advisory Committee for the Federal Rules of Evidence amended Rule 608(b) in 2003.[110] In so doing, the rule was "amended to clarify that the absolute prohibition on extrinsic evidence applies only when the sole reason for proffering that evidence is to attack or support the witness'[s] character for truthfulness."[111] To remedy this overbroad language, the term "credibility" in the first sentence of the rule was replaced with the phrase "character for truthfulness."[112] The notes regarding the 2003 amendment explain that "[t]he amendment conforms the language of the Rule to its original intent, which was to impose an absolute bar on extrinsic evidence only if the sole purpose for offering the evidence was to prove the witness'[s] character for veracity."[113] The Advisory Committee notes for Rule 608(b) indicate that the intent behind Rule 608(b) was to limit the rule to character evidence and not other forms of credibility.[114] Further, the notes for the 2003 Amendment explain that "[b]y limiting the application of the Rule to proof of a witness'[s] character for truthfulness, the amendment leaves the admissibility of extrinsic evidence offered for other grounds of impeachment (such as contradiction, prior inconsistent statement, bias and mental capacity) to Rules 402 and 403."[115] This amendment should eliminate the erroneously overbroad application of the Federal Rule 608(b) prohibition on the use of extrinsic evidence.

V. ANALYZING AND ELIMINATING THE POTENTIAL MISAPPLICATION OF ALABAMA RULE 608(B)

Alabama's version of Rule 608(b) sets forth even more stringent protections for a witness on cross-examination whose "credibility" is being attacked by the use of specific instances of conduct.[116] Alabama Rule 608(b), similar to its pre-amendment federal counterpart, disallows the use of ex-

109. 28 WRIGHT & GOLD, *supra* note 11, at 40.
110. FED. R. EVID. 608 advisory committee's notes.
111. *Id.*
112. FED. R. EVID. 608(b). Also, the same amendment was made to the last sentence in Rule 608(b). *See* FED. R. EVID. 608 advisory committee's notes. According to the advisory committee note, this change was made to provide consistency in terminology throughout Rule 608(b). *Id.* However, no problem similar to that in the first sentence of Rule 608(b) has emerged because a cross-examiner never was permitted to use extrinsic evidence under this provision in the rule; therefore, this portion of the amendment is beyond the scope of this Comment.
113. *Id.* advisory committee's notes.
114. *See* 28 WRIGHT & GOLD, *supra* note 11, at 41 n.4 (explaining that the advisory committee's note regarding Rule 608(b) "begins with the observation that subdivision (b) is '[i]n conformity with Rule 405.' Of course, Rule 405 pertains to the methods of proving character and says nothing about other ways to prove credibility."); *see also* FED. R. EVID. 608 advisory committee's note (offering similar explanation).
115. FED. R. EVID. 608 advisory committee's note.
116. The second sentence of the rule is similar to the federal version. As described *supra* note 112, the second sentence is not at issue in this Comment.

trinsic evidence to prove specific instances of the witness's conduct when the witness's *credibility*[117] is being attacked.[118] However, in departing from the current Federal Rule of Evidence 608(b), Alabama Rule 608(b) also proscribes the mere inquiry into specific instances of conduct for which there have been no convictions.[119] Because of the twin protections within the Alabama Rule, the current text of Alabama's Rule 608(b) heightens the necessity for changes to prevent the misapplication of these protections. This part outlines suggestions for remedying the problems with both protections—the prohibition against the admission of extrinsic evidence and the ban on cross-examination—as they stand under the current version of Alabama Rule 608(b).

A. Preventing Misapplication of the Extrinsic Evidence Protection

Prior to an amendment in 1992, Ohio's Rule 608(B) encompassed the same dangers, with respect to the ban on extrinsic evidence, as the current version of Alabama's Rule 608(b).[120] Ohio's Rule 608(B) was identical to the pre-amendment version of the federal rule,[121] and the term "credibility" was used in the first sentence of the rule.[122] In 1992, the Ohio Advisory Committee substituted "character for truthfulness" for "credibility."[123] The staff notes for that amendment explain that the drafters of Ohio's Rule 608(B) felt that "[t]he . . . term [credibility] is too broad and, therefore, may cause confusion."[124] In articulating the dangers inherent in such a broad term, the Advisory Committee notes explain:

> Evid.R. 608, along with Evid.R. 609 (prior convictions), concerns impeachment by means of character evidence. The rules do not deal with other methods of impeachment, such as bias, which is governed by Evid.R. 616, or prior inconsistent statements, which are governed by Evid.R. 613. Thus, the limitation on the admissibility of extrinsic evidence in Evid.R. 608(B) concerns only specific acts of conduct reflecting upon untruthful character, and not on "credibility" in general.[125]

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117. The term "credibility" in FED. R. EVID. 608(b) was changed to "character for truthfulness" in the 2003 Amendment to FED. R. EVID. 608(b). *See* discussion *supra* Part III.

118. ALA. R. EVID. 608(b).

119. *Id.* The federal version of Rule 608(b), however, allows cross-examination as to acts falling within the scope of the rule. *See* discussion *supra* Part II.

120. Ohio's previous version of Rule 608(b) regarding specific instances of conduct provided, in pertinent part: "Specific instances of the conduct of a witness, for the purpose of attacking or supporting his *credibility*, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence." OHIO R. EVID. 608(B) (1980) (amended 1992) (emphasis added).

121. *See id.*

122. *Id.*

123. *Id.* advisory committee's note.

124. *Id.*

125. *Id.*

Further, the notes accompanying the Ohio amendment made clear that "[e]xtrinsic evidence may be admissible under some other theory of impeachment."[126]

Like the pre-amendment versions of federal Rule 608(b) and Ohio's Rule 608(B), Alabama's current Rule 608(b) does not allow the use of extrinsic evidence to prove specific instances of a witness's conduct for the purpose of attacking or supporting the witness's *credibility*.[127] Yet, the Advisory Committee notes to Alabama Rule 608(b) explain that "Rule 608 does not . . . exclude extrinsic evidence of conduct, when that evidence is sought or offered for purposes sanctioned by other rules."[128] Similar to its counterpart in the Ohio Rules of Evidence,[129] Alabama's Rule 616 expressly provides that the credibility of a witness may be attacked "by presenting evidence that the witness has a bias or prejudice for or against a party to the case or that the witness has an interest in the case."[130] This rule, in light of the rationale set forth in the staff notes for the 1992 Amendment to Ohio Rule 608(B)[131] and the Alabama Advisory Committee's intent that the Rule 608(b) ban on extrinsic evidence not apply to evidence offered under other rules,[132] clearly stands for the proposition that the drafters of Alabama's Rule 608(b) did not intend for its protections to extend to bias—another form of impeachment.[133] Next, like the federal version of Rule 613(b)[134] and Ohio's Rule 613(B),[135] Alabama's Rule 613(b) allows the use of extrinsic

126. *Id.*
127. ALA. R. EVID. 608(b).
128. *Id.* advisory committee's note.
129. OHIO R. EVID. 616 provides, in pertinent part: "In addition to other methods, a witness may be impeached by any of the following methods: (A) Bias[:] Bias, prejudice, interest, or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by extrinsic evidence."
130. ALA. R. EVID. 616. It should be noted that the Federal Rules of Evidence contain no such provision.
131. *See* OHIO R. EVID. 608(B) advisory committee's note (explaining that the inclusion of a rule governing bias indicates that Rule 608(B) does not cover other methods of impeachment).
132. ALA. R. EVID. 608(b) advisory committee's note.
133. *Id.*
134. FED. R. EVID. 613(b) provides, in pertinent part: "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."
135. OHIO R. EVID. 613(B), regarding extrinsic evidence of a prior inconsistent statement by a witness, provides:

> Extrinsic evidence of a prior inconsistent statement by a witness is admissible if both of the following apply:
>
> (1) If the statement is offered solely for the purpose of impeaching the witness, the witness is afforded a prior opportunity to explain or deny the statement and the opposite party is afforded an opportunity to interrogate the witness on the statement or the interests of justice otherwise require;
>
> (2) The subject matter of the statement is one of the following:
>
> (a) A fact that is of consequence to the determination of the action other than the credibility of a
>
> (b) A fact that may be shown by extrinsic evidence under Evid. R. 608(A), 609, 616(B) or 706;
>
> (c) A fact that may be shown by extrinsic evidence under the common law of impeachment if not in conflict with the Rules of Evidence.

evidence under some circumstances when the evidence is offered to prove a prior inconsistent statement.[136] As shown in the staff notes to the 1992 amendment to Ohio's Rule 608(B), such a rule provides evidence of the drafters' intent that 608(B) should not apply to other forms of impeachment. Further evidence of such intent lies in the Advisory Committee notes for Alabama's Rule 608(b) where, like the staff notes for the 1992 Ohio Amendment,[137] the Committee explained that extrinsic evidence of self-contradiction should not be excluded under this rule notwithstanding the absence of a specific rule to that end.[138]

The Advisory Committee notes for Alabama's Rule 608(b) also indicate that "[p]roof of such acts [for which there has been no conviction] also may be admissible when offered for purposes other than impeachment."[139] One example a purpose other than impeachment is when "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."[140] Finally, in demonstrating another situation where extrinsic evidence may be used for a non-impeachment purpose, the Advisory Committee note to Alabama Rule 608(b) explains that "[i]f the witness denying the conduct is a party, then the cross-examiner may offer extrinsic evidence under the rule permitting proof of an admission."[141]

The utmost concern when operating under a set of rules is to align the rules with the intent of the drafters.[142] As outlined above, the Advisory Committee for Alabama's Rule 608(b) set out several circumstances under which the Rule 608(b) ban on extrinsic evidence should not apply.[143] Yet, the language of Alabama's current version of Rule 608(b) does not comport with the intent of the Advisory Committee. Like both the federal and Ohio version of Rule 608(b) prior to amendment, Alabama Rule 608(b) contains the word "credibility" in its first sentence.[144] As illustrated above by several

136. ALA. R. EVID. 613(b), regarding extrinsic evidence of a prior inconsistent statement by a witness, provides, in pertinent part: "Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness has been confronted with the circumstances of the statement with sufficient particularity to enable the witness to identify the statement and is afforded an opportunity to admit or to deny having made it."

137. *See* OHIO R. EVID. 608(B) advisory committee's note (explaining that "extrinsic evidence offered to show contradiction, an impeachment method not specifically covered by any rule, may be admissible under certain circumstances").

138. ALA. R. EVID. 608(b) advisory committee's note. The actual language refers to the ability of the cross-examiner to ask about a witness's acts of self-contradiction. However, as explained in the advisory committee notes, if an examiner is allowed to inquire into certain acts, then he is allowed to prove the act extrinsically after it has been denied. It follows that if a cross-examiner can inquire into acts of self-contradiction, then she will be able to prove the acts extrinsically because the extrinsic ban does not apply to self-contradiction.

139. *Id.*

140. *Id.* (citing United States v. Cutler, 676 F.2d 1245 (9th Cir. 1982)).

141. *Id.* (citing United States v. Calle, 822 F.2d 1016, 1020-21 (11th Cir. 1987)).

142. *See generally* FED. R. EVID. 608 advisory committee's note (explaining that the 2003 Amendment to FED. R. EVID. 608(b) was enacted to align the intent of the drafters of the rule with the language in the rule).

143. ALA. R. EVID. 608(b) advisory committee's note.

144. ALA. R. EVID. 608(b).

federal decisions, commentators, and the Advisory Committees for both the Federal Rules of Evidence and the Ohio Rules of Evidence, the term "credibility" is overly broad and has given rise to misapplication and abuse of the protections within the federal version of Rule 608(b). Several federal decisions have applied Rule 608(b) to evidence offered to show bias and self-contradiction[145]—two purposes that the Advisory Committee of Alabama's Rule 608(b) have expressly stated are outside the protections of that rule.[146] Similarly, the problems with the term "credibility" outlined in the staff notes for the 1992 amendment to Ohio's Rule 608(B) are a clear indicator that an amendment is needed for the Alabama rule, especially given the high degree of similarity between the Alabama and Ohio Rules of Evidence in this context and the intent of the drafters of each state's respective version of Rule 608(b). In light of the Advisory Committee notes and the inclusion of rules in the Alabama Rules of Evidence addressing other forms of impeachment, it is certain that the drafters of Alabama's Rule 608(b) did not intend for the rule to extend to other forms of impeachment or to non-impeachment purposes. Therefore, Rule 608(b) clearly should be amended to reflect this intent.

Further, given the threat of the misapplication of Alabama's Rule 608(b) like that in federal cases and the similarity to the circumstances giving rise to an amendment to Rule 608(b) in Ohio, it follows that Alabama's rule calls for a similar amendment. By changing the term "credibility" in the first sentence of Alabama's Rule 608(b) to the phrase "character for truthfulness," the language of Alabama's rule can be modified to reflect the true intent of its drafters as in both the federal rule and Ohio's rule. Such a change would go great lengths to eliminate the danger of a misapplication of the Rule 608(b) ban on extrinsic evidence to situations in which it clearly does not extend.

B. Addressing Alabama's Rule 608(b) Preclusion of Cross-Examination in Light of the Dangers Inherent in the Current Rule

As discussed in the introduction to this part,[147] Alabama's Rule 608(b) rejected its federal counterpart to the extent that it does not permit the cross-examination of a witness as to specific instances of his or her conduct "for the purpose of attacking or supporting the witness's credibility."[148] Yet, because of the inclusion of this protection in the first sentence of Alabama's Rule 608(b), the use of the term "credibility" applies to the prohibition against cross-examination as well as to the extrinsic evidence prohibition.[149]

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145. *See supra* notes 17-18.

146. ALA. R. EVID. 608(b) advisory committee's note; *see also* ALA. R. EVID. 616.

147. *See* discussion *supra* Part V.

148. ALA. R. EVID. 608(b); *see also* 2 CHARLES W. GAMBLE, MCELROY'S ALABAMA EVIDENCE § 140.01(10) (5th ed. 1996).

149. The first sentence of ALA. R. EVID. 608(b) provides: "Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than conviction of

Therefore, the problem with the potential misapplication of the term "credibility" emerges in the same manner as described above with regard to the extrinsic evidence restriction in 608(b) because "a witness may be asked on cross-examination about the witness'[s] prior, unconvicted acts if they qualify under some other ground of impeachment."[150] As discussed above, the use of the term "credibility" in the first sentence of the rule gives rise to much room for misapplication as it deviates from the original intent of the drafters of the rule.[151] Therefore, Alabama's problem with the use of "credibility" in the current form of the rule is two-fold. This part addresses two possible methods of correcting the problems with Alabama's Rule 608(b) prohibition of cross-examination in this context.

Contrary to Alabama's Rule 608(b), the federal version of Rule 608(b) allows cross-examination as to "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness'[s] character for truthfulness."[152] Yet, Federal Rule 608(b) prohibits the use of extrinsic evidence to prove such acts, and "the cross-examiner must accept the witness'[s] answer as to whether he did or did not commit the act."[153]

The first possible solution to remedy the potential overextension of Alabama's Rule 608(b) preclusion of cross-examination in this context is for Alabama to adopt the federal version of the rule and allow cross-examination. Such an amendment certainly would eliminate any possibility of overextending the prohibition against cross-examination. As with the federal version of Rule 608(b), a cross-examiner in Alabama would have to accept the witness's answer after inquiring into such acts. Several purposes underlying the requirement of "taking the answer" of the witness have been noted. First, this practice "keep[s] trials from being sidetracked"[154] and "helps maintain the focus on substance and matters bearing immediately on credibility."[155] Further, it has been argued that this practice "reduces the prejudice that comes with opening the subject of behavior bearing on truthfulness, since it is likely to be comprised of acts that are bad or unattractive, and juries are likely to misuse the evidence, especially if the witness is a party."[156]

These concerns are certainly valid, and it is undisputed that efficiency and shielding against prejudice are concerns underlying Rule 608(b).[157]

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crime as provided in Rule 609, may not be inquired into on cross-examination of the witness nor proved by extrinsic evidence."

150. *See* 2 GAMBLE, *supra* note 148, at 651.

151. *See* discussion *supra* Part V.A. The intent of the drafters, as discussed in the section dealing with the extrinsic evidence prohibition in Rule 608(b), is equally applicable to the ban on cross-examination under that rule.

152. FED. R. EVID. 608(b).

153. CHARLES W. GAMBLE, CHARACTER EVIDENCE: A COMPREHENSIVE APPROACH § 13.1 (2d ed. 2000).

154. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 6.27 (3d ed. 2003).

155. *Id.*

156. *Id.*

157. *See* MCCORMICK ON EVIDENCE § 41 (John W. Strong ed., 5th ed. 1999).

However, these concerns undermine the disparity in treatment in the federal version of Rule 608(b) between inquiry into prior acts and extrinsic evidence used to prove such acts. While the restriction on extrinsic evidence undoubtedly works toward diminishing the concerns expressed above, it certainly is not the best manner of achieving efficiency and preventing prejudice.

If efficiency and reducing opportunities for prejudice are the underlying concerns, eliminating these concerns can be best achieved by precluding any cross-examination into the prior conduct of the witness as in Alabama's Rule 608(b). Merely forcing the cross-examiner to "take the answer" of the witness has "long been considered a travesty."[158] An example of how this practice is problematic occurs in a criminal prosecution when a cross-examiner questions the witness, who is also the defendant, about a past act without conviction under Rule 608(b) and the witness answers in the negative.[159] Even if the witness gives a negative answer, "the jury is not likely to believe it, particularly where the question is quite precise."[160] Also, such questions on cross-examination are "often of a character similar to the charge for which the defendant is on trial."[161] In many cases, when such questions are offered, these "[q]uestions are invariably asked with such particularity as to time and place and with the flourishing of documents by the cross-examiner so as to make denials by the witness ineffectual in the eyes of the jury."[162] Further, there is no "easy guarantee of the reliability . . . of the prosecutor's [or cross-examiner's] questions, some of which may be based on inaccurate information. Such questions, despite denials, are especially damaging."[163] It requires no stretch of the imagination to envision other instances in both the civil and criminal context in which such prejudice could occur under a form of Rule 608(b) that allows for cross-examination as to prior unconvicted acts.

Therefore, it is apparent that the best practice for maintaining judicial efficiency and protecting against prejudice is to preclude the cross-examiner from asking about prior acts that would fall under the scope of Rule 608(b).[164] For these reasons, it would not be in the best interest of Alabama's Rule 608(b) to adopt the federal approach.

In eliminating the danger of the misapplication of the ban on cross-examination in Rule 608(b), the most reasonable solution would be to leave the Rule 608(b) ban on cross-examination as it currently stands and change the term "credibility" to the phrase "character for truthfulness" in the first

158. 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 608 app.100[1] (Joseph M. McLaughlin ed., 2d ed. 2004) (citing a letter from Professor Alexander Brooks to the advisory committee for the Federal Rules of Evidence regarding the 1971 draft of Rule 608(b)).
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *See* MCCORMICK ON EVIDENCE, *supra* note 157, § 41.

sentence of the rule. If this recommended change were adopted, the scope of Alabama's Rule 608(b) ban on cross-examination could be limited to the intended scope of the drafters. Further, this simple amendment could limit the ban on extrinsic evidence to its intended scope, therefore aligning the twin-protections within Alabama's Rule 608(b). The potential for abuse of both prongs of protection in Alabama's Rule 608(b) in the manner outlined in this Comment could be eliminated by effecting these changes. Not only is this alteration the least drastic of the alternatives, it is the most effective way to embrace the intent of the rule's drafters.

VI. CONCLUSION

As it currently stands, the language of Alabama's Rule 608(b) does not reflect the intent of its drafters. Thus, the potential for abuse arising out of interpretation of this rule exists, and action to correct the impending misapplication of the rule is necessary to align judicial interpretations of the rule with the intent of its drafters. In light of the types of abuse that have occurred in federal decisions interpreting Federal Rule of Evidence 608(b), Alabama's Rule 608(b) is in need of an amendment similar to the 2003 Amendment to the federal version of Rule 608(b) and the 1992 Amendment to Ohio's Rule 608(B).

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