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Time of Request: Friday, May 24, 2013 15:16:12 EST
Client ID/Project Name:
Number of Lines: 136
Job Number: 1825:410879172

Research Information

Service: Terms and Connectors Search
Print Request: Current Document: 1
Source: New York Law Journal
Search Terms: doc-id(#900005449583#)

New York Law Journal (Online)

March 21, 2006 Tuesday

LENGTH: 2167 words

HEADLINE: Federal Rules of Evidence 608(b): A Modest Amendment Proposal;
Outside Counsel

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BODY:

It is a trial lawyer's bugaboo. Defense counsel, attempting to discredit a government witness on cross-examination, asks if he committed a recent fraud not yielding a criminal conviction. Assume the question has an ironclad good faith basis ? a document the witness wrote, a tape capturing his voice, a civil judgment or other self-authenticating item confirming his liability. Yet, despite this irrefutable proof, the witness flatly denies counsel's accusation.

Under settled law, counsel is stuck with, or powerless to rebut, the witness's answer. Since the prior fraud is a collateral matter, Fed. R. Evid. 608(b)[1] bars the use of extrinsic evidence to "prove it up." Elementary, right?

Not necessarily. Rule 608(b)'s extrinsic evidence ban strives to avoid confusing and time-consuming "mini-trials" on peripheral issues. This policy is well-served by prohibiting impeachment of a witness's veracity through testimony by other witnesses ? the ban's core concern.[2] After all, a parade of witnesses disputing trivialities would reduce the trial to a diversionary swearing match, a series of convoluted detours to determine the accuracy of prior misconduct allegations. In one commentator's colorful phrase, the "sideshow" would "take over the circus" ? the very spectacle the rule condemns.[3]

New Scenario

But what if our hypothetical government witness authenticates the impeaching tape or document by acknowledging his own voice, writing or signature? What if he merely contests the item's meaning, intent and import? What if the witness admits the existence of the civil judgment or other self-authenticating record, denying only the underlying fraud?

In these circumstances, where the principal witness himself lays a sufficient foundation for proffered impeachment evidence, there is little danger of a "proverbial trial within a trial"[4] to establish authenticity. Hence, the fear of digression through witness multiplication evaporates, and the rationale for exclusion dissolves.

Indeed, where authenticity is undisputed, tangible impeachment evidence is no less reliable than a witness's prior criminal conviction, expressly admissible under Rule 609(a). To remedy this discrepancy, Rule 608(b)'s first sentence should be amended to track its second by allowing the court, in its discretion, to admit properly authenticated documentary or physical evidence for the purpose of extrinsically attacking witness credibility.

'Carter,' 'Zandi' and 'Simpson'

This proposal finds ample support in decisional and statutory law. Consider, for example, the U.S. Court of Appeals for the Third Circuit's opinion in

Carter, a civil rights suit under 42 U.S.C. ?1983. Carter, a prison inmate, alleged that three guards assaulted him during a routine cell search. On cross-examination, the defense confronted him with a letter that ostensibly instructed an unidentified recipient on how to file a false prison brutality complaint. Carter conceded writing the letter but claimed it merely encouraged the filing of a legitimate complaint. The trial court directed Carter to read the letter aloud and later admitted it in evidence to impugn his credibility.

Carter appealed the ensuing judgment against him, arguing that the letter's receipt violated Rule 608(b)'s extrinsic evidence ban. The Third Circuit disagreed and affirmed, stressing Carter's "admission that he wrote the letter." In strikingly apt language, the court explained:

"[T]he great majority of . . . decisions finding violations of rule 608(b) do so when . . . extrinsic evidence . . . is obtained from a witness other than the one whose credibility is under attack. When, however, the extrinsic evidence is obtained from and through . . . th[at] very witness . . . the rule's core concerns are not implicated . . . . Carter did not deny having written the letter; rather, he conceded his authorship but claimed that the letter was not an effort to encourage the filing of false complaints. Carter's adoption of the letter, and thus his admission of the act used to impeach him, distinguishes this case from every case . . . holding that the extrinsic evidence rule has been violated. In those cases . . . [t]he impeachment process . . . would have required the examiner to produce additional evidence to refute the witness's denial of the acts charged. Such a process makes apparent the basis for the rule against extrinsic evidence: if refutation of the witness's denial were permitted . . . , these collateral matters would assume a prominence . . . out of proportion to their significance. The[] reasons for barring extrinsic evidence lose their force when the witness whose credibility is challenged concedes the alleged acts. No issues are confused or time wasted through a trial of a collateral matter: no trial is needed since the matter is conceded . . . . We hold . . . that the extrinsic evidence ban should be relaxed when the witness sought to be impeached admits the impeaching act." To similar effect is United States v. Zandi,5 a Fourth Circuit drug case in which one defendant testified on his own behalf. Attacking the defendant's veracity, the prosecutor introduced several false documents ? credit, employment and loan applications, tax returns and a lease ? that the defendant largely conceded completing. On appeal, the Fourth Circuit sustained the documents' receipt over a Rule 608(b) challenge. Invoking Carter, it observed that "when a witness admits to having performed certain acts," courts "generally hold that . . . the prohibition against using extrinsic evidence" does not apply. In other words, where there is no dispute that the prior misconduct occurred, the threat of distracting mini-trials recedes accordingly. There is also United States v. Simpson,6 another narcotics prosecution from the Fifth Circuit. Simpson took the stand in his own

defense, painting himself as a legitimate businessman who was "merely role playing" in purported drug-related conversations. To dispel these claims, the government was permitted to present an Securities and Exchange Commission civil injunction reflecting Simpson's participation in securities violations involving a Louisiana oil company. Simpson appealed on 608(b) grounds. Again citing Carter, the Fifth Circuit affirmed, emphasizing that he admitted his participation "simultaneously" with the document's "introduction," effectively identifying and authenticating it.7The Hawaiian Experience These holdings are sound and cogent, and Rule 608(b)'s absolute extrinsic evidence ban should be eased to incorporate them. In fact, at least one jurisdiction ? Hawaii ? has partially codified the logic of Carter, Zandi, Simpson and their progeny. In 1992, Hawaii amended its 608(b) analogue to allow "extrinsic evidence" of specific instances of conduct, in the court's "discretion," if "probative" of witness "untruthfulness" ? without reported incident.8 In revamping the rule, the drafters correctly noted that the "extrinsic evidence bar," while "afford[ing] an easily applied, bright line solution to a difficult problem," occasionally excludes highly "probative impeaching evidence," prompting "question[ing] in some recent scholarship."Counterpoints Unavailing Critics will retort that admitting extrinsic evidence a witness has already acknowledged is needlessly cumulative. But it is fundamental that a party is entitled to "prove its case by evidence of its own choice."9 And as the Second Circuit has remarked in a parallel context, documentary evidence or other tangible proof may be "much more convincing"10 than a dry concession or bare questions and argument by counsel. For this reason, the Supreme Court ordinarily forbids witnesses from escaping a case's "full evidentiary force" by "naked admission," sapping it of weight, color, depth and richness.11 In sum, as any trial lawyer will attest, a bland confession is no substitute for ? and lacks the visceral punch of ? the "robust evidence . . . used to prove it."12 Equally unfounded is a second presumed objection: when a witness acknowledges a given piece of impeachment evidence but contests its meaning or intent, a tangential excursion will result anyway, defeating Rule 608(b)'s primary purpose. Be that as it may, the import of an item of physical evidence raises a classic question of fact. It follows that the jury should be able to examine the item and evaluate for itself ? without additional witness testimony ? the plausibility of the principal witness's explanation. More significantly, though, an identical excursion would occur were the witness merely interrogated about his explanation under Rule 608(b)'s second sentence. Admitting the actual item prolongs nothing, and may even shorten the inquiry on the theory that the jury can review the evidence itself and reach its own conclusion. In all events, the solution to this perceived problem is the same in either instance, and it lies in the proposed amendment's discretionary component. For under the modified rule, courts would retain wide latitude ? as in the second sentence ? to exclude unduly confusing, duplicative or prejudicial impeachment evidence through conventional 403 balancing. The "excursion" complaint thus places too little faith in the wisdom and experience of trial judges.Conclusion As a matter of logic, policy and simple intuition, it is unseemly to let a witness actively mislead the jury, or even commit perjury, by acknowledging a piece of extrinsic impeachment evidence, while denying any impropriety and hiding behind the "collateral-fact doctrine"13 to thwart rebuttal. This is especially so in criminal cases, which often turn on the suspect credibility of accomplice witnesses testifying under onerous cooperation or immunity agreements. As it is, however, Rule 608(b)'s blanket extrinsic evidence ban appears to condone just that unfortunate scenario. Relaxing the ban to allow discretionary admission of concrete impeachment evidence identified and authenticated by the witness himself ? with no further testimony from other witnesses ? strikes a sensible compromise between the competing concerns informing the Evidence Rules in general and Rule 608(b) in particular. On the one hand, by permitting the jury to physically inspect and draw its own inferences from proffered impeachment evidence, such an approach would deter clever or evasive witnesses from gaming the search for truth, promoting the overall goal of accurate fact-finding. On the other hand, by continuing to preclude testimony from a string of auxiliary witnesses, it would minimize the risks of delay, obfuscation, surprise and waste of time. Failing official revision, counsel should encourage trial judges, in their discretion, to allow extrinsic impeachment by appropriately authenticated tangible evidence on the authority of Carter, Zandi, Simpson and their progeny.Gerald L. Shargel and Marc Fernich are criminal defense lawyers in Manhattan. Mr. Shargel also teaches evidence at Brooklyn Law School.Endnotes: 1. Rule 608(b) states, in pertinent part: Specific instances of the conduct of a witness, for the purpose of attacking . . . 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 . . . untruthfulness, be inquired into on cross-examination of the witness . . . concerning the witness' character for . . . untruthfulness . . . . 2 See Carter v. Hewitt, 617 F.2d 961, 969-70 (3d Cir. 1980). 3. E. Cleary, McCormick on Evidence, ?41, at 89 (3d ed. 1984). 4. United States v. Bynum, 3 F.3d 769, 772 (4th Cir. 1993). 5. 769

F.2d 229 (4th Cir. 1985). 6. 709 F.2d 903 (5th Cir. 1983). 7 Cf., e.g., United States v. DeSantis, 134 F.3d 760, 765-66 (6th Cir. 1998) (state appellate opinion affirming prior deceit finding ? acknowledged by testifying federal defendant "not a party" to "th[o]se proceedings, but only a witness" ? erroneously admitted under 608(b)). On the approach urged here, it is arguable that DeSantis and similar cases are wrongly decided. Compare, e.g., United States v. Herzberg, 558 F.2d 1219, 1222-23 (5th Cir. 1977) (state appellate opinion affirming unrelated civil fraud judgment erroneously admitted where testifying federal defendant denied prior litigation); United States v. Peterson, 808 F.2d 969 (2d Cir. 1987) (allegedly forged check erroneously admitted where defendant-witness disavowed it). Had the defendants in these cases identified and authenticated the respective impeachment items, the theory pressed here would favor admission over exclusion. 8. RS Rules of Evid., Rule ?608 ?626-1. 9. Old Chief v. United States, 519 U.S. 172, 186 (1997). 10. Rosario v. Kuhlman, 839 F.2d 918, 927 (2d Cir. 1988). 11. See generally Old Chief, 519 U.S. at 186-90 (noting essential "persuasive power of the concrete and particular"). 12. Ibid. at 189. 13. 28 C. Wright, A. Miller & V. Gold, Federal Practice & Procedure, Evid. R. 608, at ?6119 (1993).

LOAD-DATE: September 23, 2011