

1-1-2015

Lose the Battle, Win the War: The Use, Dangers, and Problems Surrounding Rules 806 and 608(B), and How They Can Be Fixed

Gregory J. Gianoni
Suffolk University Law School

Follow this and additional works at: <https://dc.suffolk.edu/jtaa-suffolk>



Part of the [Litigation Commons](#)

Recommended Citation

20 Suffolk J. Trial & App. Advoc. 1 (2015)

This Article is brought to you for free and open access by Digital Collections @ Suffolk. It has been accepted for inclusion in Suffolk Journal of Trial and Appellate Advocacy by an authorized editor of Digital Collections @ Suffolk. For more information, please contact dct@suffolk.edu.

LOSE THE BATTLE, WIN THE WAR: THE USE, DANGERS, AND PROBLEMS SURROUNDING RULES 806 AND 608(B), AND HOW THEY CAN BE FIXED.

*LT Gregory J. Gianoni, JAGC, USN**

TABLE OF CONTENTS

I. INTRODUCTION: SEE THE FOREST THROUGH THE TREES	2
II. WHAT YOU DON'T KNOW, CAN HURT YOU	4
A. <i>What You Need To Know</i>	4
1. <i>The testimony Zamboni—clearing the mud</i>	4
2. <i>Impeachment is not very peachy</i>	4
3. <i>Here, say anything you want</i>	5
4. <i>The workings of 806</i>	5
B. <i>Why You Need To Know It</i>	8
III. IF YOU DON'T USE IT, YOU CAN'T ABUSE IT	9
A. <i>The Black Pearl: Rare Beauty</i>	9
B. <i>A Pearl of Wisdom</i>	11
IV. THE RESULTING SPLIT OF AUTHORITY	11
A. <i>United States v. Friedman (1988)</i>	11
B. <i>United States v. White (1997)</i>	13
C. <i>United States v. Saada (2000)</i>	15
D. <i>Synthesize the Splitting Sides</i>	17
V. PROVING THE WRONG APPROACH	18
A. <i>The Legislative Intent</i>	18
B. <i>The Legislative Loophole</i>	19
VI. PRESERVE IMPEACHMENT	20
A. <i>The Hidden Credibility Trick</i>	21
B. <i>Be There Or Be Square</i>	22
VII. CRIMINAL CONSEQUENCES DO NOT AFFECT THE STANDARD	24
A. <i>Background</i>	25

* The positions and opinions stated in this article are those of the author and do not represent the views of the United States Government, the Department of Defense, or the United States Navy. Lieutenant Gregory J. Gianoni is an active duty Navy judge advocate presently serving at the Region Legal Service Office, Mid-Atlantic. He received his J.D. from California Western School of Law and his B.S. from Bentley University.

B. Restriction Through Diction To Avoid the Infliction	26
VIII. INDECENT PROPOSALS	27
IX. STRIKE . . . “ABOVE, BUT NOT BELOW, THE BELT”	28
X. CONCLUSION.....	30

I. INTRODUCTION: SEE THE FOREST THROUGH THE TREES

This article will resolve a conceptual conflict among the circuits—when an attorney in trial is attacking the credibility of an admissible (and admitted) out-of-court hearsay declaration, should the out-of-court declarant be subject to impeachment with extrinsic evidence?

Attorneys are bestowed the power to control the tactics used in the courtroom because their training and experience give them the requisite knowledge to make informed strategic decisions.¹ In order to predict the likelihood of success in court and assess the value of their case, an attorney takes many things into consideration. One of those variables is often the admissibility of evidence at trial. Although the predictability of the courts and juries never has, and likely never will be, an exact science, the admissibility of evidence is something that should remain consistent.

Unfortunately, inconsistent is the admissibility of extrinsic evidence to prove prior conduct for the impeachment of a non-testifying hearsay declarant.² There is uncertainty surrounding whether Rule 608(b)—which bars attacking credibility with extrinsic evidence, such as calling to the stand and asking questions of another witness—applies in concert with Rule 806—which allows attacking the credibility of an out-of-court declarant—or if Rule 806 is its own rule of admissibility.³ There is a circuit-split between the Second and Third Circuits on which the D.C. Circuit has weighed.⁴ *United States v. Saada*⁵, the most recent of these

¹ See MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. (1983) (remarking client normally defers to their lawyer's special knowledge and skill).

² Compare FED. R. EVID. 608 (restricting the presentation of extrinsic evidence on credibility), with FED. R. EVID. 806 (granting litigators ability to introduce extrinsic evidence to attack credibility).

³ See FED. R. EVID. 608 (barring the presentation of extrinsic evidence to attack credibility); FED. R. EVID. 806 (allowing litigators to introduce evidence of out-of-court declarant's credibility).

⁴ Compare *United States v. Friedman*, 854 F.2d 535, 569-70 (2d Cir. 1988) (decreeing in dicta that extrinsic evidence can prove prior conduct when impeaching a non-testifying hearsay declarant), with *United States v. White*, 116 F.3d 903, 920 (D.C. Cir. 1997) (disallowing the presentation of extrinsic evidence to prove prior conduct), and *United States v. Saada*, 212 F.3d 210, 220-21 (3d Cir. 2000) (parsing statutory language to determine that Rule 608(b)'s ban on extrinsic evidence is appropriate).

cases, was decided on May 15, 2000.⁶ These decisions have created more problems than they have solved.

Extrinsic evidence should be permitted to impeach a non-testifying hearsay declarant because the Federal Rules of Evidence should not destroy what might be a party's only means of impeachment.⁷ Opinion or reputation evidence is considerably less effective than evidence of specific instances of conduct to show a witness's character for untruthfulness.⁸ This holds true because, while opinion and reputation evidence are a third party's perspective of an individual, specific instances of conduct are acts a person made of their own volition, and are appropriately given more weight by the trier of fact.⁹ To ensure the reliability of extrinsic evidence, safeguards exist such as good faith, Rule 403, and the hearsay exceptions themselves.¹⁰

First, this article will explain the importance of Federal Rule of Evidence 806 and the advantages of using it effectively. Second, it will highlight the three-way circuit split that exists between the Second, Third, and D.C. Circuits. Third, it will address why extrinsic evidence should be permitted to impeach a non-testifying hearsay declarant's prior conduct and, in turn, how this may affect a criminal defendant. Last, this article will provide a solution to the contradictory intent and application of both Rules 806 and 608(b). The most efficient and effective solution is to strike the obsolete Rule 608(b) from the Federal Rules of Evidence and rely suitably on Rule 403.

⁵ 212 F.3d 210 (3d Cir. 2000).

⁶ See *id.* at 210.

⁷ See *Friedman*, 854 F.2d at 570 n.8 (explaining the application of Rules 608(b) and 806).

⁸ Cf. FED. R. EVID. 405 advisory committee's note ("Of the three methods of proving character . . . evidence of specific instances of conduct is the most convincing.").

⁹ See *id.* (stating that prior conduct is the most persuasive form of evidence).

¹⁰ See FED. R. EVID. 403 (establishing a balancing test that all evidence must pass before introduction to jury); FED. R. EVID. 803 (enumerating the hearsay exceptions); see also *Michelson v. United States*, 335 U.S. 469, 481 (1948) (recognizing that the trial justice correctly evaluated prior specific instance before allowing inquiry on cross-examination); *Abram v. Gerry*, 672 F.3d 45, 57 (1st Cir. 2012) (Tourella, J., dissenting) (reasoning that the court should allow litigators to inquire into prior accusations in good faith); *United States v. Guay*, 108 F.3d 545, 552-53 (4th Cir. 1997) (explaining that a cross-examiner needs a good faith basis before introducing specific instances of conduct); *United States v. Lamarr*, 75 F.3d 964, 971 (4th Cir. 1996), *cert. denied*, 519 U.S. 948 (1996) (articulating that counsel needs a good faith factual basis when inquiring into specific instances of conduct); KEVIN F. O'MALLEY, ET AL., *FEDERAL JURY PRACTICE AND INSTRUCTIONS* § 6:3, at 573 (6th ed. 2006). Preliminary proceedings should be held prior to counsel asking "did you know" types of questions to give opposing counsel a forum to oppose such a line of questioning. O'MALLEY, ET AL., *supra*, §6.3, at 574.

II. WHAT YOU DON'T KNOW, CAN HURT YOU

A. What You Need To Know

To understand the operation of Rule 806, it is important first to understand the fundamental components of testimony, impeachment, and hearsay.

1. The testimony Zamboni—clearing the mud

Testimony consists of the statements made by a competent witness on the witness stand under oath of affirmation.¹¹ There are three forms in which a statement may be made: (1) a person's oral assertion; (2) a person's written assertion; or, (3) a person's nonverbal conduct that is intended as an assertion.¹² Pointing after being asked a question is an example of nonverbal conduct intended to be an assertion.¹³ The pointer conveys a message, an assertion, to another party.¹⁴ The person who makes the statement or assertion is referred to as the declarant.¹⁵

2. Impeachment is not very peachy

Impeachment is when an attorney discredits a witness by questioning the witness's veracity, demonstrating that the individual is unworthy of belief or the evidence is inaccurate or unreliable.¹⁶ For example, in a civil or criminal trial, either party can offer character evidence to impeach a testifying witness.¹⁷ One form of character evidence is specific instances of past conduct involving dishonesty—something in the person's background that suggests the person tends to speak or act dishonestly.¹⁸ Under the Federal Rules of Evidence, specific instances of past conduct involving dishonesty are conduct other than a criminal

¹¹ See BLACK'S LAW DICTIONARY 1613 (9th ed. 2009).

¹² See FED. R. EVID. 801(a) (describing what classifies as a statement).

¹³ See Richard B. Kuhns, *Implied Assertions and the Hearsay Rule*, 16 MISS C.L. REV. 139, 141 (1995) (explaining why the act of pointing constitutes a non-verbal assertion).

¹⁴ See *id.* at 141-42 (illustrating how pointing is intended to substitute for an oral assertions).

¹⁵ See FED. R. EVID. 801(b).

¹⁶ See BLACK'S LAW DICTIONARY 820-21 (9th ed. 2009).

¹⁷ See *In re Adler, Coleman Clearing Corp. v. Ensminger*, No. 95-08203, 1998 WL 160036, at *9 (S.D.N.Y. Apr. 3, 1998). The evidence must also be relevant and conform with the other rules pertaining to impeachment evidence. See *id.* (elaborating on the prerequisites required before admitting evidence to the jury).

¹⁸ See FED. R. EVID. 608 (allowing certain character evidence before the jury).

conviction—criminal convictions are governed by Rule 609.¹⁹ For example, cheating on one’s exam in law school would be a specific instance of conduct that shows one’s untrustworthiness.

3. Here, say anything you want

Hearsay is an out-of-court statement that is offered into evidence “to prove the truth of the matter asserted.”²⁰ Hearsay is not admissible unless there is an exception because it is inherently unreliable.²¹ In addition to the hearsay exceptions, the Federal Rules of Evidence provide parameters for out-of-court statements that are categorized as “not hearsay.”²² Exceptions are provided because some statements have “guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial[.]”²³ Some hearsay is necessary for the trier of fact to make educated decisions based upon relevant reliable evidence.

4. The workings of 806

The Legislature, by enacting Rule 806, considered the issue of whether a non-hearsay statement or hearsay exception could be used to admit an out-of-court statement into evidence without the declarant’s appearance.²⁴ Rule 806—Attacking and Supporting the Declarant’s Credibility—provides that:

When a hearsay statement – or a statement described in Rule 801(d)(2)(C), (D), or (E) – has been admitted in evidence, the declarant’s credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of a declarant’s inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement

¹⁹ See FED. R. EVID. 609 (governing the use of criminal conviction).

²⁰ See FED. R. EVID. 801(c)(1)-(2).

²¹ See FED. R. EVID. 802 (highlighting that exceptions are made by federal statute or by Supreme Court rules).

²² Compare FED. R. EVID. 801 (presenting a list of “non-hearsay” statements), with FED. R. EVID. 803 (listing the true exceptions to the hearsay prohibition).

²³ See FED. R. EVID. 803 advisory committee’s note.

²⁴ See FED. R. EVID. 806 advisory committee’s note (detailing the reasons why Congress passed Rule 806).

was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.²⁵

Rule 806 attempts to level the playing field between the proponent and opponent of an admitted hearsay statement.²⁶ Pursuant to Rule 806, the opponent to admitted hearsay has the liberty to attack the declarant's credibility as if the declarant took the stand and gave sworn testimony.²⁷ Rule 806 permits attacks on the credibility of the declarant of a hearsay statement as if the declarant had testified.²⁸

A declarant's credibility may be attacked by admitting into evidence the declarant's convictions, bias or interest, character for truthfulness, and inconsistent statements.²⁹ Rule 806 does not permit impeachment of the declarant's statement when offered for a "non-truth" purpose not expressly enumerated by the rule.³⁰ The Federal Rules of Evidence considers a "non-truth" to be an exclusion from the hearsay rule, rather than an exception.³¹ This means that the statement, although fitting the description of hearsay, is not in fact hearsay.³² If counsel fails to object to an otherwise inadmissible hearsay statement, "it would appear . . . [to] trigger the application of Rule 806 impeachment of . . . the declarant."³³

Rule 608 allows for impeachment of a witness's character for truthfulness, however, Rule 608(b) bars doing so by extrinsic evidence, which includes asking one witness about another person's past acts of dishonesty.³⁴

²⁵ FED. R. EVID. 806.

²⁶ See MICHAEL H. GRAHAM, 7 HANDBOOK OF FED. EVID. § 806:1 (7th ed. 2012) (explaining the purpose of Rule 806).

²⁷ See ROBERT E. JONES, ET AL., RUTTER GROUP PRACTICAL GUIDE: FEDERAL CIVIL TRIAL AND EVIDENCE § 8:3295 (2012) (stating opposing party's right to challenge a declarant's credibility).

²⁸ See *United States v. Little*, No. CR 08-0244 SBA, 2012 WL 2563796, at *2-3 (N.D. Cal. June 28, 2012) (stating attacks on credibility are governed by Rule 806); see also *United States v. Becerra*, 992 F.2d 960, 965 (9th Cir. 1993) (discussing that Rule 806 permits attacks on a hearsay declarant's credibility as though the declarant testified).

²⁹ See FED. R. EVID. 806 (allowing certain attacks on declarants).

³⁰ See David Sonenshein, *Impeaching the Hearsay Declarant*, 74 TEMP. L. REV. 163, 165-67 (2001) (explaining how to attack a declarant's credibility).

³¹ See FED. R. EVID. 801(d) (enumerating the non-hearsay exclusions rather than exceptions).

³² See *id.*

³³ See Sonenshein, *supra* note 30, at 167. This means that the opponent of a hearsay statement can forgo an objection, and instead, impeach the out of court declarant as a tactical means of introducing damaging evidence of the opposing party's witness. *Id.*

³⁴ *United States v. Uvino*, 590 F. Supp. 2d 372, 374 (E.D.N.Y. 2008).

Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

The witness; or

Another witness whose character the witness being cross-examined has testified about

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.³⁵

Allowing the introduction of extrinsic evidence opens the door for opposing counsel to offer extrinsic evidence to rebut the same, causing a mini-trial within.³⁶ Rule 608(b) bans extrinsic evidence to avoid "mini-trials on peripheral or irrelevant matters" regarding prior acts.³⁷ This is not to be confused with impeachment by contradiction.³⁸

Impeachment by contradiction allows extrinsic evidence to show that prior "specific testimony" is false, while Rule 608(b) prohibits extrinsic evidence that attacks a witness's credibility.³⁹ Specific testimony generally refers to testimony given under oath at a prior hearing or proceeding.⁴⁰ Rules 806 and 608(b) intersect when the testifying witness does not have knowledge of the prior conduct of the out-of-court declarant,

³⁵ FED. R. EVID. 608(b); *see Uvino*, 590 F. Supp. 2d at 374 (barring the use of extrinsic evidence to impeach a witness's character for truthfulness).

³⁶ *See* Brief for Appellant at 40 n.8, *United States v. Saada*, 212 F.3d 210 (3d Cir. 2000) (Nos. 99-5126, 99-5148) (arguing that the introduction of extrinsic evidence decreases judicial efficiency).

³⁷ O'MALLEY, ET AL., *supra* note 10, at §6.3, at 575-76.

³⁸ *See id.* (illustrating the differences between Rule 608(b) impeachment and impeachment by contradiction).

³⁹ *See* 15B WORDS AND PHRASES EXTRINSIC EVIDENCE § 529-533 (2004 & Supp. 2014); *see also* FED. R. EVID. 608(b) (declaring that all evidence other than testimony at trial is classified as extrinsic evidence); *United States v. Kincaid-Chauncey*, 556 F.3d 923, 932 (9th Cir. 2009) (explaining why impeachment by contradiction is important and how it can be used effectively); *United States v. Castillo*, 181 F.3d 1129, 1132-33 (9th Cir. 1999) (revealing the limits on introducing evidence through impeachment by contradiction); O'MALLEY, ET AL., *supra* note 10, at §6.3, at 576. Extrinsic evidence is evidence other than testimony given at trial. *See* FED. R. EVID. 608(b); *United States v. Balsam*, 203 F.3d 72, 87 (1st Cir. 2000) (declaring that all evidence other than testimony at trial is extrinsic evidence).

⁴⁰ *See* O'MALLEY, ET AL., *supra* note 10, at §6.3, at 575 n.39 (elaborating on what many courts classify as "specific testimony").

and the impeaching party wishes to introduce extrinsic evidence to show the declarant's prior conduct involving dishonesty – although unrelated to the substantive factual matters of consequence in the instant action.⁴¹

The language in Rule 806 does not specifically address its conflict with Rule 608(b).⁴² There is one issue, however, that the Legislature foresaw and corrected within the language of Rule 806. It surrounds Rule 613's requirement that a witness be afforded "the opportunity to admit or deny a prior inconsistent statement before extrinsic evidence of that statement may be introduced."⁴³ On its face, Rule 613's application poses a problem because, by definition, Rule 806 allows for impeachment to take place in the absence of the declarant.⁴⁴ Rule 806's language fixes this problem "by providing that evidence of the statement is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain."⁴⁵ However, Rule 806 does not provide any similar exception for the unavailability of a hearsay declarant in the context of Rule 608(b), thus creating a similar and equally problematic discrepancy in the Federal Rules of Evidence.⁴⁶

B. Why You Need To Know It

The admission of hearsay evidence may deprive a party of the opportunity to cross-examine a witness, but evidence admitted as hearsay is not protected from the test of impeachment.⁴⁷ Impeachment of the out-of-court hearsay declarant is an effective tool during trial but it is often overlooked.⁴⁸ When an attorney loses the battle to keep this type of hearsay evidence out, the best alternative is to impeach the non-testifying

⁴¹ Compare FED. R. EVID. 608 (limiting the introduction of extrinsic evidence to attack credibility), with FED. R. EVID. 806 (allowing litigators to use extrinsic evidence to attack credibility).

⁴² See FED. R. EVID. 806.

⁴³ *United States v. Saada*, 212 F.3d 210, 221 (3d Cir. 2000).

⁴⁴ See FED. R. EVID. 806 (giving counsel the opportunity to impeach the *non-testifying* hearsay declarant).

⁴⁵ *Saada*, 212 F.3d at 221 (internal quotation marks omitted) (explaining applicability of Rule 806); see FED. R. EVID. 806 advisory committee's note (codifying the Congressional intent behind Rule 806's passage).

⁴⁶ See *Saada*, 212 F.3d at 222 (declaring that Rule 806 does not provide a similar exception); see also ROBERT A. BARKER & VINCENT C. ALEXANDER, 5A N.Y. PRAC., EVIDENCE IN N.Y. STATE AND FEDERAL COURTS § 8:96 (2013) (explaining New York's application of Rule 806).

⁴⁷ See BARKER & ALEXANDER, *supra* note 46, at §8.96.

⁴⁸ See KARL B. TEGLAND, WASHINGTON PRACTICE SERIES: EVIDENCE LAW AND PRACTICE § 806.2 (5th ed. 2012) (detailing the importance of impeachment to litigators).

hearsay declarant.⁴⁹ This is a critical opportunity for the hearsay opponent because he can damage the declarant's credibility.⁵⁰ Although these battles shape the evidence placed before the jury, the jury decides the war when weighing the evidence and assessing a declarant's credibility as well as the ultimate outcome of the case.

III. IF YOU DON'T USE IT, YOU CAN'T ABUSE IT

A. The Black Pearl: Rare Beauty

Impeaching the non-testifying hearsay declarant is an important trial tactic that is little-known and underused. Scholars have suggested that most attorneys believe, "impeachment is ordinarily [only] performed on cross-examination of a witness who has appeared and testified on direct examination."⁵¹ This premise is supported by the infrequent number of appellate decisions in which courts have addressed Rule 806 controversies.⁵² Even less frequently appealed is whether the ban on extrinsic evidence imposed by Rule 608(b) applies under a Rule 806 interrogation.⁵³ Rarely does a court decide whether to admit extrinsic evidence to show prior conduct during a Rule 806 impeachment, because it is so seldom used by attorneys.⁵⁴

⁴⁹ See *id.* at § 806.2 n.3 (citing Anthony M. Brannon, *Successful Shadowboxing: The Art of Impeaching Hearsay Declarants*, 13 CAMPBELL L. REV. 157, 158-59 (1991)) (illustrating the tactics available to attorneys in many scenarios).

⁵⁰ See *id.*

⁵¹ See Sonenshein, *supra* note 30, at 163 (describing the misconceived notion of impeachment).

⁵² See West Law Search, WEST LAW NEXT, <http://next.westlaw.com>, (access Federal Rules of Evidence Rule 806; then click "Citing References" on top banner; then click "Cases" on the side banner) (last accessed January 11, 2015). The Westlaw citing references for Rule 806 yields 26 "Highest Court" and 353 "Other Court" cases. See *id.* When cross referenced with "608(b)" using the "Locate" function, there are only 26 cases total that are found as of January 11, 2015. See *id.* (access Federal Rules of Evidence Rule 806; then click "Citing References" on top banner; then click "Cases" on the side banner; then type "608(b)" into the "Search within results" toolbar) (last accessed January 11, 2015).

⁵³ See *supra* text accompanying note 52.

⁵⁴ See Interview with Senior Judge Jeffrey T. Miller, United States District Court for the Southern District of California, in San Diego, Cal. (Mar. 11, 2013) [hereinafter *Interview with Senior Judge Jeffrey T. Miller*]; Interview with Senior Judge Thomas J. Whelan, United States District Court for the Southern District of California, in San Diego, Cal. (Mar. 5, 2013) [hereinafter *Interview with Senior Judge Thomas J. Whelan*]; Interview with Judge Cathy Ann Bencivengo, United States District Court for the Southern District of California, in San Diego, Cal. (Feb. 27, 2013) [hereinafter *Interview with Judge Cathy Ann Bencivengo*]; Interview with Magistrate Judge Karen S. Crawford, United States District Court for the Southern District of California, in San Diego, Cal. (Jan. 24, 2013) [hereinafter *Interview with Magistrate Judge Karen*

To demonstrate how rarely attorneys impeach a non-testifying hearsay declarant, we can analyze in comparison the widely used provisions of Rule 804.⁵⁵ Contrasting Rule 806 and Rule 804—Exceptions to the Rule Against Hearsay, When the Declarant Is Unavailable as a Witness—the number of citing references pale in comparison; there are 6 times the number of trial motions, memoranda, and affidavits; 8 times the number of appellate briefs; and, 13 times the number of cases.⁵⁶ This is a shocking realization considering that in most instances where hearsay is admitted into evidence, Rule 806 can be used.

S. Crawford]. Judge Miller served as a deputy state attorney general of California from 1968-1987. *Interview with Senior Judge Jeffrey T. Miller, supra*. Judge Miller served as a judge on the California Superior Court for San Diego County from 1987-1997. *Id.* Judge Miller became a federal judge in 1997 and obtained “Senior” status in 2010. *Id.* Judge Whelan served as a deputy district attorney of San Diego, California from 1969-1989. *Interview with Senior Judge Thomas J. Whelan, supra*. Judge Whelan was a judge in the Superior Court of California in San Diego County from 1990-1998. *Id.* Judge Whelan was then appointed to District Court for the Southern District of California, taking “Senior” status in 2010. *Id.* Judge Bencivengo joined a predecessor to the law firm DLA Piper in 1988. *Interview with Judge Cathy Ann Bencivengo, supra*. Judge Bencivengo became partner in 1996 and stayed at this firm until 2005 when she was nominated as a federal magistrate judge for the Southern District of California. *Id.* Judge Bencivengo became a United States District Court Judge for the Southern District of California in 2012. *Id.* Magistrate Judge Crawford worked as an Assistant United States Attorney in the Civil Division of the U.S. Attorney’s Office for the Southern District of California. *Interview with Magistrate Judge Karen S. Crawford, supra*. Magistrate Judge Crawford also worked as a trial attorney with the United States Department of Justice. *Id.* Then, Magistrate Judge Crawford made partner with Duane Morris, LLP in San Diego, California. *Id.* Magistrate Judge Crawford became a magistrate judge in 2012. *Id.* Federal District Court Judges Cathy Ann Bencivengo, Thomas J. Whelan, Jeffrey T. Miller, and Federal Magistrate Judge Karen S. Crawford, *inter alia*, have never dealt with the issue in their court rooms. *See supra* text accompanying.

⁵⁵ Compare FED. R. EVID. 806 (attacking and supporting a declarant’s credibility), with FED. R. EVID. 804 (illustrating the exception to rules of evidence when declarant is unavailable as witness).

⁵⁶ Compare *supra* text accompanying note 52, with West Law Search, WEST LAW NEXT, <http://next.westlaw.com>, (access Federal Rules of Evidence Rule 804; then click “Citing References” on top banner; then observe the side banner for statistics) (last accessed January 11, 2015).

	Highest Court (consisting of U.S.S.C. and State Supreme Courts)	Other Court	Appellate Briefs	Appellate Petitions, Motions & Filings	Trial Motions, Memoranda & Affidavits
Rule 806	26	353	571	17	1197
Rule 806 & 608(b)	1	25	49	1	296
Rule 804	391	4540	4352	201	7262

B. A Pearl of Wisdom

Even if the Rule 608(b) hurdle is cleared, ignoring the benefits of Rule 806 is a missed opportunity. For example, consider an undercover police officer who in a later criminal trial recounts statements made by an unwitting source other than the accused, such as another member of the criminal enterprise. A savvy defense attorney should cross-examine the officer about the unsavory past of the “source,” a snitch of sorts. It is a win-win. Either the officer knew of—but did not reveal on direct examination—the source’s dishonest past and so the officer seems to be trying to fool the jury by vouching for the source as credible, or the officer never checked into the source’s past before representing the source to the jury as credible and so the officer simply seems foolish. Presuming the officer doesn’t know the dishonest conduct of the source, defense counsel should be allowed to prove it by means of extrinsic evidence, subject to the rigors of Rule 403.

Although Rule 806 is rarely used during trial and more seldom appealed, the following three cases have created a split of authority in the Second, Third, and D.C. Circuits.⁵⁷

IV. THE RESULTING SPLIT OF AUTHORITY

A. United States v. Friedman (1988)

The Second Circuit became the first circuit court to address the quandary that arises at the intersection of Rules 806 and 608(b) in *United States v. Friedman*.⁵⁸ The Second Circuit did not reach the issue of whether extrinsic evidence was admissible because they affirmed the lower court’s decision to exclude it pursuant to Rule 403, making any further inquiry unnecessary.⁵⁹ In dicta, however, the court provided that extrinsic evidence would have been permissible had it not failed the Rule 403 balancing test.⁶⁰

⁵⁷ Compare *United States v. Friedman*, 854 F.2d 535, 569-70 (2d Cir. 1988) (declaring through dicta that extrinsic evidence can prove prior conduct when impeaching a non-testifying hearsay declarant), with *United States v. White*, 116 F.3d 903, 920 (D.C. Cir. 1997) (prohibiting the presentation of extrinsic evidence to prove prior conduct), and *United States v. Saada*, 212 F.3d 210, 220-21 (3d Cir. 2000) (dissecting statutory language to determine whether Rule 608(b)’s ban on extrinsic evidence is appropriate).

⁵⁸ 854 F.2d 535, 535 (2d Cir. 1988) (addressing the rarely appealed issue of the interplay between Rules 806 and 608(b)).

⁵⁹ See *id.* at 570 (showing that Rule 403 is the appropriate standard).

⁶⁰ See *id.* at 570 n.8 (developing limits on the admittance of extrinsic evidence); see also

In this case, the jury found that defendant Friedman, *inter alia*, used the New York City Parking Violations Bureau to collect bribes and kickbacks in a racketeering operation that resulted in “a cesspool of corruption.”⁶¹ In that pool was Donald Manes, a political figure in New York City, rising from Councilman to Queens Borough President and then Chairman of the Queens Democratic Committee.⁶² Manes’ position of power allowed him to be a key player in the conspiracy.⁶³ By the time the case was brought to trial, Manes was unavailable due to his suicide in the Spring of 1986.⁶⁴

Prior to his suicide, and aware of the investigation implicating his involvement, Manes was seen driving recklessly while bleeding from slash wounds on his left wrist and ankle.⁶⁵ Manes first explained that his wounds were inflicted by two men who hid in the rear seat of his automobile and abducted him.⁶⁶ He later recanted, admitting his wounds were self-inflicted from an attempted suicide.⁶⁷ In March of 1986, two months after his attempted suicide, Manes killed himself making him unavailable for trial.⁶⁸

Geoffrey Lindenaur, a chief witness for the government, testified to hearsay statements made by Manes that were admitted into evidence against the defendant as “declarations of a co-conspirator in furtherance of the conspiracy[.]”⁶⁹ The defendant attempted to offer testimony of the Assistant District Attorney, to whom Manes had originally lied, together with a videotape of Manes admitting to his self-inflicted harm.⁷⁰ The district court declined to allow the defendant to introduce evidence that Manes had initially lied to law-enforcement authorities regarding his attempted suicide.⁷¹ The court reasoned that the evidence had no probative value and might confuse the jury.⁷² Confusion of the jury is a problem that

FED. R. EVID. 403 (allowing the exclusion of evidence if its probative value is substantially outweighed by the risk of unfair prejudice).

⁶¹ *Friedman*, 854 F.2d at 541.

⁶² *Id.* at 543.

⁶³ *Id.* at 542-43.

⁶⁴ *United States v. Friedman*, 854 F.2d 535, 543 (2d Cir. 1988).

⁶⁵ *Id.* at 569.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 553.

⁶⁹ *See Friedman*, 854 F.2d at 543, 569. Geoffrey Lindenauer falsely claimed to hold a Doctor of Philosophy to operate an unprofitable “sham psychotherapy institute,” which he used to have sex with his patients. *See id.* at 543.

⁷⁰ *United States v. Friedman*, 854 F.2d 535, 569 (2d Cir. 1988).

⁷¹ *Id.* at 569-70.

⁷² *Id.* (affirming the trial court judge’s sustaining of Rule 403 objections).

Rule 403 directly addresses and seeks to avoid.⁷³

On appeal, the Second Circuit found the evidence was “properly excluded because it was simply not probative on the issue of the credibility of Manes’s conspiratorial statements to Lindenauer.”⁷⁴ The Second Circuit found that the trial court had not erred in finding that Manes’s false account of attempted suicide was not probative to the credibility of the statements against the defendant.⁷⁵

Although the Second Circuit found no occasion to address the issue of whether extrinsic evidence can be used to prove specific instances of conduct for the purposes of attacking or supporting credibility, the court provided guidance in dicta.⁷⁶ The court noted that Rule 608(b) limits such evidence to cross-examination.⁷⁷ More importantly, in a footnote, the court stated that “Rule 806 applies . . . when the declarant has not testified and there has by definition been no cross-examination, and resort[ing] to extrinsic evidence may be the *only* means of presenting such evidence to the jury.”⁷⁸ This means that in the Second Circuit, a litigator can use extrinsic evidence to prove prior conduct when impeaching a non-testifying hearsay declarant through Rule 806.⁷⁹

B. United States v. White (1997)

The D.C. Circuit arrived at a different result in *United States v. White*,⁸⁰ deciding that an inquiry into prior conduct is permissible, but extrinsic evidence cannot be admitted to prove prior conduct.⁸¹

In *White*, defendant Ronald Hughes joined the First Street Crew street gang and began selling crack cocaine with defendant Antone White and others.⁸² Thereafter, Arvell Williams, an acquaintance of White, went to the Assistant United States Attorney’s Office and offered to assist in the investigation of the First Street Crew.⁸³ Pursuant to his arrangement with

⁷³ FED. R. EVID. 403 (seeking to avoid, *inter alia*, “confusing the issues [and] misleading the jury.”).

⁷⁴ *Friedman*, 854 F.2d at 569.

⁷⁵ *Id.* at 570.

⁷⁶ *United States v. Friedman*, 854 F.2d 535, 569-70 (2d Cir. 1988).

⁷⁷ *See id.* at 570 n.8.

⁷⁸ *Id.* (emphasis added); *see United States v. Uvino*, 590 F. Supp. 2d 372, 375 (E.D.N.Y. 2008) (applying a similar test as the *Friedman* court).

⁷⁹ *See Friedman*, 854 F.2d at 570.

⁸⁰ 116 F.3d 903 (D.C. Cir. 1997).

⁸¹ *Id.* at 920.

⁸² *Id.* at 909.

⁸³ *Id.*

law enforcement, Williams wore a wire and purchased crack from several members of the First Street Crew.⁸⁴ White grew suspicious of Williams, suspecting that he was working with the police.⁸⁵ After two months as an informant, Williams arranged to accompany Sergeant Sutherland, an undercover officer with the Metropolitan Police Department, in the purchase of crack cocaine from two members of the First Street Crew.⁸⁶ The following day Williams was shot sixteen times, resulting in his death.⁸⁷

Defendant Hughes, *inter alia*, was charged in a twenty-six-count indictment with murdering Williams as well as other firearm and drug related charges.⁸⁸ Hughes was sentenced to life in prison on the drug conspiracy and sentenced to 240 months on each of three drug distribution counts with all sentences running concurrently.⁸⁹

During the course of trial, Sergeant Sutherland testified to his involvement.⁹⁰ Through his testimony, Williams' out-of-court statements were admitted against Hughes.⁹¹ The court allowed this testimony because the Government had shown, by a preponderance of the evidence, that Hughes conspired to murder Williams; thereby, causing Williams' unavailability and thus, waiving Hughes' right to confrontation and any potential hearsay objections.⁹²

Sergeant Sutherland was cross-examined regarding Williams' prior conduct.⁹³ The scope of his cross-exam included "drug use, drug dealing, and prior convictions."⁹⁴ The court prohibited questions about whether Williams had made false statements on an employment application and

⁸⁴ *Id.*

⁸⁵ *White*, 116 F.3d at 909.

⁸⁶ *United States v. White*, 116 F.3d 903, 909 (D.C. Cir. 1997).

⁸⁷ *Id.*

⁸⁸ *Id.* at 910.

⁸⁹ *Id.* at 910-11. Two sentences that run concurrent run at the same time, as opposed to a sentence running consecutively, one after the other. See Rachel A. Mills, Comment, *Too Many Cooks Spoil the Sentence: Fragmentation of Authority in Federal and State Sentencing Schemes*, 41 SETON HALL L. REV. 1637, 1640 (2011) (explaining the difference between concurrent and consecutive sentences).

⁹⁰ *White*, 116 F.3d at 920.

⁹¹ *Id.* at 910.

⁹² See U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."). The preponderance of the evidence standard requires that the trier of fact is "persuaded that something is more likely true than not true." 2 NICHOLS CYCLOPEDIA OF FEDERAL PROCEDURE FORMS § 59:36 (2012); see *United States v. White*, 116 F.3d 903, 910 (D.C. Cir. 1997) (developing reasons why evidence was allowed before the jury).

⁹³ *White*, 116 F.3d at 920.

⁹⁴ *Id.* at 920.

whether he had violated court orders in the past.⁹⁵ The court reasoned that, even if permitted to ask such questions, Sutherland barely knew Williams and was unlikely capable of answering them.⁹⁶ The D.C. Circuit reversed and concluded that this line of questioning was permitted, but counsel “could not have made reference to any extrinsic proof of those acts.”⁹⁷ The court defined “extrinsic evidence” as evidence that is extrinsic to the witness on the stand, not the out-of-court declarant.⁹⁸ For example, documentation of an out-of-court eye-witness’s drug use or drug dealing could not be used to show such conduct, but similar questions could be asked. Had the *White* court used a strict interpretation of extrinsic evidence, the testifying witness could not be asked questions about the out-of-court declarant’s conduct, because the testifying witness would be extrinsic evidence.⁹⁹

C. United States v. Saada (2000)

In *United States v. Saada*, the Third Circuit held that the plain reading of Rule 608(b)’s ban on extrinsic evidence is incorporated into the rule by the language in Rule 806.¹⁰⁰ *Saada* centered on a fraudulent insurance claim from the staged flooding of a warehouse.¹⁰¹ The defendants, Isaac Saada and Neil Saada, operated a business that dealt in high end “ivory, jewels, gold and other materials.”¹⁰² In August of 1990, the Saadas were in financial duress due to litigation.¹⁰³ They settled the lawsuit, agreeing to pay \$3.8 million on a debt for which the Saadas were both personally liable.¹⁰⁴ On November 28, 1990, Neil broke a sprinkler head and caused a flood in an area containing the company’s most valuable

⁹⁵ *Id.*

⁹⁶ *See id.*; *see also* GRAHAM, *supra* note 26, at §806:1 (displaying the problems created by allowing a witness with insufficient knowledge to testify).

⁹⁷ *See White*, 116 F.3d at 920 (relying on Rule 608(b)). The court also concluded that because of the damage previously administered to William’s credibility, the trial court’s conclusion that subsequent questioning was of “little utility” was within its discretion. *Id.*

⁹⁸ *United States v. White*, 116 F.3d 903, 920 (D.C. Cir. 1997).

⁹⁹ *See* FED. R. EVID. 608 advisory committee’s note (interpreting extrinsic evidence); *see also White* 116 F.3d at 920 (applying relaxed interpretation of extrinsic evidence).

¹⁰⁰ *See United States v. Saada*, 212 F.3d 210, 221-22 (3d Cir. 2000) (reconciling the interplay between Rules 608(b) and 806).

¹⁰¹ *Id.* at 214.

¹⁰² *Id.* at 213-14. Isaac Saada and his son Neil Saada were both on trial in this case. *Id.* at 213. They were both convicted of conspiracy to defraud an insurance company, mail fraud, and wire fraud. *Id.*

¹⁰³ *Saada*, 212 F.3d at 214.

¹⁰⁴ *Id.* (explaining the defendant’s settlement and subsequent bankruptcy filing).

merchandise, destroying the contents therein.¹⁰⁵ When police and firefighters arrived on the scene Neil told them the sprinkler head *accidentally* broke while moving a heavy box on the top of a stack of boxes.¹⁰⁶

During trial, one of Saadas's employees, Linda Chewing, testified that during the flood Tom Yaccarino was heard "screaming words to the effect of 'oh my God, Neil did something stupid, [threw] something, now he has got a mess . . . I can't believe it. He is so stupid. He threw it. He is stupid, he is dumb.'"¹⁰⁷ Tom Yaccarino was a former judge and vice-president of the Saadas's company.¹⁰⁸ Yaccarino died before the trial.¹⁰⁹ The government sought to impeach Yaccarino's credibility and attack his statement by introducing evidence and factual support of Yaccarino's "removal from the bench and disbarment for unethical conduct[.]"¹¹⁰ The defendants objected, claiming that "the credibility of a hearsay declarant may not be impeached with extrinsic evidence of bad acts," pursuant to Rule 608(b).¹¹¹

The Third Circuit ruled that this objection was valid and that Rule 608(b)'s ban on extrinsic evidence to prove prior bad acts is not modified by Rule 806 "even when those declarants are unavailable to testify."¹¹² The *Saada* court reasoned that because the witness testifying to the hearsay statement may still be questioned on cross-examination, the exclusion of extrinsic evidence during cross-examination is negligible.¹¹³ The *Saada* court concluded that Rule 806 does not make a specific exception to accommodate for the unavailability of a witness, and thus the ban on extrinsic evidence pursuant to Rule 608(b) is enforceable.¹¹⁴ Presuming Linda Chewing doesn't know about Tom Yaccarino's questionable past, the government is left with a very weak impeachment of his credibility.

¹⁰⁵ *Id.*

¹⁰⁶ *United States v. Saada*, 212 F.3d 210, 214 (3d Cir. 2000).

¹⁰⁷ *Id.* at 218.

¹⁰⁸ *Id.* The name of the business was Scrimshaw Handicrafts, located in New Jersey. *Id.* at 214.

¹⁰⁹ *Id.* at 218.

¹¹⁰ *Saada*, 212 F.3d at 219.

¹¹¹ *Id.*

¹¹² *United States v. Saada*, 212 F.3d 210, 221 (3d Cir. 2000).

¹¹³ *See id.*

¹¹⁴ *See id.* (comparing how Rule 806's language addresses the conflict that arises when used with Rule 613 but not Rule 608(b)).

D. Synthesize the Splitting Sides

The aforementioned decisions have caused an unwarranted circuit split regarding the Federal Rules of Evidence. The Second Circuit and courts within its jurisdiction have examined the footnote in *Friedman* and decided that extrinsic evidence is admissible, whereas other courts have sided with *White* and *Saada*, reasoning that Rule 608(b)'s language governs without exception.¹¹⁵ However, what the courts fail to realize is that Rule 608(b) and Rule 403 seek to avoid the same complications—confusing the issues and an undue consumption of time—ideals that are already expressly addressed and prohibited by Rule 403.¹¹⁶

Rule 403 provides that:

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.¹¹⁷

Rule 608(b) can be eliminated from the Federal Rules of Evidence because Rules 403 and 608(b) serve the same purpose.¹¹⁸ Striking Rule 608(b) would eradicate the circuit split and clarify the threshold that extrinsic evidence of prior conduct must surpass—Rule 403.

¹¹⁵ See *United States v. Uvino*, 590 F. Supp. 2d 372, 374 (E.D.N.Y. 2008) (citing footnote in *Friedman* for authority to admit extrinsic evidence during Rule 806 impeachment). But see *State v. Johnson*, 967 A.2d 1174, 1180-81 (Vt. 2008) (holding that extrinsic evidence is not appropriate to show prior conduct); see also *Taylor v. State*, 963 A.2d 197, 212 (Md. 2009) (citing the *Saada* decision generally); *State v. Martisko*, 566 S.E.2d 274, 280-81 (W.Va. 2002) (deciding that extrinsic evidence is not permissible to show prior conduct).

¹¹⁶ See FED. R. EVID. 403 (codifying the balancing test courts use when deciding a piece of evidence's admissibility); FED. R. EVID. 608 advisory committee's note (offering insights into why Rule 608 was codified by Congress); 3A JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 979, at 823-26 (Chadbourn rev. 1970) (enumerating the reasons for excluding extrinsic evidence); Margaret Meriwether Cordray, *Evidence Rule 806 and the Problem of Impeaching the Non-testifying Declarant*, 56 OHIO ST. L.J. 495, 523-24 (1995) (declaring that the risk of confusing the issues is the primary reason for excluding extrinsic evidence); William G. Hale, *Specific Acts and Related Matters as Affecting Credibility*, 1 HASTINGS L.J. 89, 89-90 (1950) (reasoning appropriate to exclude extrinsic evidence because of "(1) confusion of issues; (2) undue consumption of time; (3) unfair surprise"); see also *Saada*, 212 F.3d at 222 (acknowledging that decision does not address all issues related to interplay between Rules 608 and 403); *United States v. Martz*, 964 F.2d 787, 789 (8th Cir. 1991), *cert. denied*, 506 U.S. 1038 (1992) (stating that the purpose of Rule 608(b) is to avoid mini-trials); accord *United States v. Martz*, 964 F.2d 787, 789 (8th Cir. 1992); *Foster v. United States*, 282 F.2d 222, 223 (10th Cir. 1960).

¹¹⁷ FED. R. EVID. 403.

¹¹⁸ See FED. R. EVID. 403 (limiting the evidence allowed before a trier of fact); FED. R. EVID. 608(b) (creating the framework to limit evidence allowed before a trier of fact).

V. PROVING THE WRONG APPROACH

A. The Legislative Intent

The Federal Rules of Evidence were enacted to address the issues that arise when a witness testifies in court.¹¹⁹ For example, when Rule 609 was debated and enacted by Congress, it was presumed that Rule 608(b) would only allow for impeachment of a witness testifying in court.¹²⁰ Moreover, it is clear that Rule 608 was drafted with the same understanding—that it would be used to impeach a *testifying* witness regarding specific instances of conduct.¹²¹ This logic is cemented by the drafter's language, providing that specific instances of conduct can “be inquired into on *cross-examination of the witness*.”¹²² Several judges similarly believe that Rule 608(b) is limited to a testifying declarant.¹²³

In contrast, Rule 806 presumes that the declarant will not testify in court.¹²⁴ This presumption is valid because Rule 806 was codified under the hearsay section of the Federal Rules of Evidence under the presumption that the statements were made out of court.¹²⁵ Rule 806 requires the declarant's absence from court.¹²⁶ When evidence rules pertaining to witnesses were drafted, the drafters presumed that the witness would testify in court.¹²⁷ Therefore, when impeachment rules are used in concert with Rule 806, “they are being used in a context very different from that envisioned[.]”¹²⁸ These competing interests clash when Rule 806 is used to impeach an out-of-court hearsay declarant, and rules created on the premise

¹¹⁹ See Cordray, *supra* note 116, at 497 (discussing how the Federal Rules of Evidence are interpreted based on legislative intent).

¹²⁰ See 120 CONG. REC. 2376 (1974) (remarks of Rep. Hogan); 120 CONG. REC. 2377 (1974) (remarks of Rep. Dennis).

¹²¹ See Cordray, *supra* note 116, at 521-22 (discussing the purpose behind Rule 608(b) allowing for impeaching a testifying witness); see also FED. R. EVID. 608 advisory committee's note (revealing the Congressional intent behind enacting Rule 608).

¹²² Cordray, *supra* note 116, at 521-22 (emphasis added) (internal quotation marks omitted) (citing FED. R. EVID. 608(b)).

¹²³ See *Interview with Senior Judge Thomas J. Whelan*, *supra* note 54; see also *Interview with Senior Judge Jeffrey T. Miller*, *supra* note 54.

¹²⁴ See Cordray, *supra* note 116, at 497 (discussing the different legislative intent behind Rule 806 and the other rules of evidence).

¹²⁵ See FED. R. EVID. 806(c)(1)-(2) (defining hearsay as an out-of-court statement offered for its truth).

¹²⁶ See FED. R. EVID. 806.

¹²⁷ See Cordray, *supra* note 116, at 497 (discussing the premise of evidence rules regarding witnesses).

¹²⁸ See *id.* (explaining how legislative intent alters the interpretation of the Federal Rules of Evidence).

of an in-court declarant are applied.

The Legislature cannot anticipate every hypothetical; hence, it may take many reformulations before the rules convey the Legislature's intent.¹²⁹ For example, Rule 608(b) was amended effective December 1, 2003, changing the rule's language to ban evidence addressing "character for truthfulness" rather than "credibility," thereby narrowing the restriction's scope to the parameters that Congress originally intended.¹³⁰

Originally, Rule 608(b) intended to bar extrinsic evidence related only to the witness's veracity.¹³¹ Extrinsic evidence offered for other forms of impeachment, such as contradiction, prior inconsistent statement, bias, and mental capacity, is governed by other rules and was not intended to be controlled by Rule 608(b).¹³² Moreover, extrinsic evidence may be used to show "prejudice, interest and corruption, perception . . . prior criminal convictions, character for dishonesty[,] and inaccurate memory."¹³³

B. The Legislative Loophole

"[T]he only avenue for admitting information of prior bad acts to impeach the credibility of a witness—cross-examination—is closed if the hearsay declarant cannot be called to testify[,] and if the witness does not have personal knowledge."¹³⁴ A ban on extrinsic evidence may require the party against whom the hearsay statement was admitted to call the declarant to the stand.¹³⁵ The party admitting the statement is given significant power and the hearsay opponent is left without any reasonable recourse¹³⁶

¹²⁹ Laws and regulations are constantly being amended to further the original intent of the legislature or to correct interpretations that have strayed too far in the wrong direction.

¹³⁰ See FED. R. EVID. 608 advisory committee's note. To clarify its original intent, the Legislature amended the language, narrowing the scope to only "character for truthfulness." *Id.* The phrasing "credibility" was too broad and spawned varied decisions and interpretations. See O'MALLEY, ET AL., *supra* note 10, at § 6:3, at 575 n.39.

¹³¹ See FED. R. EVID. 608 (amended 2003); see also FED. R. EVID. 608(b) advisory committee's note ("stating that the Rule is '[i]n conformity with Rule 405, which forecloses use of evidence of specific instances as proof in chief of character unless character is in issue in the case . . .').

¹³² See FED. R. EVID. 608 (amended 2003) (referencing Rules 402 and 403); O'MALLEY, ET AL., *supra* note 10, at § 6.3, at 578-79 n.41 (detailing the intended scope of Rule 608(b)).

¹³³ See Sonenshein, *supra* note 30, at 166.

¹³⁴ See *United States v. Saada*, 212 F.3d 210, 221-22 (3d Cir. 2000) (recognizing the importance of impeachment with prior conduct but ultimately finding that argument unpersuasive).

¹³⁵ *Id.*

¹³⁶ See *id.* (identifying the injustices created by inappropriately applying Rules 608 and 806 in concert).

Excluding extrinsic evidence for prior conduct provides an opportunity for the hearsay proponent to avoid calling the declarant to the stand, thereby avoiding even the potential for credibility and impeachment issues.¹³⁷ If the declarant is *unavailable* to testify, the hearsay proponent is again advantaged because they can prevent the use of impeachment evidence regarding prior misconduct “unless the witness testifying to the hearsay has knowledge of the declarant’s misconduct[.]”¹³⁸ which is often unlikely.¹³⁹ Moreover, if the declarant is available to testify, the opponent’s only option is to call the declarant as a hostile witness.¹⁴⁰

Although the Third Circuit decided that the “plain language” of Rule 608(b) bans extrinsic evidence, it also acknowledged that the decision banned a form of impeachment.¹⁴¹ The courts should not limit counsel’s ability to impeach, and invariably control the tactical approach of the trial.

VI. PRESERVE IMPEACHMENT

Regularly, the hearsay opponent will not be able to cross-examine the declarant because the declarant never takes the stand.¹⁴² Rightfully, courts are hesitant to protect a non-testifying hearsay declarant from impeachment.¹⁴³ It is important to cross-examine the declarant to put the credibility and reliability of the admitted hearsay in question.¹⁴⁴ Such an inquiry requires the rule to be modified to allow extrinsic evidence in

¹³⁷ See Cordray, *supra* note 116, at 526 (“[I]f a party felt that a witness was vulnerable to attack under Rule 608(b), that party might attempt to insulate the witness from this form of impeachment by offering his out-of-court statements, rather than calling him to testify.”).

¹³⁸ Saada, 212 F.3d at 222; see generally 4 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 511 n.7 (2d ed. 1994); Cordray, *supra* note 116, at 525, 530.

¹³⁹ It is unlikely that the testifying witness knows the prior conduct of the declarant because many of the hearsay exceptions and qualifying hearsay exclusions pertain to situations where people are not in a close relationship with each other. For example, present sense impressions and excited utterances are often heard at a car accident or other event where people do not know each other. Moreover, exceptions to hearsay are made for certain documents based upon their inherent reliability, but people that testify to those documents, often coworkers, do not likely know their coworkers prior conduct.

¹⁴⁰ See Cordray, *supra* note 116, at 525-26 (advising litigators of the limited options if the declarant is available to testify).

¹⁴¹ See *United States v. Saada*, 212 F.3d 210, 221 (3d Cir. 2000) (noting the broad implications of the decision).

¹⁴² See TEGLAND, *supra* note 48, at §806.2.

¹⁴³ See ROGER PARK & TOM LININGER, THE NEW WIGMORE: A TREATISE ON EVIDENCE: IMPEACHMENT AND REHABILITATION § 2.6, at 87 (2012) (explaining the court’s reluctance to shield the declarant from impeachment).

¹⁴⁴ See BARKER & ALEXANDER, *supra* note 46, at §8.96 (suggesting the importance of cross-examination).

support of the declarant's bad acts.¹⁴⁵ When offered to prove prior bad acts, Rule 806 should be interpreted to modify Rule 608(b)'s ban on extrinsic evidence.¹⁴⁶ This avoids eliminating an effective, powerful and imperative form of impeachment.¹⁴⁷

*A. The Hidden Credibility Trick*¹⁴⁸

The hearsay opponent is disadvantaged when denied the opportunity to cross-examine the declarant.¹⁴⁹ Interrogating a witness specifically and repeatedly about specific instances of conduct is a potent impeachment tool, allowing counsel to convey suspicion and doubt to the jury.¹⁵⁰ The reliability of evidence is premised upon confrontation: "physical presence, oath, cross-examination, and observation of demeanor by the trier of fact."¹⁵¹ "[N]ervousness cannot be shown from a cold transcript[.]"¹⁵² The jury's observation of a witness's demeanor on cross examination is critical to assess the witness's credibility.¹⁵³ The trier of fact should be exposed to not only the demeanor of the witness, but the "nervousness, expressions, and other body language" of the testifying witness.¹⁵⁴ The trial court observes the "verbal and nonverbal behavior . . .

¹⁴⁵ See *id.* (assessing whether to modify the rule and allow extrinsic evidence to support a declarant's bad acts).

¹⁴⁶ See *Saada*, 212 F.3d at 221 (interpreting Rule 806 as modifying Rule 608(b)).

¹⁴⁷ See *id.*

¹⁴⁸ See DEREK ZUMSTEG, *THE CHEATER'S GUIDE TO BASEBALL* 63-65 (2004). This is a play-on-words based upon the well-known baseball term, the hidden ball trick. *Id.* The hidden ball trick is executed when a defenseman hides the ball, generally in his glove, palm or armpit, while the pitcher pretends to have it. See *id.* If the runner steps off of the base the defenseman with the "hidden ball" tags him out. *Id.*

¹⁴⁹ See FED. R. EVID. 806 (leveling the playing field between parties by exposing hearsay declarants to impeachment). Although the predicate of having the hearsay exceptions is that there is no cross-examination, courts overlook this disadvantage because of the statement's reliability. *Id.*

¹⁵⁰ See 3 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, *FEDERAL EVIDENCE* § 306, at 245 (1979) (stating that admissions are not necessary, as questions are enough caution to the jury).

¹⁵¹ See *Maryland v. Craig*, 497 U.S. 836, 837 (1990) (explaining the central purpose behind the Confrontation Clause).

¹⁵² See *Snyder v. Louisiana*, 552 U.S. 472, 479 (2008) (quoting *Snyder v. Louisiana*, 942 So.2d 484, 496 (La. 2008)); *United States v. Lakich*, 23 F.3d 1203, 1210-11 (7th Cir. 1994) (explaining the value of observing a witness testify over merely reading a transcript).

¹⁵³ See *Craig*, 497 U.S. at 837, 845-46 (explaining what the Confrontation Clause provides beyond that of a "personal examination"); see also *Snyder*, 552 U.S. at 490 (expressing the importance of observing demeanor firsthand).

¹⁵⁴ See *Gray v. Moore*, 520 F.3d 616, 627 (6th Cir. 2008) (quoting *United States v. Hamilton*, 107 F.3d 499, 503 (7th Cir. 1997)) (proposing that physical presence enhances the accuracy of fact finding).

reactions and responses . . . facial expressions, attitudes, tone of voice, eye contact, posture, and body movements . . .” of those whom testify before it.¹⁵⁵ Recognizing the value and weight of observing first-hand testimony, appellate courts defer to the trier of fact for determinations of credibility.¹⁵⁶

It is imbalanced for an out-of-court declarant to remain more credible than the testifying witness because the declarant had the luxury of not facing personal impeachment and exposure of his character flaws.¹⁵⁷ A hearsay opponent that does not have the opportunity to impeach the declarant with specific instances of conduct “is clearly worse off than . . . if her opponent had called the declarant to testify[.]” because the jury does not ascertain the emotions or hear the declarant’s responses first-hand.¹⁵⁸

B. Be There Or Be Square

In person cross-examination is an important tool at trial, but it is unavailable when the declarant does not testify.¹⁵⁹ The declarant’s credibility should be exposed to the rigors of impeachment as though that person testified.¹⁶⁰ The jury should have the opportunity to evaluate the declarant’s credibility to the same extent as a witness who testifies in court.¹⁶¹ “[T]he proper place for a challenge to a witness’s credibility is in cross-examination and in subsequent argument to the jury[.]”¹⁶² A jury should weigh the witness’s credibility when evaluating the evidence.¹⁶³

When Rule 806 is used to impeach the non-testifying hearsay

¹⁵⁵ See *United States v. Nobles*, 69 F.3d 172, 181 (7th Cir. 1995) (quoting *United States v. Eddy*, 8 F.3d 577, 582-83 (7th Cir. 1993)); *Lakich*, 23 F.3d at 1210-11 (addressing the factors assessed by viewing the declarant in person).

¹⁵⁶ See *Nobles*, 69 F.3d at 181 (allowing a trier of fact to determine credibility rather than appellate court because the appellate court is not in an appropriate position).

¹⁵⁷ See *PARK & LININGER*, *supra* note 143, at §2.6 (explaining that it is unfair to allow the declarant to avoid impeachment and remain credible).

¹⁵⁸ See *Cordray*, *supra* note 116, at 525.

¹⁵⁹ See Brief for Appellant at 39, *United States v. Saada*, 212 F.3d 210 (3d Cir. 2000) (Nos. 99-5126, 99-5148) (stating a court must judge the witness’s demeanor). The trier of fact considers not only the attorneys demeanor and arguments, but more importantly, the demeanor of the witnesses that take the stand and offer testimony. See generally *id.*

¹⁶⁰ See *JONES, ET AL.*, *supra* note 27, at §8:3296 (reasoning that the out-of-court declarant should face character and impeachment testimony).

¹⁶¹ See FED. R. EVID. 806 advisory committee’s note (establishing that the declarant’s credibility should be evaluated to the same degree as an in-court witness).

¹⁶² See *United States v. Truman*, 762 F. Supp. 2d 437, 449 (N.D.N.Y. 2011) (citation omitted) (internal quotation marks omitted) (revealing the importance of a witness’s credibility to a case’s outcome).

¹⁶³ See *Truman*, 762 F. Supp. 2d at 449 (advising the jury to factor credibility into the evidence’s weight).

declarant, the hearsay opponent cannot induce the declarant to admit to his prior specific acts or inquire about prior specific acts that could impeach the declarant's credibility.¹⁶⁴ The hearsay proponent is advantaged by Rule 806 and incentivized to proffer hearsay evidence rather than a live witness's testimony from the hearsay declarant.¹⁶⁵ Scholars have opined that, "the law of evidence should not provide incentives for the proffer and admission of hearsay evidence."¹⁶⁶ The trier of fact should be given every opportunity to exercise its discretion and analysis of a live witness. It is unfair to prohibit extrinsic evidence when the declarant cannot be confronted about the untruthful acts for which they are being impeached.¹⁶⁷ The declarant's absence from court complicates this already difficult form of impeachment.¹⁶⁸

"Rule 806 should be read as modifying . . . Rule [608(b)] . . . [by] permitting extrinsic evidence of . . . misconduct."¹⁶⁹ Requiring otherwise would unfairly force the attacking party to call the out-of-court declarant to the stand despite his opponent having introduced the statement giving rise to the attack.¹⁷⁰ Even worse, if the declarant is unavailable the impeaching party may be left with no other device for introducing relevant impeachment evidence.¹⁷¹ Irrespective of the declarant's availability, the impeaching party should not be forced to call the declarant if his opponent solicited the statement that is being impeached.¹⁷² The result is unfair.

In *Saada*, the Third Circuit justified their decision to ban the introduction of extrinsic evidence pursuant to Rule 608(b), in part, by

¹⁶⁴ See ROGER C. PARK, TRIAL OBJECTIONS HANDBOOK, § 4:87, at 4-223-24 (2nd ed. 2002) (illustrating how litigators utilize non-testifying hearsay declarants to their advantage).

¹⁶⁵ See Cordray, *supra* note 116, at 526 (concluding practitioners gain no advantage by using a live witness); see also Alan D. Hornstein, *On the Horns of an Evidentiary Dilemma: The Intersection of Federal Rules of Evidence 806 and 608(b)*, 56 ARK. L. REV. 543, 570 (2003) ("But where the hearsay declarant has engaged in conduct that might cast doubt on her veracity, Rule 806 leaves a lacuna that can serve to privilege hearsay over in-court testimony.").

¹⁶⁶ See Hornstein, *supra* note 165, at 570 (arguing that the Federal Rules of Evidence should not entice lawyers to offer hearsay evidence).

¹⁶⁷ See PARK & LININGER, *supra* note 143, at §2.6, at 85-86 (discussing the opportunity to confront declarant about untruthful acts); see also *United States v. Uvino*, 590 F. Supp. 2d 372, 375 (E.D.N.Y. 2008) (allowing the defendants to attack a non-testifying individual's veracity by reading documents to the jury pursuant to their Fifth Amendment rights).

¹⁶⁸ See PARK & LININGER, *supra* note 143, at §2.6, 85-87 (presenting difficult scenarios often encountered by courts and a litigators approach to those scenarios).

¹⁶⁹ See *United States v. Finley*, No. 87 CR 364-1, 1989 WL 58223, at *1 n.1 (N.D. Ill. May 19, 1989) (citation omitted) (holding that extrinsic evidence is admissible as long as it is relevant to credibility).

¹⁷⁰ See *id.* at *1 (developing issues presented by alternate reading of statutory interplay).

¹⁷¹ *Id.*

¹⁷² See LOUISELL & MUELLER, *supra* note 150, at §501, at 1241 (advocating that Rule 806 should permit extrinsic evidence of misconduct).

relying on the other means of impeachment that the opponent has available.¹⁷³ The *Saada* court was persuaded by the potential use of opinion and reputation evidence, convictions, and prior inconsistent statements.¹⁷⁴ Unfortunately, these other means of impeachment during cross-examination are not always available.¹⁷⁵ For example, if the witness that introduces the hearsay statement did not have contact with the declarant, then his answers during cross-examination will not be useful.¹⁷⁶ Moreover, of all the methods of proving character, evidence of prior conduct is the most persuasive.¹⁷⁷ If the hearsay opponent is not going to have the opportunity to cross-examine the hearsay declarant, it is only fair that he be given full authority to delve into all other manners of impeachment, subject to Rule 403.

VII. CRIMINAL CONSEQUENCES DO NOT AFFECT THE STANDARD

In a criminal trial there are consequences to the abuse of Rule 806 when used “to place otherwise inadmissible hearsay before the jury.”¹⁷⁸ These situations, as well as the admission of extrinsic evidence, should only be subjected to the Rule 403 balancing test.¹⁷⁹

¹⁷³ See *United States v. Saada*, 212 F.3d 210, 221 (3d Cir. 2000).

¹⁷⁴ See *id.* at 221.

“[O]ther avenues for impeaching the hearsay statement remain open. For example, the credibility of the hearsay declarant—and indeed that of the witness testifying to the hearsay statement—may be impeached with opinion and reputation evidence of character under Rule 608(a), evidence of criminal convictions under Rule 609, and evidence of prior inconsistent statements under Rule 613.”

Id.

¹⁷⁵ See *United States v. Washington*, 263 F. Supp. 2d 413, 423 n.5 (D. Conn. 2003) (stating regardless of the alternatives mentioned in *Saada*, “no such consolation prize exists for [all] defendants”).

¹⁷⁶ See *id.* (elaborating on why the options listed in *Saada* are unrealistic in many scenarios).

¹⁷⁷ See FED. R. EVID. 405 advisory committee’s note (opining that prior conduct is the most persuasive form of evidence).

¹⁷⁸ See *United States v. Fay*, 668 F.2d 375, 379 (8th Cir. 1981) (quoting *United States v. Rogers*, 549 F.2d 490, 497 (8th Cir. 1976), *cert. denied* 431 U.S. 918 (1977)) (acknowledging that litigators cannot introduce inadmissible hearsay without consequences).

¹⁷⁹ See *United States v. Robinson*, 783 F.2d 64, 68 (7th Cir. 1986) (holding that the court can decide how to shield the jury by “[w]eighing the value to each co-defendant of being able to impeach the credibility of the others against the prejudice to each of having his criminal convictions before the jury . . .”). Here, just as Rule 403 provides, prejudice is the determining factor in the judge’s analysis of scope and admissibility. See FED. R. EVID. 403 (basing admissibility, in part, on its prejudicial effect).

A. Background

If the hearsay declarant, or more likely the declarant of a statement admitted under 801(d)(2)(C), (D), or (E), is the defendant, his character may be exposed to the jury despite his decision not to testify.¹⁸⁰ For example, in a criminal trial, a prosecutor can offer a non-testifying defendant's admissible hearsay as the admission of a party opponent.¹⁸¹ Pursuant to Rule 607, the prosecutor can then impeach his own witness, the defendant.¹⁸² Therefore, a defendant that invokes his Fifth Amendment right against self-incrimination is not immune from impeachment.¹⁸³ These types of "pretext impeachments," however, are generally impermissible pursuant to other principles of law.¹⁸⁴

Alternatively, one scholar has suggested that the government can offer damaging non-pretextual testimony of the defendant's out-of-court statements into evidence and then impeach his own witness, the defendant, with prior convictions.¹⁸⁵ This does not conform to the parameters articulated in Rule 806.¹⁸⁶ Rule 806 does not include the admission of a party opponent, e.g., a confession, recognized under the umbrella of Rule 801(d)(2)(A).¹⁸⁷ Scenarios exist, however, where a defendant's credibility may be at risk despite never taking the stand. One of those risks is the admission of propensity evidence against the defendant.

Propensity evidence is evidence of similar conduct of the accused

¹⁸⁰ See Sonenshein, *supra* note 30, at 168-69 (describing a scenario when a hearsay declarant is subjected to character evidence).

¹⁸¹ See FED. R. EVID. 801(d)(2)(A) (regulating that a statement is not hearsay when it is an opposing party's statement and "[t]he statement is offered against an opposing party and: (A) was made by the party in an individual or representative capacity . . .").

¹⁸² See FED. R. EVID. 607 ("Any party, including the party that called the witness, may attack the witness's credibility."); see also Sonenshein, *supra* note 30, at 168. These examples were shown to illustrate that the baseline test for admissibility is Rule 403 and that Rule 608(b) serves the same exact purpose. Compare FED. R. EVID. 608(b) (adopting analysis to allow evidence with many similarities to Rule 403), with FED. R. EVID. 403 (creating a baseline balancing test used to determine evidence's admissibility).

¹⁸³ See U.S. Const. amend. V. ("No person shall be . . . compelled in any criminal case to be a witness against himself . . ."); see also *Robinson*, 783 F.2d at 68; *United States v. Bovain*, 708 F.2d 606, 613 (11th Cir. 1983).

¹⁸⁴ See *United States v. Peterman*, 841 F.2d 1474, 1479 (10th Cir. 1988) ("Evidence of the conviction of a codefendant, then, may be used for impeachment but may not be used to establish the guilt of the defendant.").

¹⁸⁵ See Sonenshein, *supra* note 30, at 168-69 (offering an alternate theory of pretext impeachment).

¹⁸⁶ See FED. R. EVID. 806 (excluding expressly Rule 801(a) and (b) from the rule's scope).

¹⁸⁷ See *id.* (illustrating that the rule does not allow for admissions of party opponents). Rule 806's language expressly omits certain hearsay exclusions, which do not give rise to the ability of the hearsay opponent to cross-examine the declarant. See *id.*

on similar occasions that demonstrates, in essence, a disposition of the accused to commit the underlying offense.¹⁸⁸ “Evidence of a crime, wrong, or other act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.”¹⁸⁹ For example, in a criminal case, the prosecution cannot introduce evidence that the defendant has a history of burglary to show that it is likely he committed the burglary for which he is on trial; past crimes cannot be used to prove guilt of a pending charge.¹⁹⁰ The government will not use past conduct because it is the proponent of the defendant’s confession; therefore it is counterproductive to ask the jury to disbelieve the confession based upon prior acts.¹⁹¹ These aforementioned scenarios are not allowed because the purpose is not to discredit the declarant’s credibility, but rather, to persuade the jury to apply the defendant’s convictions as propensity evidence.¹⁹²

Although this type of impeachment is generally disallowed, the court has discretion to admit the evidence for specific purposes which are explained to the jury.¹⁹³ In fact, the court “*must* restrict the evidence to its proper scope[.]”¹⁹⁴

B. Restriction Through Diction To Avoid the Infliction

In *United States v. Bovain*,¹⁹⁵ co-defendant John Nichols pled guilty and testified for the prosecution to out-of-court statements made by co-defendant Charles Finch.¹⁹⁶ The statements concerned co-defendant Dean Rickett’s drug activity.¹⁹⁷ Next, pursuant to Rule 806, Rickett attempted to impeach Finch’s credibility by introducing records

¹⁸⁸ See FED. R. EVID. 404(b)(1) committee’s note (defining propensity evidence); see also *Similar Fact Evidence Definition*, WORKING MANUAL OF CRIMINAL LAW (last visited Dec. 28, 2014), <http://www.duhaime.org/LegalDictionary/S/SimilarFactEvidence.aspx>.

¹⁸⁹ FED. R. EVID. 404(b)(1).

¹⁹⁰ See FED. R. EVID. 404(b)(2) (enumerating exceptions for which the prosecution may offer the evidence, “[t]his evidence may be admissible for . . . proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.”).

¹⁹¹ See Sonenshein, *supra* note 30, at 169 (illustrating why the analysis of certain evidentiary scenarios is not practical).

¹⁹² See *id.*

¹⁹³ See FED. R. EVID. 105 (“If the court admits evidence that is admissible against a party or for a purpose—but not against another party or for another purpose—the court . . . must restrict the evidence to its proper scope and instruct the jury accordingly.”).

¹⁹⁴ *Id.* (emphasis added).

¹⁹⁵ 708 F.2d 606 (11th Cir. 1983).

¹⁹⁶ *Id.* at 608, 613.

¹⁹⁷ *Id.* at 608.

constituting extrinsic evidence of Finch's prior convictions.¹⁹⁸ Finch's credibility was open to evidentiary support because extrinsic evidence is permitted to show prior convictions.¹⁹⁹ Then, Finch was forced to defend his credibility despite his never taking the stand.²⁰⁰ If defendants assert their Fifth Amendment right against self-incrimination, they are left with no alternative to admitting rebuttal evidence.²⁰¹

The *Bovain* court instructed the jury that Finch's convictions could only be used to discredit the accuracy of his statements, not as propensity evidence attributable to his guilt.²⁰² Alternatively, other judges chose to "protect the defendants' presumption of innocence by refusing to allow impeachment with evidence of prior convictions."²⁰³ In both instances, the courts' decisions were subject to Rule 403.²⁰⁴

VIII. INDECENT PROPOSALS

One scholar suggested that Rule 806 be modified to address and clarify its nonconformity with Rule 608(b).²⁰⁵ Another scholar recommended that courts should decide whether to admit extrinsic evidence on a case-by-case basis using a balancing test of factors.²⁰⁶ This suggestion is impractical because it would be too inconsistent, exacerbating rather than solving the discrepancy. Another ineffective proposal focuses

¹⁹⁸ *Id.* at 613.

¹⁹⁹ *See* FED. R. EVID. 608(b) (allowing extrinsic evidence when it concerns prior convictions); *Bovain*, 708 F.2d at 613.

²⁰⁰ *See Bovain*, 708 F.2d at 613; *see also* FED. R. EVID. 608(b) (discussing the use of extrinsic evidence to prove prior convictions).

²⁰¹ *See United States v. Bovain*, 708 F.2d 606, 613 (11th Cir. 1983).

²⁰² *See Bovain*, 708 F.2d at 613.

"The defendant in a criminal case has an absolute right under our Constitution not to testify. The fact that Defendant did not testify must not be discussed or considered in any way when deliberating and in arriving at your verdict. No inference of any kind may be drawn from the fact that a defendant decided to exercise [his] [her] privilege under the Constitution and did not testify. As stated before, the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or of producing any evidence."

O'MALLEY ET AL., *supra* note 10, at §15:14, at 450.

²⁰³ *See, e.g., United States v. Robinson*, 783 F.2d 64, 68 (7th Cir. 1986).

²⁰⁴ *See id.* The court always has the option to exclude relevant evidence pursuant to Rule 403, and thus the admission of evidence by the *Bovain* court implicitly demonstrates the court's decision that the evidence was not worthy of exclusion for any of the enumerated reasons. *Id.*; *see also Bovain*, 708 F.2d at 613.

²⁰⁵ *See Cordray, supra* note 116, at 530-31 (proposing an amendment to Rule 806).

²⁰⁶ *See Hornstein, supra* note 165, at 571 (establishing multi-faceted test assessing, "the importance of the declarant's statement, [and] the extent to which the misconduct might affect the fact-finder's assessment of the declarant's veracity because of the nature of the misconduct or its attenuation in time . . .").

on the judiciary's understanding—or lack of understanding—of what classifies as extrinsic evidence.²⁰⁷ The argument contends that Rule 806 allows the opponent of the hearsay statement to attack a non-testifying declarant's credibility.²⁰⁸ Although Rule 806 allows counsel to treat the testifying witness as the out-of-court declarant for the purposes of impeachment, it does not specify whether the court should consider the actual presence of the non-testifying witness.²⁰⁹ In other words, should we imagine that the declarant is there, and give credit to that manifestation to realize an actual appearance? Alan D. Hornstein argues that the *White* court misunderstood extrinsic evidence and “endorsed the admission of [certain types of] extrinsic evidence[.]” rather than entirely banning it pursuant to Rule 608(b).²¹⁰ Fortunately, such a debate is unnecessary.

Neither an amendment to Rule 806, nor an additional balancing test, nor a dictionary or academic debate, is necessary to resolve this issue. Currently, courts do not analyze Rule 608(b) very often because of the restrictions that Rule 403 imposes. If evidence survives the scrutiny of Rule 403, as well as other relevant rules, it should be admitted into evidence.

IX. STRIKE . . . “ABOVE, BUT NOT BELOW, THE BELT”²¹¹

Rule 806 does not expressly impose a test of probative value.²¹² Despite its silence, the trial court still must weigh the evidence upon the judicial scale of relevance and assess the Rule 403 balancing test.²¹³ The court decides which questions are appropriate and probative pursuant to Rule 403.²¹⁴ Moreover, the court may exclude evidence that is otherwise

²⁰⁷ See Hornstein, *supra* note 165, at 552 (discussing the perceived misnomer of “extrinsic evidence” by the court in *White*); see also *United States v. White*, 116 F.3d 903, 920 (D.C. Cir. 1997) (refusing to categorize the cross-examination of a testifying witness regarding the non-testifying hearsay declarant's credibility as extrinsic evidence).

²⁰⁸ See FED. R. EVID. 806.

²⁰⁹ See *id.*

²¹⁰ See Hornstein, *supra* note 165, at 552; see also Sonenshein, *supra* note 30, at 166 (“Rule 806 impeachment is, by definition, based on extrinsic evidence”).

²¹¹ See *People v. Vasher*, 537 N.W.2d 168, 172 (Mich. 1995) (quoting *State v. Rollo*, 351 P.2d 422, 427 (Or. 1960)) (commenting that Rule 403 bars prejudicial evidence hitting metaphorically “below the belt”).

²¹² See *United States v. Mejia-Velez*, 855 F. Supp. 607, 615-16 (E.D.N.Y. 1994).

²¹³ See FED. R. EVID. 401 (defining relevant evidence as making a material fact more or less probable); *Mejia-Velez*, 855 F. Supp. at 614; see also *Vaughn v. Willis*, 853 F.2d 1372, 1379 (7th Cir. 1988).

²¹⁴ See *Armstrong v. Bair*, No. CIV-03-0255-C, 2007 WL 626043, at *5 (W.D. Okla. Feb. 23, 2007) (determining the allowance of evidence under Rule 403).

admissible under Rule 608(b) if it fails the Rule 403 balancing test.²¹⁵

Rule 608(b) seeks to avoid confusing the trier of fact and a “mini-trial” on the tangential point of a witness’s prior conduct resulting in an undue consumption of time.²¹⁶ In addition, allowing false allegations of misconduct would force the witness to unrealistically defend against every alleged act of his life.²¹⁷

Safeguards exist to avoid such situations. For example, to inquire into a witness’s prior conduct on cross-examination, counsel must first have a “good faith basis for the question.”²¹⁸ Some courts may require concrete proof before allowing such a line of interrogation.²¹⁹ Without the requirements of good faith and occasionally concrete evidence, courts would permit a “fishing expedition,” resulting in a waste of time for the court and the parties involved.²²⁰ The evidence, of course, is still subject to the Rule 403 test that protects against unfair prejudice.²²¹

²¹⁵ See *id.* at *3 (deciding that admitting a judicial decision as extrinsic evidence was improper to impeach a *testifying* declarant); see also *United States v. Bedonie*, 913 F.2d 782, 802 (10th Cir. 1990) (discussing Rule 608(a)); *United States v. Uvino*, 590 F. Supp. 2d 372, 375 (E.D.N.Y. 2008) (citing *United States v. Friedman*, 854 F.2d 535, 570 (2d Cir. 1988)) (“determinations of relevance and rulings as to the proper scope of cross-examination, must be left to the broad discretion of the trial judge . . .”). The court may admit evidence that is traditionally excluded pursuant to Rule 608(b), however, instances exist where the jury is exposed to character evidence that must be subject to rebuttal in the interests of justice. See, e.g., *United States v. Castillo*, 181 F.3d 1129, 1133 (9th Cir. 1999) (affirming Judge Miller, who was interviewed for this article, and permitting extrinsic evidence of drug related conduct because the defendant testified and inaccurately portrayed himself as a model citizen).

²¹⁶ See WIGMORE, *supra* note 116, at §979, at 826; Cordray, *supra* note 116, at 523; Hale, *supra* note 116, at 89-90 (excluding extrinsic evidence because of “(1) confusion of issues; (2) undue consumption of time; (3) unfair surprise”); see also *United States v. Saada*, 212 F.3d 210, 222 (3d Cir. 2000) (citing *Carter v. Hewitt*, 617 F.2d 961, 971 (3d Cir. 1980)); accord *United States v. Martz*, 964 F.2d 787, 789 (8th Cir. 1992), *cert. denied*, 506 U.S. 1038 (1992) (stating that the purpose of Rule 608(b) is to avoid mini-trials); *Foster v. United States*, 282 F.2d 222, 223 (10th Cir. 1960).

²¹⁷ See WIGMORE, *supra* note 116, at §979, at 826-27; see also *United States v. Banks*, 475 F.2d 1367, 1368 (5th Cir. 1973).

²¹⁸ See *Michelson v. United States*, 335 U.S. 469, 481 (1948) (suggesting counsel needs a good faith basis for questions during cross-examination); *White v. Coplan*, 399 F.3d 18, 25 (1st Cir. 2005) (declaring an assumption of good faith basis for asking questions is necessary); *United States v. Guay*, 108 F.3d 545, 552 (4th Cir. 1997) (discussing that a good faith basis is needed for questions during cross-examination); *United States v. Lamarr*, 75 F.3d 964, 971 (4th Cir. 1996), *cert. denied*, 519 U.S. 948 (1996) (developing the principle of good faith basis for inquiring into incidents during impeachment); O’MALLEY, ET AL., *supra* note 10, at §6.3, at 573-74 (explaining the importance of preliminary proceedings to give opposing counsel a forum to oppose certain questions).

²¹⁹ See *Interview with Senior Judge Thomas J. Whelan*, *supra* note 54 (indicating circumstances where proof of prior conduct is needed before the Rule 403 test).

²²⁰ See *id.*

²²¹ See *United States v. Friedman*, 854 F.2d 535, 570 (2d Cir. 1988); JONES, ET AL., *supra*

Unfair prejudice includes, but is not limited to, evidence that the jury will unduly weigh more heavily or the inequitable use of such evidence.²²² The court must decide whether a declarant's past conduct sheds doubt on his credibility.²²³ This is done by comparing the circumstances surrounding the prior conduct with those surrounding the hearsay statement.²²⁴ This is sufficiently accomplished with the use of Rule 403.

X. CONCLUSION

An attorney has an ethical obligation to defer to his client in determining the objectives of the representation as well as how the objectives will be accomplished.²²⁵ With respect to the "technical, legal and tactical matters," clients often defer to the attorney for his expertise and knowledge.²²⁶ For the attorney to be effective at trial, the necessary tools must be available, and at times this requires an adjustment of the rules.²²⁷ Enforcing the blanket ban on extrinsic evidence would preclude the use of one of the most important tools for impeachment provided to an attorney, the introduction of prior conduct.²²⁸ Rule 806 serves to provide equal ground between live witnesses and non-testifying hearsay declarants, avoiding a net gain to the proponent who otherwise escapes impeachment, "and a net loss for the fact-finding process."²²⁹ This is only possible, however, if Rule 608(b) is ignored.

Rule 806 establishes its own rule for admissibility, subject to the balancing test of Rule 403. Rule 806 intends to modify the ban on extrinsic evidence imposed by Rule 608(b), allowing extrinsic evidence of specific acts for impeachment.²³⁰ The Third and D.C. Circuits have erred in

note 27, at §8:3285.

²²² See GRAHAM, *supra* note 26, at §806:1 (citing *People v. Mills*, 537 N.W.2d 909, 917 (Mich. 1995)). In addition, Rule 611 bars harassment and undue embarrassment. See FED. R. EVID. 611(a)(3).

²²³ See *United States v. Uvino*, 590 F. Supp. 2d 372, 375 (E.D.N.Y. 2008) (citing *Friedman*, 854 F.2d at 570).

²²⁴ See *id.*

²²⁵ See MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (1983).

²²⁶ See MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. (1983).

²²⁷ See PAUL F. ROTHSTEIN, FEDERAL RULES OF EVIDENCE 841 (3rd ed. 2014).

²²⁸ See Cordray, *supra* note 116, at 525 (stressing the necessity of presenting prior conduct for impeachment purposes).

²²⁹ See Sonenshein, *supra* note 30, at 164.

²³⁰ See generally Cordray, *supra* note 116, at 522 (suggesting that it is possible that Rule 806 modifies Rule 608(b) because "Rule 806 could be understood to allow the general type of impeachment authorized in Rule 608(b), making allowances for necessary alterations in form");

enforcing the ban on extrinsic evidence. The rules and their legislative intent demonstrate that Rule 608(b) should not apply in concert with Rule 806.

The solution is to strike Rule 608(b) from the Federal Rules of Evidence because it seeks to avoid the same trials and tribulations prevented by Rule 403. It does not matter if the declarant is unavailable because there are too many extenuating circumstances regarding incrimination and refusal to testify, creating more problems. Attempting to decipher and filter through these scenarios is itself an undue burden, waste of time, and cause for confusion to the courts and counsel, because the rule itself is not needed. Because admissibility under Rule 403 is an adequately limiting fact intensive decision,²³¹ judicial economy, as well as relative trial prediction and consistency in the rules of evidence, can be accomplished by striking Rule 608(b). To serve the interests of justice, courts should dispose of the limits placed upon relevant extrinsic evidence for impeachment purposes imposed by Rule 608(b), particularly when applied in conjunction with Rule 806.²³²

see also Hornstein, *supra* note 165, at 556-58 (citing *United States v. Saada*, 212 F.3d 210, 219-20 (3d Cir. 2000)) (explaining the government's argument to the court).

²³¹ *Interview with Senior Judge Jeffrey T. Miller, supra* note 54.

²³² *See* BARKER & ALEXANDER, *supra* note 46, at §8.96; *see also* *Taylor v. State*, 963 A.2d 197, 211, 213 (Md. 2009) (reversing conviction because defendant should have been permitted to impeach hearsay declarant with evidence of unconvicted acts pertaining to veracity); *State v. Martisko*, 566 S.E.2d 274, 276 (W.Va. 2002) (permitting extrinsic evidence in the form of a prior complaint).