STATE OF WISCONSIN

SUPREME COURT

In re:

WISCONSIN STATUTES §§ 901.07, 906.08, 906.09, and 906.16

AMENDED PETITION OF WISCONSIN JUDICIAL COUNCIL FOR AN ORDER AMENDING WIS. STATS. §§ 901.07, 906.08, 906.09; AND CREATING WIS. STAT. § 906.16

April M. Southwick
WI State Bar No. 1070506
110 East Main Street, Suite 822
Madison, WI 53703
(608) 261-8290
(608) 261-8289 (facsimile)
april.southwick@wicourts.gov

ON BEHALF OF THE WISCONSIN JUDICIAL COUNCIL

March 23, 2017

The Wisconsin Judicial Council respectfully petitions the Wisconsin Supreme Court to amend WIS. STATS. §§ 901.07, 906.08, and 906.09; and create WIS. STAT. § 906.16. This petition is directed to the Supreme Court's rule-making authority under WIS. STAT. § 751.12.

PETITION

The Judicial Council respectfully requests that the Supreme Court adopt the following:

SECTION 1. 901.07 (title) of the statutes is amended to read:

901.07. Remainder of or related writings or ~~recorded~~ statements.

SECTION 2. 901.07 of the statutes is amended to read:

901.07. Remainder of or related writings or statements. When any part of a writing or ~~recorded~~ statement ~~or part thereof~~, whether recorded or unrecorded, is introduced by a party, an adverse party may require the party at that time to introduce any other part or any other writing or ~~recorded~~ statement which ought in fairness to be considered contemporaneously with it to provide context or prevent distortion.

Judicial Council Committee Note:
This amendment is consistent with *State v. Eugenio*, 219 Wis. 2d 391, 410, 579 N.W.2d 642, 651 (1998), which acknowledged that the rule of completeness is applicable to oral testimony, and with *State v. Anderson*, 230 Wis. 2d 121, 600 N.W.2d 913 (Ct. App.), review denied, 230 Wis.2d 275, 604 N.W.2d 573 (1999), which provided guidance on how, and when, to apply the rule of completeness.

"The rule of completeness, however, should not be viewed as an unbridled opportunity to open the door to otherwise inadmissible evidence. Under the rule of completeness the court has discretion to admit only those statements which are necessary to provide context and prevent distortion. The circuit court must closely scrutinize the proffered additional statements to avert abuse of the rule…'[A]n out-of-court statement that is inconsistent with the declarant's trial testimony does not carry with it, like some evidentiary Trojan Horse, the entire regiment of other out-of-court statements that

might have been made contemporaneously.' " *Eugenio*, 219 Wis.2d at 412 (citations omitted).

SECTION 3. 906.08 (2) of the statutes is amended to read:

906.08 (2) SPECIFIC INSTANCES OF CONDUCT. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's ~~credibility~~ character for truthfulness, other than a conviction of a crime or an adjudication of delinquency as provided in s. 906.09, may not be proved by extrinsic evidence. They may, however, subject to s. 972.11 (2), if probative of truthfulness or untruthfulness and not remote in time, be inquired into on cross-examination of the witness or on cross–examination of a witness who testifies to his or her character for truthfulness or untruthfulness.

SECTION 4. 906.08 (3) of the statutes is amended to read:

906.08(3) TESTIMONY BY ACCUSED OR OTHER WITNESSES. The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the privilege against self-incrimination when examined with respect to matters which relate only to ~~credibility~~ character for truthfulness.

Judicial Council Committee Note:

The following federal Advisory Committee Note regarding the 2003 amendment to FED. R. EVID. 608 is instructive, though not binding, in understanding the scope and purpose of the amendments to s. 906.08 (2) and (3).

> The Rule has been amended to clarify that the absolute prohibition on extrinsic evidence applies only when the sole reason for proffering that evidence is to attack or support the witness' character for truthfulness. *See United States v. Abel*, 469 U.S. 45 (1984); *United States v. Fusco*, 748 F.2d 996 (5th Cir. 1984) (Rule 608(b) limits the use of evidence "designed to show that the witness has done things, unrelated to the suit being tried, that make him more or less believable per se"); Ohio R.Evid. 608(b). On occasion the Rule's use of the overbroad term "credibility" has been read "to bar extrinsic evidence for bias, competency and contradiction impeachment since they too deal with credibility." American Bar Association Section of Litigation, *Emerging Problems Under the Federal Rules of Evidence* at 161 (3d ed. 1998). The amendment conforms the language of the Rule to its original intent, which was to impose an absolute bar on extrinsic evidence only if the sole purpose for offering the evidence was to prove the witness' character for veracity. See Advisory Committee Note to Rule 608(b) (stating that the Rule is "[i]n conformity with Rule 405, which forecloses use of evidence of specific incidents as proof in chief of character unless character is in issue in the case ... ").

By limiting the application of the Rule to proof of a witness' character for truthfulness, the amendment leaves the admissibility of extrinsic evidence offered for other grounds of impeachment (such as contradiction, prior inconsistent statement, bias and mental capacity) to Rules 402 and 403. *See, e.g., United States v. Winchenbach*, 197 F.3d 548 (1st Cir. 1999) (admissibility of a prior inconsistent statement offered for impeachment is governed by Rules 402 and 403, not Rule 608(b)); *United States v. Tarantino*, 846 F.2d 1384 (D.C. Cir. 1988) (admissibility of extrinsic evidence offered to contradict a witness is governed by Rules 402 and 403); *United States v. Lindemann*, 85 F.3d 1232 (7th Cir. 1996) (admissibility of extrinsic evidence of bias is governed by Rules 402 and 403).

It should be noted that the extrinsic evidence prohibition of Rule 608(b) bars any reference to the consequences that a witness might have suffered as a result of an alleged bad act. For example, Rule 608(b) prohibits counsel from mentioning that a witness was suspended or disciplined for the conduct that is the subject of impeachment, when that conduct is offered only to prove the character of the witness. *See United States v. Davis*, 183 F.3d 231, 257 n.12 (3d Cir. 1999) (emphasizing that in attacking the defendant's character for truthfulness "the government cannot make reference to Davis's forty-four day suspension or that Internal Affairs found that he lied about" an incident because "[s]uch evidence would not only be hearsay to the extent it contains assertion of fact, it would be inadmissible extrinsic evidence under Rule 608(b)"). *See also* Stephen A. Saltzburg, *Impeaching the Witness: Prior Bad Acts and Extrinsic Evidence*, 7 Crim. Just. 28, 31 (Winter 1993) ("counsel should not be permitted to circumvent the no-extrinsic-evidence provision by tucking a third person's opinion about prior acts into a question asked of the witness who has denied the act").

For purposes of consistency the term "credibility" has been replaced by the term "character for truthfulness" in the last sentence of subdivision (b). The term "credibility" is also used in subdivision (a). But the Committee found it unnecessary to substitute "character for truthfulness" for "credibility" in Rule 608(a), because subdivision (a)(1) already serves to limit impeachment to proof of such character.

SECTION 5. 906.09 (1) of the statutes is amended to read:

906.09. Impeachment by evidence of conviction of crime or adjudication of delinquency. (1) GENERAL RULE. For the purpose of attacking ~~the credibility~~ character

for truthfulness, ~~of~~ a witness~~, evidence that the witness has been convicted of a crime or adjudicated delinquent is admissible.~~ may be asked whether the witness has ever been convicted of a crime or adjudicated delinquent and the number of such convictions or adjudications. ~~The party cross examining the witness is not concluded by the witness's answer.~~ If the witness's answers are consistent with the previous determination of the court pursuant to subsection (3), then no further inquiry may be made unless it is for the purpose of rehabilitating the ~~credibility of the witness~~ witness's character for truthfulness.

SECTION 6. 906.09 (2) of the statutes is renumbered 906.9 (2) (intro.) and amended to read:

(2) Exclusion. Evidence of a conviction of a crime or an adjudication of delinquency may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Factors for a court to consider in evaluating whether to admit evidence of prior convictions for ~~impeachment purposes~~ the purpose of attacking a witness's truthful character include:

SECTION 7. 906.09 (2) (a) to (f) of the statutes are created to read:

906.09 (2) (a) The lapse of time since the conviction.
(b) The rehabilitation or pardon of the person convicted.
(c) The gravity of the crime.
(d) The involvement of dishonesty or false statement in the crime.
(e) The frequency of the convictions.
(f) Any other relevant factors.

SECTION 8. 906.09 (3) of the statutes is amended to read:

(3) Admissibility of conviction or adjudication. No question inquiring with respect to a conviction of a crime or an adjudication of delinquency, nor introduction of evidence with respect thereto, shall be permitted until the ~~judge~~ court determines pursuant to s. 901.04 whether the evidence should be excluded.

Judicial Council Committee Note:
The amendment to sub. (1) is intended to conform the rule more closely to current practice. It is consistent with *Nicholas v. State*, 49 Wis.2d 683, 183 N.W.2d 11 (1971) and *State v. Bailey*, 54 Wis.2d 679, 690, 196 N.W.2d 664, 670 (1972).

The following federal Advisory Committee Note regarding the 2006 amendment to federal Rule 609 is instructive.

The amendment also substitutes the term "character for truthfulness" for the term "credibility" in the first sentence of the Rule. The limitations of Rule 609 are not applicable if a conviction is admitted for a purpose other than to prove the witness's character for untruthfulness. *See, e.g., United States v. Lopez*, 979 F.2d 1024 (5th Cir. 1992) (Rule 609 was not applicable where the conviction was offered for purposes of contradiction).

The amendment to sub. (2) continues to recognize the long-standing principle that this statutory exclusion is a "particularized application" of s. 904.03, *State v. Gary M.B.*, 2004 WI 33, ¶ 21, 270 Wis. 2d 62, 81, 676 N.W.2d 475, 485, and codifies the holding in *Gary M.B.* that circuit courts are required, in determining whether to admit or exclude prior convictions, to examine a number of factors. Majority op., ¶ 21; Chief Justice Abrahamson's dissent, ¶ 56; Justice Sykes' dissent, ¶ 85, *State v. Kuntz,* 160 Wis.2d 722, 752, 467 N.W.2d 531 (1991); *State v. Kruzycki,* 192 Wis.2d 509, 525, 531 N.W.2d 429 (Ct. App. 1995); *State v. Smith,* 203 Wis.2d 288, 295-96, 553 N.W.2d 824 (Ct. App. 1996). However, the committee recognizes that in conducting the balancing test, the circuit court need only consider those factors applicable to the case. *Kuntz*, 160 Wis.2d at 753, 467 N.W.2d 531. Sub. (2) does not include expungement because evidence of a conviction expunged under Wis. Stat. § 973.015(1) is not admissible under this rule. *State v. Anderson*, 160 Wis.2d 435, 437 (Ct. App. 1991).

In *State v. Gary M.B.*, the majority observed that "in the future, it would be prudent for circuit courts to explicitly set forth their reasoning in ruling on § 906.09(2) matters in order to demonstrate that they considered the relevant balancing factors applicable in the case before them." 2004 WI 33, ¶ 35, 270 Wis. 2d 62, 87-88, 676 N.W.2d 475, 488. Chief Justice Abrahamson noted, "[t]he purposes of requiring a circuit court to perform this process on the record are many. The process increases the probability that a circuit court will reach the correct result, provides appellate courts with a more meaningful record to review, provides the parties with a decision that is comprehensible, and increases the transparency and accountability of the judicial system." Chief Justice Abrahamson's dissent, ¶ 48.

Formatted: Hidden

SECTION 9. 906.16 of the statutes is created to read:

906.16. Bias of witness. For the purpose of attacking the credibility of a witness, evidence of bias, prejudice, or interest of the witness for or against any party to the case is admissible.

Judicial Council Committee Note:
This rule is adopted from the Uniform Rules of Evidence 616, which codifies *United States v. Abel*, 469 U.S. 45, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984). The rule codifies the common law in Wisconsin. *See State v. Long*, 2002 WI App 114, ¶ 18, 255 Wis. 2d 729, 647 N.W.2d 884 (Ct. App. 2002) ("Wisconsin law is in accordance with the principle set forth in Abel."). The committee viewed codification of the rule as useful, however, to reiterate that bias, prejudice, or interest of a witness is a fact of consequence under Wis. Stat. § 904.01. Further, the rule should make it clear that bias, prejudice, or interest is not a collateral matter, and can be established by extrinsic evidence. *State v. Williamson*, 84 Wis. 2d 370, 383, 267 N.W.2d 337, 343 (1978) ("The bias or prejudice of a witness is not a collateral issue and extrinsic evidence may be used to prove that a witness has a motive to testify falsely…The extent of the inquiry with respect to bias is a matter within the discretion of the trial court.")

The Wisconsin Judicial Council respectfully requests that the Court publish the Judicial Council Committee Notes to proposed WIS. STATS. §§ 901.07, 906.08, 906.09, and 906.16.

Dated March 23, 2017.

RESPECTFULLY SUBMITTED,

WISCONSIN JUDICIAL COUNCIL

_____

April M. Southwick, Attorney
WI State Bar #1070506
110 E. Main Street, Suite 822
Madison, Wisconsin 53703
(608) 261-8290
Facsimile: (608) 261-8289
april.southwick@wicourts.gov