

Serial: 155183

IN THE SUPREME COURT OF MISSISSIPPI

No. 89-R-99002-SCT

IN RE: MISSISSIPPI RULES OF EVIDENCE

ORDER

This matter is before the Court en banc on the Motion to Amend Certain Rules of the Mississippi Rules of Evidence filed by the Supreme Court Advisory Committee on Rules. After due consideration, the Court finds that the amendment of Rule 608 and the Comment as set forth in Exhibit “A” will promote the fair and efficient administration of justice.

IT IS THEREFORE ORDERED that the petition is hereby granted to the extent that Rule 608 and Comment of the Mississippi Rules of Evidence is amended as set forth in Exhibit “A” hereto. This amendment is effective on July 1, 2009.

IT IS FURTHER ORDERED that the Clerk of this Court shall spread this order upon the minutes of the Court and shall forward a true certified copy to West Publishing Company for publication as soon as practical in the advance sheets of *Southern Reporter, Third Series (Mississippi Edition)* and in the next edition of *Mississippi Rules of Court*.

SO ORDERED, this the 22nd day of May, 2009.

/s/ George C. Carlson, Jr. _____

GEORGE C. CARLSON, JR., PRESIDING
JUSTICE

TO DENY: DICKINSON, RANDOLPH AND CHANDLER, JJ.
NOT PARTICIPATING: KITCHENS, J.

Exhibit A

Rule 608. Evidence of Character and Conduct of Witness

(a) Opinion and Reputation Evidence of Character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific Instances of Conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's ~~his~~ ~~credibility~~ character for truthfulness, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness's ~~his~~ character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

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

[Amended effective July 1, 2009.]

Comment

Rule 608 is concerned with character evidence of witnesses. Rule 404(a) prohibits the use of character evidence to prove conformity of conduct, but with some exceptions. Rule 608 addresses those exceptions. Thus, it is necessary to read both rules together.

Subsection (a) permits the introduction of character evidence of a witness only after the witness's ~~his~~ character for veracity has been attacked. A party may not bolster the ~~his~~ ~~witness's~~ character of the party's own witness; the party can only react in response to a charge of untruthfulness. ~~This conforms to existing practice in Mississippi. See *Austin v. Montgomery*, 336 So.2d 745 (Miss. 1976). A second limitation in subsection (a) is that Moreover, only the witness's character for truthfulness or its opposite can be attacked. Other character traits are irrelevant for impeachment purposes. Subsection (a) provides that the eEvidence shall be produced~~

in the form of an opinion or reputation. In Mississippi it has been customary to impeach using reputation evidence. See *Pickens v. State*, 61 Miss. 663 (1884). Only when a foundation was laid showing that the impeaching witness knew the reputation of the other witness was he allowed to give an opinion. Subsection (a) simplifies the admission of opinion evidence. The reason for this is that today it is generally recognized that reputation evidence is nothing more than opinion evidence and that it holds no greater likelihood of certainty than does opinion. See McCormick, *Evidence*, § 44.

Subsection (b) flatly prohibits impeaching the impeachment of a witness's character for truthfulness via *extrinsic proof of* by specific acts of the witness's conduct, but it provides two important exceptions. First, a witness may be impeached by a except criminal convictions pursuant to Rule 609, which governs the kinds of criminal convictions which may be used to attack a witness. Mississippi has traditionally allowed a witness to be impeached by evidence of a criminal conviction but not by other specific acts. See *Vick v. Cochran*, 316 So.2d 242 (Miss. 1976); *Allison v. State*, 274 So.2d 678. Details of the crime may not be elicited. — In contrast, specific instances of conduct of the witness may, in the discretion of the court, be inquired into on cross-examination of that witness (or on cross-examination of another who testifies concerning that witness's character for truthfulness) if probative of truthfulness or untruthfulness. See *Brent v. State*, 632 So.2d 936, 944 (Miss. 1994) (“If the past conduct did not involve lying, deceit, or dishonesty in some manner, it cannot be inquired into on cross-examination.”)

This absolute prohibition on extrinsic evidence applies only when the sole reason for proffering that evidence is to attack or support the witness's character for truthfulness. The admissibility of extrinsic evidence offered for other grounds of impeachment, such as contradiction, prior inconsistent statement, bias, and mental or sensory capacity, is governed by Rules 402, 403, and 616.

The extrinsic evidence prohibition of Rule 608(b) bars the use of any kind of evidence, including documents or the testimony of other witnesses, except a direct admission by the witness being cross-examined. See Brent at 945 (“a party cross-examining a witness about past instances of conduct is bound by the witness's answer [and] is not permitted to offer evidence in rebuttal to contradict it.”) The extrinsic evidence prohibition likewise 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)".

The second exception of Rule 608 goes further than pre-rule Mississippi practice. This exception allows for impeachment by specific acts which are something other than criminal convictions when the character trait of truthfulness of the witness being cross-examined is under attack. The second exception also allows the witness to be cross-examined regarding specific acts involving the truthfulness of another witness about whom he has testified. This exception only applies when the character trait of truthfulness or untruthfulness is being explored.

Of course, counsel must have a good faith basis before beginning to inquire on cross-examination about specific instances of past conduct, and may not merely seek a "fishing license." Brent, 632 So.2d at 645.

The last sentence of Rule 608 seeks to guarantee that a witness does not waive the his privilege against self-incrimination when he is questioned about matters relating to his credibility.

[Comment amended effective July 1, 2009.]