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# Informant Credibility and Evidence of Cooperation in Other Cases

*Clifford S. Fishman*<sup>†</sup>

## Abstract

*Professor Clifford Fishman here addresses many of the issues that arise when an informant is used as a witness at trial*

## Introduction

The prosecutor calls an informant as a witness. Her carefully prepared questions elicit in damning detail how—according to the informant—the defendant eagerly participated in the crimes charged in the indictment. On cross, defense counsel goes into full attack mode, covering the informant’s prior convictions, his other unsavory and untruthful acts, and the informant’s sordid reasons for cooperating with the police—money, a break on his own case, or both.<sup>1</sup>

To rehabilitate the informant, the prosecutor wants to elicit testimony from police officers about the many cases the informant has helped them make and how truthful he has always been in the process. To what extent

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From 1969 to 1977 Professor Fishman served as an Assistant District Attorney in New York County District Attorney’s Office and as Chief Investigating Assistant D.A. in New York City’s Special Narcotics Prosecutor’s Office where, among other things, he tried dozens of jury trials; wrote and supervised the execution of more than thirty wiretap and eavesdrop orders; wrote search warrants leading to the seizure of untold quantities of heroin, cocaine, and marijuana as well as a two hundred pound bog of peat moss; oversaw the purchase of the most expensive pound of pancake mix in law enforcement history; and acquired extensive experience in the care and feeding of informants.

<sup>1</sup> Often a prosecutor will elicit much of this negative material on direct examination, in the hopes of reducing its sting somewhat and of enabling her to tell the jury during final argument that she was “open and frank” with them and “did not attempt to hide” the informant’s less than pristine past. (It costs nothing to be “open and frank” about information the other side has an absolute right to bring out anyway.) Even so, defense counsel undoubtedly will cover the same information, in greater detail and with maximum sarcasm and indignation.

should she be allowed to do so? And once she does, what can defense counsel do in response?

This situation arises frequently in criminal trials, although surprisingly, not all that often in reported opinions. This Article discusses the law and tactics of the situation.

## I. "Character Evidence"

It is axiomatic that a party may not bolster the credibility of a witness unless and until that credibility has been attacked.<sup>2</sup> The advisory committee's note<sup>3</sup> to Federal Rule of Evidence 608(a) explains why: "The

<sup>2</sup> See, e.g., FED. R. EVID. 608(a)(2) (relating to reputation and opinion testimony); FED. R. EVID. 608(b)(2) (relating to evidence of specific acts); see also *United States v. Bolick*, 917 F.2d 135, 138-39 (4th Cir. 1990); *Homan v. United States*, 279 F.2d 767, 772 (8th Cir. 1960); CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 47 (John W. Strong ed., 5th ed. 1999) (stating that, "absent an attack upon credibility, no bolstering evidence is allowed"); 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 608.11, at 17 (Joseph M. McLaughlin ed., 2d ed. 2002) (stating that "[r]eputation or opinion evidence may not be used to bolster a witness's character for truthfulness until his or her veracity has first been attacked"); GLEN WEISSENBERGER, FEDERAL RULES OF EVIDENCE: RULES, LEGISLATIVE HISTORY, COMMENTARY AND AUTHORITY § 608.5 (1999); 4 JOHN H. WIGMORE, EVIDENCE § 1104 (Chadbourn rev. 1972).

The Uniform Rules of Evidence contain an identical provision to the Federal Rules of Evidence. In addition, thirty-three states have codified identical or similar versions of the federal rules. 2 BARBARA E. BERGMAN & NANCY HOLLANDER, WHARTON'S CRIMINAL EVIDENCE § 9.22 (15th ed. 2001); see ALA. R. EVID. 608; ALASKA R. EVID. 608; ARIZ. R. EVID. 608; ARK. R. EVID. 608; COLO. R. EVID. 608; DEL. R. EVID. 608; FLA. STAT. ANN. § 90.609 (1999); HAW. R. EVID. 608; IDAHO R. EVID. 608; IOWA R. EVID. 608; ME. R. EVID. 608; MICH. R. EVID. 608; MINN. R. EVID. 608; MISS. R. EVID. 608; MONT. R. EVID. 608; NEB. REV. STAT. § 27-608 (1995); N.H. R. EVID. 608; N.M. R. EVID. 608; N.C. R. EVID. 608; N.D. R. EVID. 608; OHIO R. EVID. 608; 12 OKLA. STAT. § 2608 (1993); OR. R. EVID. 608; R.I. R. EVID. 608; S.D. COMP. LAWS ANN. § 19-14-9 (1995); TENN. R. EVID. 608; TEX. R. EVID. 608; UTAH R. EVID. 608; VT. R. EVID. 608; WASH. R. EVID. 608; W. VA. R. EVID. 608; WIS. STAT. ANN. § 906.08 (2000); WYO. R. EVID. 608. *But see* CAL. EVID. CODE § 786 (1995) (stating only evidence regarding an individual's character for truth or veracity is permitted to attack or support a witness's credibility); NEV. REV. STAT. § 50.085 (2000) (permitting opinion testimony in limited circumstances, prohibiting reputation evidence, and forbidding use of extrinsic evidence to provide prior acts, except when prior act involves the commission of a crime).

<sup>3</sup> The Advisory Committee is a body of practitioners, judges, and scholars that was created by the Supreme Court's Judicial Conference. 1 CHARLES ALAN WRIGHT, FEDERAL PRACTICE & PROCEDURE Crm 3d § 4 (1999). This body advises the Judicial Conference as to which rules need to be written, amended, or put into force. *Id.* The Advisory Committee's Notes provide interpretation and commentary about the Federal Rules of Evidence.

enormous needless consumption of time which a contrary practice would entail justifies the limitation."<sup>4</sup>

It is likewise axiomatic that the character of a witness for truthfulness may not be attacked by extrinsic evidence of the witness's prior untruthful acts, nor defended by evidence of his prior truthful acts.<sup>5</sup> First, evidence as to whether someone lied, or told the truth on other occasions, does not compel the conclusion that he is lying or testifying truthfully now, and is therefore of uncertain relevance.<sup>6</sup> Second, if a party adversely affected

<sup>4</sup> FED. R. EVID. 608(a) advisory committee's note; *see also* *United States v. Riddle*, 193 F.3d 995, 998 (8th Cir. 1999) (stating that Rule 608(b)'s prohibition on using extrinsic evidence is to avoid holding mini-trials); *United States v. Elliott*, 89 F.3d 1360, 1368 (8th Cir. 1996) (stating that the prohibition in Rule 608(b) is to avoid mini-trials and any such evidence admitted is at the discretion of the court); MCCORMICK, *supra* note 2, § 47, at 72 (stating that a "witness's proponent ordinarily may not bolster the witness's credibility [because] we do not want to devote court time to the witness's credibility and run the risk of distracting the jury from the historical merits unless and until the opposing attorney attacks the witness's credibility"); WEINSTEIN & BERGER, *supra* note 2, § 608.20[1], at 33 ("Instances of conduct that are offered solely on the issue of a witness's credibility are frequently characterized as 'collateral' matters, since they do not address elements of any cause of action or defense . . . [and] extrinsic evidence is inadmissible to prove collateral matters."); WIGMORE, *supra* note 2, § 1104, at 233 (stating that "there is no reason why time should be spent in proving that which may be assumed to exist"). *But see* *Bufford v. Rowan Cos.*, 994 F.2d 155, 159-60 (5th Cir. 1993) (stating that Rule 608(b) does not prohibit the use of extrinsic evidence to "contradict a witness's testimony about a material issue in the case").

<sup>5</sup> *See, e.g.*, FED. R. EVID. 608(b); *see also* 3 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE § 308 (1979) (stating that "truthfulness may be established by reputation or opinion testimony, and by cross-examination concerning specific conduct of the witness, but not by extrinsic evidence of such specific conduct").

Although it is accepted that collateral matters may not be proven by extrinsic evidence, one commentator explains:

It has been urged that the discretionary approach of Rule 403 should be substituted. . . . Although Rule 608(b) expressly prohibits extrinsic evidence of a witness's untruthful acts, the Federal Rules do not expressly codify a categorical collateral fact restriction. . . . [U]nder Rule 403, the judge would make a practical judgment as to whether the importance of the witness's testimony and the impeachment warrant the expenditure of the additional trial time.

MCCORMICK, *supra* note 2, § 49.

<sup>6</sup> MCCORMICK, *supra* note 2, § 40 (stating that "[t]he empirical studies of untruthfulness indicate that a person's general character trait for truthfulness is a poor predictor of whether she is untruthful on a specific occasion"); *see also* WEINSTEIN & BERGER, *supra* note 2, § 608.20[1].

by a witness's (W1's) testimony is permitted to offer evidence of an unrelated instance in which W1 lied or acted deceitfully, the party relying on that witness should be permitted to offer evidence that W1 did not do as alleged, or to offer evidence of occasions on which W1 told the truth.<sup>7</sup> Thus, admitting extrinsic evidence of a witness's prior untruthful acts could give rise to a series of mini-trials.<sup>8</sup>

A frequently cited application of the first axiom is the rule that the government may not offer evidence about the past reliability of an informant-witness in other cases to suggest to the jury that his testimony ought to be believed in the current case. The question arises whether a defendant's attempts to impeach the informer opens the door to such evidence. The issue is a subcategory of "character evidence." The proper answer to the question should be: sometimes, and then only to a limited extent.

The term "character evidence" is used in the law to describe evidence that does not relate directly to the specific facts at issue in the trial.<sup>9</sup> Rather, its relevance depends primarily on the character or propensity of an individual toward certain behavior:<sup>10</sup> if X "characteristically" behaves

<sup>7</sup> MCCORMICK, *supra* note 2, § 47. *But see* WEINSTEIN & BERGER, *supra* note 2, § 608.12, at 20 (stating that "what constitutes an 'attack' on the witness's character for truthfulness [can] become[] murky").

<sup>8</sup> *Riddle*, 193 F.3d at 998 (stating that the prohibition against the use of extrinsic evidence is to avoid mini-trials); *Elliott*, 89 F.3d at 1368 (same).

<sup>9</sup> 3 CLIFFORD S. FISHMAN, JONES ON EVIDENCE § 14:1 (7th ed. 1998) (stating that "character evidence is offered as a basis upon which to infer how a person behaved on a particular occasion in the past"); 2 WEINSTEIN & BERGER, *supra* note 2, § 404.02[1]-[2], at 8 (defining character evidence and stating that "character evidence is not admissible to prove conduct except as provided by Rule 404"); *see also* MCCORMICK, *supra* note 2, §§ 45, 49 (discussing collateral issues and how the courts determine whether a topic is collateral); WEINSTEIN & BERGER, *supra* note 2, § 608.02[2], at 9-10 (discussing problems with character evidence), § 608.20[1], at 33 (describing character evidence as collateral evidence).

Federal Rule of Evidence 404 permits character evidence to be used when: (1) the character of the accused is a pertinent trait; (2) the character of the alleged victim is important in the case; (3) the character of the witness is limited to evidence under rules 607, 608, and 609; (4) the evidence of other crimes, wrongs, or act is not admitted to show conformity the act. FED. R. EVID. 404.

<sup>10</sup> FISHMAN, *supra* note 9, § 14:4, at 5; MCCORMICK, *supra* note 2, §§ 186, 188; 2 WEINSTEIN & BERGER, *supra* note 2, § 404.10[1], at 11 ("[A]lthough . . . evidence may be relevant under Rule 401, its prejudicial effect outweighs its probative value."); WEINSTEIN & BERGER, *supra* note 2, § 608.20[1]; WEISSENBERGER, *supra* note 2, § 404.3, § 404.4, § 608.1 ("[C]haracter evidence has a tendency to arouse the emotions

a certain way, the argument goes, this is relevant to suggest that he behaved the same way on the occasion in question.

Character evidence comes in two forms: general and specific.<sup>11</sup> General character evidence is testimony regarding either the reputation of a person or the witness's opinion of that person.<sup>12</sup> Specific character evidence relates to how a person behaved on one or more particular occasions.<sup>13</sup> The law governing character evidence consists of two different sets of rules. One set of rules governs admissibility of character evidence about someone who has participated in some way in the events at issue in the trial.<sup>14</sup> The second group of rules governs admissibility of character evidence about someone who is testifying or has testified at the trial.<sup>15</sup> When (as often happens) a participant in the events testifies, both sets of rules apply, which of course adds to the general confusion.<sup>16</sup>

## A. Character of a Participant in the Events

As a general rule, character evidence about a participant in the events in question—for example, the defendant, complainant, or alleged victim in a criminal case, or the plaintiff or defendant in civil litigation—is not admissible.<sup>17</sup> Despite its relevance, evidence as to how people behaved

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and prejudices of the trier of fact, and the use of character evidence is consequently attended by a substantial risk of a distortion of the accuracy of the fact-finding process.”), & § 608.2.

<sup>11</sup> FED. R. EVID. 404-405.

<sup>12</sup> FED. R. EVID. 405(a). For an examination of corresponding state provisions, see FISHMAN, *supra* note 9, § 16:6.

<sup>13</sup> FED. R. EVID. 404(b), 405(b).

<sup>14</sup> *See, e.g.*, FED. R. EVID. 404, 405, 412-415. Uniform Rules of Evidence 404-405 are identical to the Federal Rules, and Uniform Rule of Evidence 412 is a modified version of Federal Rule 412. For an examination of corresponding state provisions, see FISHMAN, *supra* note 9, § 16:6 (Rules 404-405), § 19:6 (Rule 412); 4 CLIFFORD S. FISHMAN, JONES ON EVIDENCE § 20:9 (Rule 413) & § 20:13 (Rule 414) (7th ed. 2000); 1 GREGORY P. JOSEPH ET AL., EVIDENCE IN AMERICA ch. 42 (1987).

<sup>15</sup> *See, e.g.*, FED. R. EVID. 608, 609. Although Uniform Rule of Evidence 608 is identical to the Federal Rule of Evidence, Uniform Rule of Evidence 609 is a modified version. JOSEPH ET AL., *supra* note 14.

<sup>16</sup> 2 WEINSTEIN & BERGER, *supra* note 2, § 404.02[2], at 8.

<sup>17</sup> FISHMAN, *supra* note 9, § 16:1; MCCORMICK, *supra* note 2, § 188; 2 WEINSTEIN & BERGER, *supra* note 2, § 404.02[2], at 8. Thus, for example, as to general character

on other, unrelated occasions is excluded because it would distract the jury from what should be its primary focus (*i.e.*, the events that gave rise to the lawsuit), and would greatly prolong trials and make the experience even less pleasant than it already is for everyone involved in a trial (other than the lawyers).<sup>18</sup> These rules, and the complex structure of exceptions to them,<sup>19</sup> have developed into a body of law so complex that judicial

evidence, Federal Rule of Evidence 404(a) provides, in part: "Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion. . . ." FED. R. EVID. 404(a). Uniform Rule of Evidence 404(a) contains identical language.

As to specific character evidence, Federal Rule of Evidence 404(b) provides, in part: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." FED. R. EVID. 404(b). Uniform Rule of Evidence 404(b) contains identical language.

Similarly, Rule 412(a)(1) excludes evidence about a sex-offense complainant's "other sexual behavior"; Rule 412(a)(2) excludes evidence of the complainant's "sexual predisposition." FED. R. EVID. 412. Every state has a similar rule, which is known as a "rape shield law." *See, e.g.*, CAL. EVID. CODE § 1108 (West 1995 & Supp. 2002); GA. CODE ANN. § 24-2-3 (1995); MO. ANN. STAT. § 491.015 (West 1996); NEV. REV. STAT. ANN. § 48.069 (Michie 2002); N.J. STAT. ANN. § 2A:84A-32.1 (West 1994); TEX. R. EVID. 412. These rules shield a rape complainant from having her previous sexual activity exposed at trial. For an exhaustive analysis of rape shield laws, their exceptions, and the litigation they have spawned, see FISHMAN, *supra* note 9, ch. 19; Clifford S. Fishman, *Consent, Credibility and the Constitution: Evidence Relating to a Sex Offense Complainant's Past Sexual Behavior*, 44 CATH. U.L. REV. 709 (1995).

Federal Rules of Evidence 413-415 are dramatic exceptions to the law's general dislike of character evidence. These rules direct that a sex-offense defendant's prior sexual offenses *are* generally admissible. *See* FED. R. EVID. 413-415. For an analysis of this provision, which has received a mixed and generally negative reaction in the states, see 4 FISHMAN, *supra* note 9, ch. 20.

<sup>18</sup> WEINSTEIN & BERGER, *supra* note 2, § 608.02[2], at 9; *see also* FISHMAN, *supra* note 9.

<sup>19</sup> Thus, Rules 404(a) and 405(a) permit a defendant to offer reputation or opinion evidence of a pertinent trait of the defendant's character or of an alleged victim's character; if the defendant does so, the prosecutor may respond in kind. *See* FISHMAN, *supra* note 9, ch. 16; MCCORMICK, *supra* note 2, § 190; 2 WEINSTEIN & BERGER, *supra* note 2, § 404.11[2][b]. Rule 404(b) permits evidence of a person's specific "other acts" where such acts have relevance independent of the forbidden propensity inference. FISHMAN, *supra* note 9, ch. 17; 2 WEINSTEIN & BERGER, *supra* note 2, §§ 404.02, 404.12[3]. Rule 405(b) permits litigants to offer reputation, opinion, and specific act evidence in those rare instances when a person's character is an "essential element" of a cause of action or defense (*e.g.*, negligent entrustment actions, child custody disputes, and some defamation cases). FED. R. EVID. 405(b); *see also* United States v. Sonntag, 684 F.2d 781, 787-88 (11th Cir. 1982) (holding that evidence of the defendant's sale of barbiturate pills, marijuana, and cocaine was admissible to prove the defendant's predisposition after he raised an entrapment defense); FISHMAN, *supra* note 9, ch. 15;

decisions and scholarly literature written about them have probably contributed substantially to both deforestation and global warming.<sup>20</sup>

Occasionally, character evidence about an informant in a criminal case will fall into this category.<sup>21</sup> Where a defendant claims that the informant coerced, entrapped, or framed him, for example, defense counsel might attempt to introduce evidence that the informant had done likewise to other individuals.<sup>22</sup> This situation arises rarely, however. Usually, a defense attorney attacks the credibility of the informant-witness, which brings into play the second set of rules, to which this Article now turns.

## B. Character of a Witness

Two rules govern the use of “character evidence” to attack or defend the character of a *witness*.<sup>23</sup> Federal Rules of Evidence 608 and 609.

### 1. Rule 609

Federal Rule of Evidence 609 permits a litigant to impeach a witness’s character for truthfulness by cross-examining the witness about certain prior convictions. The rule provides, in pertinent part:

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LOUISELL & MUELLER, *supra* note 5, § 150. Federal Rule of Evidence 412(b) codifies exceptions to the ban on a sex-offense complainant’s prior sexual behavior. See generally FED. R. EVID. 412(b); FISHMAN, *supra* note 9, ch 19.

<sup>20</sup> See, e.g., FISHMAN, *supra* note 9; EDWARD J. IMWINKELREID, UNCHARGED MISCONDUCT EVIDENCE (1984). Each of these sources is an entire volume dedicated to the subject, demonstrating, if nothing else, what some law professors do instead of having a life. The law review articles devoted to the subject are so numerous that their footnotes probably surpass the daytime population of New York City on a workday.

<sup>21</sup> United States v. Sonntag, 684 F.2d 781, 788-89 (11th Cir. 1982).

<sup>22</sup> United States v. Lochmondy, 890 F.2d 817, 821-22 (6th Cir. 1989); Washington v. Negrete, 863 P.2d 137, 140 (Wash. App. Div. 1993). For a discussion of defense use of character evidence in such situations, see FISHMAN, *supra* note 9, § 17:78.

<sup>23</sup> Needless to say, participants in the events giving rise to a lawsuit often also appear as witnesses at trial. FISHMAN, *supra* note 9, § 14:2; 2 WEINSTEIN & BERGER, *supra* note 2, § 404.02[2]. Thus, the admissibility of “character evidence” about such a witness requires applying the rules summarized in the previous section of this Article as well as Federal Rules of Evidence 608 and 609. The former rules focus on evidence that is arguably relevant about the underlying events in the case itself, while the latter rules focus exclusively on the character of the witness for truthfulness.



Rule 609. Impeachment by Evidence of Conviction of Crime

(a) General rule. For the purpose of attacking the credibility of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted . . . ; and

(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.<sup>24</sup>

Thus, an attorney has not only an absolute right to impeach a witness who has been convicted of a Rule 609(a)(2) crime—a crime “involv[ing] dishonesty or false statement”—whether it was a felony or a misdemeanor, but also a presumptive right to impeach a witness with a Rule 609(a)(1) crime—a felony conviction that did not involve “dishonesty or false statement.”<sup>25</sup> With regard to Rule 609(a)(1) felonies, the judge has discretion to preclude or limit the impeachment, although this discretion is not likely to come into play very often when the witness is a government informant who was heavily involved in the case.<sup>26</sup>

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<sup>24</sup> FED. R. EVID. 609(a). The rule establishes a somewhat different balance of probative value and risk of unfair prejudice if the witness being impeached is “an accused,” *i.e.*, the defendant in a criminal case. FED. R. EVID. 609(a). To balance the probative value and risk of unfair prejudice, a past conviction may not be introduced if: (1) more than ten years has elapsed since the date of the conviction sought to be entered into evidence; (2) the conviction was subject to pardon, annulment, certificates of rehabilitation, or any other finding of rehabilitation of that person; or (3) the conviction was part of a juvenile adjudication. FED. R. EVID. 609(b)-(d). However, if an appeal from a conviction is pending, that will not prevent it from being admissible in court. FED. R. EVID. 609(e).

<sup>25</sup> A felony is “[a] serious crime usually punishable by imprisonment for more than one year or by death.” BLACK’S LAW DICTIONARY 501 (7th ed. 2000).

<sup>26</sup> Rule 609(a)(1) explicitly incorporates Rule 403, which authorizes the judge to exclude evidence if its probative value is substantially outweighed by the danger of unfair prejudice, unnecessary consumption of time, or needless presentation of cumulative evidence. *See generally* 2 CLIFFORD S. FISHMAN, JONES ON EVIDENCE §§ 11:10-11:19 (7th ed. 1994) (discussing Rule 403). *See* WEINSTEIN & BERGER, *supra* note 2, § 608.02[3][b], at 11 (discussing the court’s discretion in controlling impeachment). Federal Rule of Evidence 611 gives the judge the flexibility to accept evidence that will not jeopardize the dignity of the witness. WEISSENBERGER, *supra* note 2, § 611.1. The credibility of a government informant who has played a key role in a criminal case is so important an issue, however, that a judge’s discretion to limit such impeachment begins only after defense counsel has had ample opportunity to impeach the informant.

## 2. Rule 608

Federal Rule of Evidence 608 provides:

### 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 credibility, 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' 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 accused's or the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility.<sup>27</sup>

This Article explores this provision and its various sub-parts in the order in which they are likely to occur at a trial.

### a. Cross-Examining the Witness: Rule 608(b)(1)

Federal Rule of Evidence 608(b)(1) governs how an attorney may attack a witness's character for credibility on cross-examination.<sup>28</sup> Providing she has a good-faith basis,<sup>29</sup> an impeaching attorney may question

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<sup>27</sup> FED. R. EVID. 608.

<sup>28</sup> The rule does not restrict cross-examination of extrinsic evidence that focuses on the accuracy of the witness's perception or memory of the events in question, the witness's narrative skills, or evidence suggesting that the witness is consciously or subconsciously biased. MCCORMICK, *supra* note 2, §§ 44-45; WEINSTEIN & BERGER, *supra* note 2, § 608.20[3][a]-[b]. The rule regulates only the use of information about prior specific acts to impeach the witness's character. FED. R. EVID. 608(b).

<sup>29</sup> See *Michelson v. United States*, 335 U.S. 469, 480, 69 S. Ct. 213, 220, 93 L. Ed. 168, 176 (1948); *United States v. Adair*, 951 F.2d 316, 319 (11th Cir. 1992). The

the witness about unsavory acts in the witness's past not directly relevant to the events in question in the lawsuit, but only if those unsavory acts are "probative of truthfulness or untruthfulness," such as lying, forgery, deception, or fraud.<sup>30</sup> Thus, an attorney cannot attack W1's character for truthfulness by asking him about a failure to pay child support, driving without a license, being fired for excessive absences, or the like.<sup>31</sup> Such behavior might not make W1 a desirable neighbor, employee, or son-in-law, but because the behavior does not directly involve acts of lying or deception, the rule does not permit cross-examination on such subjects.<sup>32</sup>

Assume defendant (D) is on trial for participating in a fraud. W1, another participant, plead guilty and is testifying for the government as part of his plea bargain. D's attorney has learned that W1 falsified his expense vouchers on an unrelated business trip a few years ago. This conduct qualifies as an untruthful act and is therefore within the scope of Rule 608(b).<sup>33</sup> As a result, defense counsel may, "in the discretion of the court," ask W1: "Isn't it a fact that you falsified your expense voucher on a business trip you took in 1999?"<sup>34</sup>

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impeaching attorney does not have to show that the witness was convicted in connection with a Rule 608(b) bad act, nor that he was arrested, indicted, fired, or sued in connection with it. It is only necessary for the impeaching attorney to show that the attorney has a good-faith basis to believe that the witness committed the act. *Michelson*, 335 U.S. at 480; *Adair*, 951 F.2d at 319; *FISHMAN*, *supra* note 9, § 16.37; *MCCORMICK*, *supra* note 2, § 41.

<sup>30</sup> *United States v. Simonelli*, 237 F.3d 19, 23 (1st Cir. 2001) (permitting testimony regarding altering time cards and other documents that were not the subject of the litigation); *United States v. Davis*, 183 F.3d 231, 256-57 (3d Cir. 1999); *United States v. Munoz*, 233 F.3d 1117, 1135 (9th Cir. 2000); *see also* *WEINSTEIN & BERGER*, *supra* note 2, §§ 608.10, 608.22[2][a]-[b] (discussing some particular acts that are probative of truthfulness). *But see* *United States v. Miles*, 207 F.3d 988, 994 (7th Cir. 2000) (stating that the failure to register a gun was a mistake and not deceit). The court must determine whether the evidence regarding an individual's unsavory acts is probative of truthfulness. *United States v. Hurst*, 951 F.2d 1490, 1501 (6th Cir. 1991).

<sup>31</sup> *WEINSTEIN & BERGER*, *supra* note 2, § 608.22[2].

<sup>32</sup> *FED. R. EVID.* 608(a), advisory committee's note ("In accordance with the bulk of judicial authority, the inquiry is strictly limited to character for veracity, rather than allowing evidence as to character generally. The result is to sharpen relevancy, to reduce surprise, waste of time, and confusion, and to make the lot of the witness somewhat less unattractive." (citation omitted)).

<sup>33</sup> *See, e.g., Simonelli*, 237 F.3d at 23.

<sup>34</sup> *FISHMAN*, *supra* note 9, §§ 16.38, 16.40.

W1 shakes his head angrily: “No, I did not!” May D’s attorney later call W2, who was W1’s supervisor, to testify that W1 in fact did submit false expense vouchers? Rule 608(b) says “no,” because although specific acts of untruthfulness may be inquired into on cross-examination, they “may not be proved by extrinsic evidence.”<sup>35</sup>

### **b. Rule 608(a)(1)**

Federal Rule of Evidence 608(a)(1) permits an impeaching attorney to call a second witness to give negative reputation or opinion testimony about a prior witness in the case.<sup>36</sup> Thus, in the example above, D’s attorney could call W2, who, once the proper foundation is shown,<sup>37</sup> may

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Courts have taken three basic approaches to determining whether certain conduct is relevant to the witness’s character for truthfulness. Under a broad view, virtually any conduct indicating bad character relates to untruthfulness. Under the narrow view, conduct is admissible only if it directly involves falsehood or deception, such as forgery or perjury. Under the middle view, “behavior seeking personal advantage by taking from others in violation of their rights” may be admissible if committed under circumstances reflecting on veracity.

WEINSTEIN & BERGER, *supra* note 2, § 608.22[2][c][i], at 57 (quoting *United States v. Manske*, 186 F.3d 770, 774-75 (7th Cir. 1999)).

<sup>35</sup> FED. R. EVID. 608(b); *see also* LOUISELL & MUELLER, *supra* note 5, § 306; WEINSTEIN & BERGER, *supra* note 2, § 608.22[1], at 46.

<sup>36</sup> FED. R. EVID. 608(a)(1); *see also* *Michelson v. United States*, 335 U.S. 469, 471 n.2, 69 S. Ct. 213, 216 n.2, 93 L. Ed. 732, 735 n.2 (1948); FISHMAN, *supra* note 9, § 16.46.

<sup>37</sup> Before W2 could so testify, D’s attorney would have to “lay a foundation” establishing that W2 knows W1 well enough to have a factual basis for her opinion. Or W2 could show that she has spoken to other members in a “community” in which W1 lives and functions, thereby establishing that she is qualified to report what that community’s assessment of W1’s character is. Concerning the foundational requirement, *see* FISHMAN, *supra* note 9, §§ 16:20-16:26. *See also* *United States v. Ruiz-Castro*, 92 F.3d 1519, 1529-30 (10th Cir. 1996); WEINSTEIN & BERGER, *supra* note 2, § 608.14[2]. To establish the necessary foundation,

the witness must be able to demonstrate that he or she is sufficiently acquainted with (1) the person whose character is under attack, (2) the community in which that person has lived, and (3) the circles in which that person has moved, so that the witness can speak with authority of the manner in which that person generally is regarded.

WEINSTEIN & BERGER, *supra* note 2, § 608.14[2], at 30.

testify that W1's reputation for truthfulness among fellow employees was poor, and that in her opinion, W1 is someone who cannot be relied upon to tell the truth.<sup>38</sup> W2 cannot substantiate her testimony with information about specific instances in which W1 was untruthful, because the latter would constitute extrinsic proof of a specific instance, which is explicitly forbidden by the first sentence of Rule 608(b)(1).<sup>39</sup>

### c. Rule 608(a)(2)

Finally, Federal Rule of Evidence 608(a)(2) directs that a party may rehabilitate a witness's character for truthfulness by calling another witness (W3, in our scenario) to testify favorably about previous witness (W1)'s good character for truthfulness, but only if "the character of the witness [W1] for truthfulness has been attacked by opinion or reputation evidence *or otherwise*."<sup>40</sup> The advisory committee's note to this provision is instructive as to the meaning of "otherwise":

Character evidence in support of credibility is admissible under the rule only after the witness' character has first been attacked, as has been the case at common law. The enormous needless consumption of time which a contrary practice would entail justifies the limitation. Opinion or reputation that the witness is untruthful specifically qualifies as an attack under the rule, and evidence of misconduct, including conviction of crime, and of corruption also fall within this category. *Evidence of bias or interest does not*. Whether evidence in the form of contradiction is an attack upon the character of the witness must depend upon the circumstances.<sup>41</sup>

Thus, by cross-examining W1 about the expense voucher or by calling W2 to give negative reputation or opinion testimony about D's character for truthfulness, D's attorney has opened the door.<sup>42</sup> The prosecutor can

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<sup>38</sup> FED. R. EVID. 608(a)(1).

<sup>39</sup> FISHMAN, *supra* note 9, § 16.42; LOUISELL & MUELLER, *supra* note 5, § 308; WEINSTEIN & BERGER, *supra* note 2, § 608.20[1].

<sup>40</sup> FED. R. EVID. 608(a)(2) (emphasis added).

<sup>41</sup> FED. R. EVID. 608(a), advisory committee's note (emphasis added) (citations omitted).

<sup>42</sup> FISHMAN, *supra* note 9, § 16.4; *see also* United States v. Brown, 39 F.3d 1188 (9th Cir. 1994) (unpublished table opinion) (stating that the facts present the classic example of opening the door on cross-examination).

now call W3, who, if the proper foundation is laid,<sup>43</sup> can testify that in his opinion W1 is a truthful person and that W1 enjoys a good reputation for truthfulness in a particular community.<sup>44</sup>

### 3. Summary

After an informant has testified for the government on direct examination, Federal Rules of Evidence 608(b) and 609(a) govern how the defense attorney may question the informant about unsavory acts in his past. Although the rules differ in many particulars—the kinds of prior acts about which the informant may be questioned,<sup>45</sup> whether defense counsel can offer evidence to back up the question if the witness answers “no,”<sup>46</sup>

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<sup>43</sup> See LOUISELL & MUELLER, *supra* note 5, § 308.

<sup>44</sup> FISHMAN, *supra* note 9, §§ 16.20-26, 16:27; LOUISELL & MUELLER, *supra* note 5, § 308; WEINSTEIN & BERGER, *supra* note 2, § 608.12[4][b] (noting that a witness may present a supportive character witness if his credibility has been attacked).

<sup>45</sup> Federal Rule of Evidence 609(a)(2) permits questioning about a conviction for any crime “involv[ing] dishones[ty] or false statement.” FED. R. EVID. 609(a)(2). Rule 609(a)(1) permits questioning about any felony conviction, whether or not the impeaching crime involved dishonesty or false statement. FED. R. EVID. 609(a)(1). Rule 608(b) permits questioning about conduct, which has not resulted in a conviction, only if that conduct is “probative of truthfulness or untruthfulness.” FED. R. EVID. 608(b). Thus, an informant could not be cross-examined about prior assaults or drug or alcohol offenses, unrelated to the facts in the current case, which did not result in a felony conviction. See, e.g., *United States v. Simonelli*, 237 F.3d 19, 23 (1st Cir. 2001); *United States v. Davis*, 183 F.3d 231, 256-57 (3d Cir. 1999); *United States v. Munoz*, 233 F.3d 1117, 1135 (9th Cir. 2000). But see *United States v. Miles*, 207 F.3d 988, 994 (7th Cir. 2000) (stating that a failure to register a gun is not probative of untruthfulness because it was a mistake and not deceit).

<sup>46</sup> If a witness falsely denies a Rule 609 conviction, the impeaching attorney may offer extrinsic evidence of the conviction. MCCORMICK, *supra* note 2, § 42; WEINSTEIN & BERGER, *supra* note 2, § 608.20[1], at 32 (“Specific instances of a witness’s conduct, other than a conviction of a crime, that are offered to attack or support a witness’s credibility may not be proved by extrinsic evidence.” (footnote omitted)). But counsel may not offer extrinsic evidence to prove an instance in which a witness engaged in conduct (unrelated to the current case) “probative of . . . untruthfulness,” even if, when asked about it on cross-examination, the witness (let us assume falsely) denies having engaged in that conduct. *Id.* § 608.22[1]. But see *id.* § 609.04[2][a] (stating that “[a] conviction that does not involve dishonesty or false statement, such as assault, may be admitted only after the court has performed the appropriate balancing test”).

and even how the questions may be worded<sup>47</sup>—they have this in common: each permits counsel to ask about such acts to attack the informant's credibility as a person.<sup>48</sup>

## II. Impeaching and Rehabilitating the Informant

### A. Types of Impeachment; Permissible Responses

We turn now to the question at hand: Do a defendant's attempts to impeach a government informant, W1, open the door to prosecution

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<sup>47</sup> Because Rule 608(b) bans the use of "extrinsic evidence" directly, logic suggests that an impeaching attorney should also be precluded from using extrinsic words in questioning the witness about prior untruthful acts. Thus, although (assuming a good-faith basis for the question) the impeaching attorney may ask, "Didn't you falsify an expense voucher in May, 2000?", she should not be permitted to ask, "Weren't you arrested for (or charged with, suspended for, fired by your employer for) falsifying an expense voucher?" Words like "arrested," "charged," "suspended," "fired," "accused," and "sued" are inherently extrinsic because they inform the jury that a third person has alleged that the witness committed the act. See *United States v. Davis*, 183 F.3d 231, 257 n.12 (3d Cir. 1999); see also Stephen A. Saltzburg, *Impeaching the Witness: Prior Bad Acts and Extrinsic Evidence*, 7 CRIM. JUST., Winter, 1993, at 28, 31.

Rule 609 permits the impeaching attorney to use the word "convicted" while questioning the witness—it would be impossible to bring out a prior conviction without doing so—even though the word "convicted" is extrinsic, because it informs the jury that someone else—the judge or jury in the prior case—came to the conclusion that the witness committed the impeaching crime. Rule 609 thus stands as an exception to the Rule 608(b) ban on use of extrinsic evidence (or extrinsically worded questions) to impeach a witness's character.

<sup>48</sup> Because an informant's credibility will almost always be an important issue for the jury, it is difficult to imagine a situation in which a judge could properly preclude a defense attorney from using an informant's prior conviction to impeach the informant. Where the informant's list of Rule 609 convictions is particularly long, the judge might reasonably instruct defense counsel to choose four or five to use and to leave the rest alone. Similarly, although Rule 608(b)(1) explicitly gives the trial judge discretion to permit impeaching cross-examination about prior untruthful acts, in a criminal case, particularly where the witness is important to the government's case, the discretion to say "no questioning" begins only after defense counsel has already examined the informant extensively. See *United States v. Manske*, 186 F.3d 770, 777-80 (7th Cir. 1999) (holding that the limited cross examination of the government witnesses was error).

evidence about W1's past reliability in other cases? Such evidence would suggest to the jury that W1's testimony ought to be believed in the current case. The case law is sparse, somewhat contradictory and inconclusive, but suggests that the answer depends, at least in part, on *how* defense counsel attacks the informant's credibility.<sup>49</sup> Results depend on whether the attack is a general assault on the informant's character for truthfulness, a specific accusation that the informant lied to frame the defendant to gain a specific advantage, or a general accusation that the informant lied to give the authorities what they demanded of him. These distinctions are often difficult to draw and are somewhat artificial; in a typical case a defense attorney might reasonably employ all three. Each method is discussed in turn below.

## 1. Rebutting an Attack on the Informant's Character for Truthfulness

As we have seen, if D's attorney cross-examines W1 about prior convictions or untruthful acts under Rules 609(a) and 608(b)(1), the prosecutor, still during the government's case-in-chief, may rehabilitate, under Rule 608(a)(2), by calling W2 to testify that in his opinion W1 is a truthful person.<sup>50</sup> First, however, W2 must give foundation testimony establishing that he knows W1 well enough to have a valid basis for that opinion.<sup>51</sup> Where W2 is a police officer with whom W1 has cooperated, to establish the foundation for his opinion, W2 may testify in general terms that W1 has cooperated with the authorities (for however many months or years) and that based on that cooperation, W2 believes W1 to be a truthful person.<sup>52</sup> The courts that have considered the issue have held

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<sup>49</sup> Compare *United States v. Murray*, 103 F.3d 310, 321 (3d Cir. 1997) (permitting evidence about the informant's past cooperation), with *United States v. Cox*, 91 F.3d 135 (4th Cir. 1996) (unpublished table decision) (finding that testimony and argument regarding an informant's prior cooperation was improper bolstering).

<sup>50</sup> See *supra* notes 40-44 and accompanying text.

<sup>51</sup> See FED. R. EVID. 608(a)(1).

<sup>52</sup> As anyone in law enforcement who has worked with informants knows, W2 is really saying, "In my opinion W1 tells the truth when he believes that we are watching him closely and is convinced that we will yank his chain hard if he tries to lie."



consistently that such testimony is permissible.<sup>53</sup> There is comparatively little law, however, deciding whether W2 may testify as to specifics.

In a Third Circuit decision, *United States v. Murray*, the defendant was convicted of murder and narcotics trafficking.<sup>54</sup> Defense counsel cross-examined the key witness on the murder charge, Richard Brown, about his drug use, his drug and theft convictions, his unlawful carrying of an unlicensed weapon, “his concealment of his drug use from [a] friend and contact in the . . . police department, and his prior inconsistent statements to the grand jury.”<sup>55</sup> Categorizing this as an attack on Brown’s character for truthfulness,<sup>56</sup> the Third Circuit correctly held that it was proper to permit a police lieutenant to offer general rebuttal testimony about the informant’s cooperation to establish a foundation for the agent’s favorable opinion testimony about the informant’s character for truthfulness.<sup>57</sup> The court further held, again correctly, that the prosecutor went too far when he had the lieutenant testify as to a specific number of cases, search warrants, or seizures that resulted from Brown’s cooperation, because

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<sup>53</sup> *United States v. Smith*, 344 U.S. App. D.C. 19, 24-26, 232 F.3d 236, 241-43 (D.C. Cir. 2000); *Murray*, 103 F.3d at 321-22; *United States v. Sanchez*, 790 F.2d 1561, 1564 (11th Cir. 1986); see also *Baxter v. Alabama*, 723 So. 2d 810, 818-20 (Ala. Crim. App. 1998) (permitting an informant to provide testimony regarding his character because defense counsel had attacked the informant’s character for truthfulness when the officer testified); *Moore v. Indiana*, 471 N.E.2d 684, 689 (Ind. 1984) (stating that the officer’s testimony regarding the informant’s past successes in acting as an informant would “hardly bolster his character”); *Engel v. N.J. Dep’t of Corrections*, 270 N.J. Super. 176, 179-80, 636 A.2d 1058, 1059-60 (Super. Ct. App. Div. 1994) (admitting testimony of investigation authorities to bolster the informant’s credibility but remanded because defendant was not given the same opportunity to prove his testimony was reliable).

<sup>54</sup> 103 F.3d 310, 313 (3d Cir. 1997).

<sup>55</sup> *Murray*, 103 F.3d at 321.

<sup>56</sup> *Id.* Some of this cross-examination—relating to Brown’s convictions, lying to his friend, and perhaps the inconsistent statements to the grand jury—clearly qualifies as an attack on Brown’s character for truthfulness under the “or otherwise” clause of Rule 608(a). Other aspects, such as his untaxed compensation, would most often be categorized as an attack suggesting motive to lie. See *United States v. Simonelli*, 237 F.3d 19, 23 (1st Cir. 2001). Questions about Brown’s drug use and carrying an unlicensed weapon technically would not be admissible for either purpose, but would be relevant to show that the police officers with whom he was working either knowingly tolerated his unlawful conduct or had very little control over him, which in either case challenges the integrity of any case based on Brown’s cooperation and testimony.

<sup>57</sup> *Murray*, 103 F.3d at 321-22.

such testimony constituted evidence of specific extrinsic acts forbidden by Rules 608(a) and 608(b).<sup>58</sup>

## 2. Rebutting Cross-Examination Attacking the Informant's Motive for Testifying

### a. A Specific Accusation

Another standard defense tactic is to elicit testimony from the informant, or from the officers with whom the informant is cooperating, spelling out the benefits the informant has received or hopes to receive for his cooperation.<sup>59</sup> For example, the defense may elicit testimony concerning a favorable plea bargain, a reduced sentence, cash awards dependant upon the extent and success of his cooperation, and the like.<sup>60</sup> The obvious thrust of such impeachment is to suggest that the informant is lying to frame the defendant in order to gain the benefit(s) in question.

To rebut this attack, the government often attempts to introduce evidence of previous instances of the defendant's cooperation which led to seizures, arrests, indictments, guilty pleas, and convictions.<sup>61</sup> If offered to support the theorem, "the informant has been truthful in other cases, so he was probably truthful in this case as well," it should be excluded as inadmissible character evidence because, in the terms of Rule 608(b), it constitutes "extrinsic evidence" of "[s]pecific instances of the [truthful] conduct of a witness, for the purpose of . . . supporting the witness' credibility."<sup>62</sup>

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<sup>58</sup> *Id.*; see also *United States v. Taylor*, 900 F.2d 779, 781 (4th Cir. 1990) (holding "that it was error for the court to admit extrinsic evidence that the informer . . . had provided reliable information and testimony that resulted in several convictions"). The *Taylor* court did not provide a specific description of the evidence offered. See *id.*

<sup>59</sup> See, e.g., *United States v. Smith*, 232 F.3d 236, 241 (D.C. Cir. 2000).

<sup>60</sup> See, e.g., *United States v. Green*, 258 F.3d 683, 692 (7th Cir. 2001); *Smith*, 232 F.3d at 241.

<sup>61</sup> See, e.g., *United States v. Fusco*, 748 F.2d 996, 997 (5th Cir. 1984) (holding the DEA agent's testimony concerning the informant's prior specific acts was admissible for the purpose of establishing an absence of bias).

<sup>62</sup> FED. R. EVID. 608(b). Such evidence would also fall under the ban of the first sentence of Rule 404(b). See FISHMAN, *supra* note 9, § 17:4.

Rule 608(b) excludes such evidence only if offered for the forbidden “purpose of . . . supporting the witness’ credibility.”<sup>63</sup> Accordingly, an experienced prosecutor will instead argue that she is offering the evidence to rebut defense counsel’s accusation of bias or motive to lie. Should this argument suffice to overcome defendant’s objection of improper bolstering?

Where defense counsel suggests that the informant’s deal with the government is contingent specifically upon his ability to deliver up the defendant, the Seventh Circuit has held, the Government should be permitted to elicit testimony that the informant has cooperated in other cases as well.<sup>64</sup> In *United States v. Lindemann*, the defendant, a prominent member of the thoroughbred racing set, was accused of hiring Tom Burns to kill an expensive, unsuccessful—but highly insured—race horse.<sup>65</sup> On cross-examination, counsel suggested that Burns needed to land a “big fish” like the defendant to get his favorable plea bargain.<sup>66</sup> On redirect the prosecutor elicited from Burns that he had named thirty others who had hired him for similar purposes, and that ninety percent of them had plead guilty.<sup>67</sup> The Seventh Circuit held that, because the evidence was relevant to rebut an accusation of bias and motive to lie, its admissibility was not affected by Rule 608(b)’s prohibition against specific act evidence to bolster a witness’s credibility, and it was not an abuse of discretion to admit it.<sup>68</sup>

It is entirely appropriate to admit general evidence of other instances of cooperation in this situation. To rule otherwise would permit defense counsel to mislead the jury while giving the prosecution no way to set the record straight. Whether the government should be allowed to elicit

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<sup>63</sup> FED. R. EVID. 608(b); see WEINSTEIN & BERGER, *supra* note 2, § 608.20[1].

<sup>64</sup> *United States v. Lindemann*, 85 F.3d 1232, 1243 (7th Cir. 1996).

<sup>65</sup> 85 F.3d 1232, 1235 (7th Cir. 1996).

<sup>66</sup> *Lindemann*, 85 F.3d at 1242.

<sup>67</sup> *Id.* The trial court immediately instructed that the latter testimony should be considered “solely for the purpose of understanding the scope of Tom Burns’ cooperation with the government,” and the fact that others pleaded guilty “must not be considered by you to infer” the guilt of the defendant on trial. *Id.*

<sup>68</sup> *Id.* at 1243-44.

testimony about a specific number of other cases, let alone convictions or guilty pleas, is another matter and is discussed below.

### **b. A General Accusation**

Where the defense attack is more general, emphasizing that his arrangement with the authorities gives the informant a motive to lie without suggesting that the case against the defendant is the keystone to the deal, it is not so clear what the law is, or should be. The Eleventh Circuit has held that such evidence should be admitted over an objection of improper bolstering.<sup>69</sup> The Fifth Circuit has held that such bolstering is permissible *before* the defendant has an opportunity to impeach the informant.<sup>70</sup> Other courts have held the admission of such evidence is not “plain” or “reversible” error where defense counsel failed to assert improper bolstering under Rule 608(b) as the basis for an objection.<sup>71</sup>

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<sup>69</sup> See *United States v. Sanchez*, 790 F.2d 1561, 1564 (11th Cir. 1986). The defendant in *Sanchez* “cross-examined a DEA agent about [the informant’s] suitability for federal investigative work.” *Id.* The opinion, however, does not provide details. See *id.* On redirect, “the agent testified that other DEA agents had worked with [the informant] in prior investigations and found him reliable.” *Id.* In ruling that admitting this evidence was not error, the court noted that “the purpose of this testimony was not to bolster [the informant’s] credibility, but to justify the DEA’s decision to employ him.” *Id.*

<sup>70</sup> *United States v. Fusco*, 748 F.2d 996, 998 (5th Cir. 1984) (“Evidence of past behavior that proves or disproves bias is therefore admissible notwithstanding Rule 608(b).”). In *Fusco*, the trial judge permitted a government agent to discuss the extent of the informant’s cooperation (including quantities of drugs seized and number of defendants indicted) before defense counsel even had an opportunity to attack the informant. *Id.* at 997. The Fifth Circuit held that this was not improper bolstering, but a rebuttal of an anticipated attack against the informant’s purported bias, and that although it is not advisable to permit a prosecutor to defend against such an attack before the attack has been made, the trial court had not abused its discretion in permitting it in this case. *Id.* at 998-99.

<sup>71</sup> A summary of several of those cases follows. In *United States v. Smith*, defense counsel cross-examined a federal agent about the informant’s plea agreement and receipt of money for his cooperation. 232 F.3d 236, 241 (D.C. Cir. 2000). On redirect, when the prosecutor began to elicit information about the informant’s cooperation in other cases, defense counsel objected to the “relevance” of the information; the judge overruled the objection. *Id.* at 240. The D.C. Circuit held, quite correctly, that the testimony was relevant. *Id.*; see also *United States v. Sumlin*, 271 F.3d 274, 282 (D.C. Cir. 2001) (If evidence is “offered only to bolster an informant’s credibility, the extrinsic evidence is barred by Rule 608(b). If offered for an alternative and legitimate reason

## B. Evaluation

As noted earlier, at least one federal circuit appears to have held that cross-examination suggesting a motive to lie automatically opens the door (over a proper objection of improper bolstering) to rebuttal evidence including specific details about cooperation in other cases (number of cases, seizures, arrests, guilty pleas, convictions).<sup>72</sup> This holding substantially undercuts the rule against bolstering. Worse, it contributes little to the truth-finding process because opening the door to cooperation

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‘... the evidence falls outside Rule 608(b)’s narrow confines.’” (citation omitted)). It is noteworthy that, in *Smith*, the trial judge sustained defense counsel’s general objection when the prosecutor asked the agent whether any of the other arrests based on the informant’s cooperation were “corroborated by any tangible evidence,” and sustained another general objection when the prosecutor asked the agent whether he believed the informant’s information in the current case was truthful. *Smith*, 232 F.3d at 240-41.

In *United States v. Lochmondy*, after defense counsel accused the informant of lying for his own benefit, the prosecutor on redirect brought out that the informant had also cooperated against others, who subsequently pleaded guilty. 890 F.2d 817, 821 (6th Cir. 1989). Defense counsel did not object until the next day during final arguments. *Id.* When the prosecutor mentioned in summation that others had been convicted, the trial judge sustained defense counsel’s objection and instructed the jury not to consider the informants’ cooperation in other cases in assessing the defendants’ guilt or innocence. *Id.* The court held that, if it was error to admit the testimony, it was not “reversible” error. *Id.* at 822.

In *United States v. Green*, defense counsel’s cross-examination of a government witness accused the informant of “setting up” a number of people, including the defendant, on false drug charges in order to avoid prosecution for his own crimes. 258 F.3d 683, 692 (7th Cir. 2001). An agent, however, who had previously worked with the informant, testified that the informant’s information in other cases was “credible and reliable and consistent with” what other officers had observed. *Id.* at 693. Because defendant’s counsel did not object to this testimony, the Seventh Circuit held that its review was for plain error. *Id.* at 692-93. The court found that there was not plain error, and the general tenor of the court’s discussion suggests that it would have found no abuse of discretion had the trial court admitted it over a timely objection. *Id.* at 693. Counsel did object to testimony that the informant’s cooperation in one case led to a conviction, and the government conceded on appeal that admitting this testimony was error. *Id.* Without deciding the issue, the Seventh Circuit held that, even if it was an error to admit the testimony, it was harmless. *Id.*

In *United States v. Martinez*, when evidence that others against whom the informant had given information had pleaded guilty, the defense counsel failed to object on hearsay grounds. 775 F.2d 31, 36 (2d Cir. 1985). The Second Circuit, however, held that the evidence was not hearsay because it was not offered to prove the others’ guilt, but to demonstrate the informant’s credibility. *Id.* at 37.

<sup>72</sup> *Fusco*, 748 F.2d at 998.

evidence could require increased discovery of sensitive information, mid-trial delays, and introduction of collateral evidence at trial.<sup>73</sup> In addition, evidence that an informant has been honest and truthful in some cases does not negate the argument that he has a motive to lie in the present case and is therefore of less than compelling probative value.

Allowing a witness to testify to specific cooperation evidence could prolong and complicate a trial. As a matter of fairness, defense counsel should be afforded a reasonable opportunity to challenge such evidence. Where the informant or officer testifies about a specific number of cases in which the informant cooperated, the defense is arguably entitled to access to the list of all such cases.<sup>74</sup> As a result, defense counsel may request a mid-trial recess to examine the records and to interview the principals involved. Moreover, defense counsel should be afforded an opportunity to call witnesses from those cases to rebut the claim either that the informant's cooperation played an important role or that the targets in those cases were in fact guilty of the crimes charged. Allowing this evidence, therefore, opens the door to mini-trials on collateral matters, which is precisely the evil that the rule against extrinsic act evidence on witness truthfulness was intended to avert.<sup>75</sup>

## Conclusion

The solution to the dilemma (get ready for a brilliant insight) rests, first, in the obligation of defense counsel to raise a specific objection ("improper bolstering in violation of Rule 608(b)"), and second, in the sound discretion of the trial judge.<sup>76</sup>

The following specifics are suggested.

First, when defense counsel attacks the informant's credibility (whether as a general attack on his character or as an implied accusation

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<sup>73</sup> See WEINSTEIN & BERGER, *supra* note 2, § 608.20[1], at 33 (stating that "extrinsic evidence is inadmissible to prove collateral matters").

<sup>74</sup> Where the cases on the list are finalized and the informant's role in them is already known to those who were targeted in them, turning over the list might not be too painful to the police department or prosecutor's office. In other circumstances, though, doing so could seriously jeopardize other cases, or even people's lives.

<sup>75</sup> See WEINSTEIN & BERGER, *supra* note 2, § 608.20[1].

<sup>76</sup> I said the insight would be brilliant. I did not say it would be original.

of motive to lie, or both), the judge should permit the prosecutor to have a police officer testify that the informant has been cooperating with the authorities for however-many weeks, months, or years, that in the officer's opinion the informant is truthful, and that the informant's reputation for truthfulness among other officers with whom she has worked is good. This testimony is clearly permitted by Rule 608(a)(2).

Second, where the Government's "bolstering" evidence about the informant is restricted to favorable opinion or reputation testimony, defense counsel should be given the option of cross-examining such testimony by asking for some details (for example, the number of cases, arrests, seizures, convictions). This is a tactic of questionable wisdom in most cases, but as a general rule defense counsel should not be permitted to demand names or other specifics.

Third, assuming the government's "bolstering" evidence is restricted to favorable opinion or reputation testimony about the informant, defense counsel should be permitted to request the judge to require the prosecutor or police officer to make an *ex parte* showing to the judge that the informant has in fact provided useful, and truthful, information in the past. This showing need not be elaborate—in the typical case it should suffice for the government to provide a list of cases or seizures made with the informant's help.

Finally, as a rule the judge should not permit the prosecutor to elicit testimony from the informant or a police officer as to the number of cases, seizures, arrests, indictments, guilty pleas, or convictions obtained as a result of the informant's cooperation. Testimony about specific other cases should not be permitted, unless such evidence is relevant on facts directly at issue in the trial.