

SUPREME COURT OF WISCONSIN

NOTICE

This order is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 16-02A

**In the matter to amend Wisconsin Statutes
 §§ 901.07, 906.08, 906.09 and create
 Wisconsin Statute § 906.16**

FILED

OCT 11, 2017

Diane M. Fremgen
Clerk of Supreme Court
Madison, WI

This order pertains to an amended rule petition. On April 19, 2016, Attorney April M. Southwick filed a rule petition on behalf of the Wisconsin Judicial Council asking this court to amend Wis. Stats. §§ 901.07 (Remainder of or related writings or recorded statements), 906.08 (Evidence of character and conduct of witness), and 906.09 (Impeachment by evidence of conviction of crime or adjudication of delinquency), and to create Wis. Stat. § 906.16 (a new "Bias rule").¹

¹ This rule petition derives from a multi-year study of Wisconsin's Rules of Evidence conducted by the Wisconsin Judicial Council. The Judicial Council tasked its Evidence & Civil Procedure Committee with the project.

[cont.]

The court conducted a public hearing on October 24, 2016. The court discussed the petition before voting to return the petition to the Judicial Council for revisions, by order dated January 20, 2017. That order sets forth several of the court's specific questions and concerns.

On March 23, 2017, the Wisconsin Judicial Council filed this amended rule petition in response to the court's questions and concerns. The amended petition was accompanied by a supporting memorandum that attached, as Appendix 1, a memorandum to the Judicial

In February 2015, the Judicial Council circulated proposed amendments to and sought feedback from potentially interested groups, including: the State Bar of Wisconsin; Milwaukee County Bar Association; Dane County Bar Association; Western District of Wisconsin Bar Association; Eastern District of Wisconsin Bar Association; Wisconsin Association for Justice; Wisconsin Defense Counsel; Wisconsin State Public Defender's Office; Wisconsin Department of Justice; Wisconsin Committee of Chief Judges; Wisconsin Judicial Conference Legislative Committee; Wisconsin Court of Appeals Judges; Wisconsin Association of Criminal Defense Attorneys; Wisconsin District Attorneys Association; Wisconsin Association of State Prosecutors; Professor Keith A. Findley, University of Wisconsin Law School; and Professor Daniel D. Blinka, Marquette University Law School.

The State Bar also published an article on the proposed changes to the evidence rules, including a notice to its readership that public feedback and comments were invited by the Wisconsin Judicial Council.

No objections to the proposed amendments were received. A question from the Committee of Chief Judges resulted in a recommendation to make an additional minor amendment to one of the rules.

This petition, as amended, is the culmination of part of the Judicial Council's project.

Council from Professor Daniel D. Blinka, Marquette University Law School.

The court discussed the amended petition at an open administrative rules conference on May 18, 2017, and voted to schedule a public hearing. On July 18, 2017, the court sent a letter to interested persons seeking input. On August 15, 2017, the court issued an order scheduling this matter for a public hearing.

The court conducted a public hearing on September 25, 2017. Attorney Thomas L. Shriner, Chair of the Judicial Council's Evidence and Civil Procedure Committee, presented the petition to the court on behalf of the Judicial Council.

At the ensuing closed rules conference, the court discussed the petition and voted unanimously to grant the amended petition and revise the rules as requested by the petitioner.² The court recognizes the extensive work this petition entailed and expresses its appreciation to the Judicial Council and to all who offered comment or otherwise contributed to this matter.

Therefore,

IT IS ORDERED that:

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

²The vote to approve the proposed amendment to Wis. Stat. § 901.07 was 5:2. Justice Shirley S. Abrahamson and Justice Ann Walsh Bradley stated they would delete "whether recorded or unrecorded" as undefined terms that might cause confusion.

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.

SECTION 3. Judicial Council Note to 901.07 of the statutes is created to read:

JUDICIAL COUNCIL 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. 1999), 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 4. 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 5. 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.

SECTION 6. Judicial Council Note to 906.08 of the statutes is created to read:

JUDICIAL COUNCIL 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 7. 906.09 (1) of the statutes is amended to read:

906.09 **(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 under sub. (3), then no further inquiry may be made unless it is for the purpose of rehabilitating the witness's character for truthfulness.

SECTION 8. 906.09 (2) of the statutes is renumbered 906.09 (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 the purpose of attacking a witness's truthful character include:

SECTION 9. 906.09 (2) (a) to (f) of the statutes are created to read:

(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 10. 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.

SECTION 11. Judicial Council Note to 906.09 of the statutes is created to read:

JUDICIAL COUNCIL 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. Subsection (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.

SECTION 12. 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.

SECTION 13. Judicial Council Note to 906.16 of the statutes is created to read:

JUDICIAL COUNCIL 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 ("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.").

IT IS FURTHER ORDERED that the effective date of this order is January 1, 2018.

IT IS FURTHER ORDERED that the Judicial Council Notes to Wis. Stats. §§ 901.07, 906.08, 906.09 and 906.16 are not adopted, but will be published and may be consulted for guidance in interpreting and applying the rule.

IT IS FURTHER ORDERED that the rule adopted pursuant to this order shall apply to court proceedings commenced after the effective date of this rule and to any proceedings within a court proceeding then pending, except insofar as, in the opinion of the circuit court, application of the rule change would not be feasible or would work injustice, in which event the former rule applies.

IT IS FURTHER ORDERED that notice of this amendment of Wis. Stats. §§ 901.07, 906.08, 906.09 and creation of Wis. Stat. § 906.16 be given by a single publication of a copy of this order in the official publications designated in SCR 80.01, including the official publishers' online databases, and on the Wisconsin court system's web site. The State Bar of Wisconsin shall provide notice of this order.

Dated at Madison, Wisconsin, this 11th day of October, 2017.

BY THE COURT:

Diane M. Fremgen
Clerk of Supreme Court

