The Goldilocks Solution: A Middle Ground Between Rules 806 and 608(b) of the Federal Rules of Evidence

by Marty Hockey[*]

Rules 806 and 608(b) of the Federal Rules of Evidence address overlapping issues that give rise to a doctrinal conflict. Rule 806 permits impeachment of hearsay declarants "as if" they had testified, while Rule 608(b) bars the use of extrinsic evidence to prove specific instances of a witness's conduct. Courts disagree about whether that bar survives Rule 806's incorporation of ordinary impeachment tools into the hearsay context. The Third and D.C. Circuits have read the rules literally, holding that Rule 806 incorporates Rule 608(b)'s prohibition on extrinsic evidence. The Second Circuit, in dicta, has suggested the opposite: that extrinsic evidence should be admissible against hearsay declarants precisely because there is no live witness present to answer questions about conduct on cross-examination. Both approaches treat the question as binary—extrinsic evidence in, or no meaningful impeachment—and as a result, one goes too far and the other not far enough. This Contribution proposes a third "just right" option: a procedure permitting counsel to pose impeachment questions to the record of an absent declarant's statement, as though cross-examining an empty chair, allowing the factfinder to weigh the questions without opening the door to extrinsic proof.

Witnesses frequently decide the fate of trials by offering testimony that persuades a jury one way or another. Because of how influential witness testimony can be, equally important is an attorney's ability to assess that testimony on cross-examination. Asking questions to probe the witness's character for truthfulness may similarly determine the outcome of litigation. When a

[*] Marty Hockey is a J.D. Candidate (2027) at New York University School of Law. This Contribution is a commentary on the problem at the 2026 Prince Evidence Moot Court Competition hosted by Brooklyn Law School. One of the questions presented was whether, under Rule 806 of the Federal Rules of Evidence, extrinsic evidence of specific instances of conduct of a hearsay declarant may be admitted to impeach a declarant's character for truthfulness when the declarant is unavailable to testify at trial. This Contribution proposes a novel solution to the problem presented. The views expressed herein do not necessarily represent the author's views.

witness cannot appear at trial—either because of death, illness, or some other legitimate reason—courts face a significant problem. Without the witness present, factfinders have no reliable way to gauge either the witness's credibility or the truth of what they said.[1]

When a party introduces a statement into evidence made by a witness unable to appear at the current trial or hearing to prove the truth of the matter asserted, it is referred to as "hearsay."[2] For example, suppose a police officer testifies that a bystander told him, "I saw the defendant run out of the store." If the bystander passes away before trial and the prosecution presents the statement to the jury to prove the defendant ran out of the store, it is hearsay. It would not be hearsay if the prosecution offered that statement just to show that the bystander was at the scene, because in that case, it would not be offered to prove the truth of what the bystander said. The Federal Rules of Evidence ("FRE") prohibit the use of hearsay statements at trial unless the statement falls within one of several carefully outlined exceptions.[3] If a statement falls within one of these categories, it is introduced at trial as though the witness had made it in person.[4]

Rules 806 and 608(b) govern how the statement, once admitted, may be tested. Rule 806 directly applies to hearsay statements, as well as out-of-court statements made by someone speaking on the party's behalf (an authorized spokesperson, an agent or employee, or a coconspirator).[5] Because an absent declarant cannot be cross-examined, Rule 806 attempts to level the playing field by providing that absent declarants may be impeached using the same tools that would be available had the declarant testified in person.[6] Rule 608(b), on the other hand, targets live witnesses rather than absent declarants. It allows for inquiry into specific instances of conduct bearing on the witness's truthfulness, but

---

[1] FED. R. EVID. 801 advisory committee's note.
[2] FED. R. EVID. 801(c).
[3] FED. R. EVID. 802.
[4] FED. R. EVID. 803 advisory committee's note.
[5] FED. R. EVID. 806; *see generally* FED. R. EVID. 801(d) (outlining who might make statements on a party's behalf).
[6] FED. R. EVID. 806.

bars the use of extrinsic evidence to prove that conduct.[7] Extrinsic evidence includes anything outside of the question asked to the witness, including documents, statements, testimony, and so on.[8] The witness can either admit or deny the conduct, and the factfinder must judge the truth of the witness's answer by observing their demeanor. When the witness is not there to be asked, the factfinder has no comparable way to judge either the answer or the witness's credibility.[9]

That tension is where Rules 806 and 608(b) collide. Rule 806 lets parties impeach absent declarants with the same tools that would be available against live witnesses, but one of those tools—asking about specific instances of conduct on cross-examination—has limited practical use when there is no one present to answer the question.[10] Parties respond by trying to prove those instances of conduct through the introduction of extrinsic evidence, which Rule 608(b) expressly forbids.[11] Courts have split on how to resolve the conflict. The D.C. Circuit in *United States v. White* and the Third Circuit in *United States v. Saada* held that Rule 806 incorporates Rule 608(b)'s bar, causing extrinsic evidence of specific instances of conduct to remain inadmissible even against absent declarants.[12] The Second Circuit in *United States v. Friedman* took the opposite approach, suggesting in dicta that extrinsic evidence should be admissible against an absent declarant because there may be no other meaningful way to impeach the absent declarant.[13]

Both approaches miss the mark. Instead of admitting or barring extrinsic evidence wholesale, courts should allow questions on specific instances of conduct into the record via the "empty chair"

---

[7] FED. R. EVID. 608(b).
[8] Andree Quaresima & Michael J. Dale, *What Does It Mean to Use Extrinsic Evidence on Cross-Examination?*, NAT'L INST. FOR TRIAL ADVOC.: THE LEGAL ADVOC., https://www.nita.org/s/product/what-does-it-mean-to-use-extrinsic-evidence-on-crossexamination/01t4W00000Da63MQAR (last visited Oct. 30, 2026).
[9] FED. R. EVID. 801 advisory committee's note.
[10] United States v. Friedman, 854 F.2d 535, 570 n.8 (2d Cir. 1988).
[11] FED. R. EVID. 608(b).
[12] United States v. White, 116 F.3d 903, 920 (D.C. Cir. 1997); *accord* United States v. Saada, 212 F.3d 219, 221 (3d Cir. 2000).
[13] *Friedman*, 854 F.2d at 570 n.8.

method. This would replicate cross-examination's actual function and allow the jury to draw inferences from unanswered questions without opening the door to a full extrinsic evidence battle. The two approaches adopted by circuit courts carry costs, and neither gets the trade-off right.

The "incorporation approach" adopted by the D.C. and Third Circuits leaves opponents of hearsay without a critical impeachment tool. Suppose someone named Tom witnessed a crime outside his house and made the following statement, which a police officer overheard: "I just saw my neighbor Jerry assault the mailman!" If Tom is unavailable to appear at trial, the prosecution would have to introduce his statement under a hearsay exception. If the court finds that the statement satisfies an exception, the statement will be admitted as evidence for the jury's consideration.[14] Because Tom is unavailable, however, the defense has no opportunity to cross-examine him. Under the "incorporation approach," the defendant would be barred from introducing evidence of prior conflicts between the two, or that Tom once stated he hoped Jerry would go to prison and be out of his life forever. The jury is left with the impression that Tom was an unbiased bystander and consequently will likely give his statement more weight than it would if he were on the stand.

When a declarant cannot testify at trial, "resort[ing] to extrinsic evidence may be the only means of presenting such evidence to the jury."[15] Alternative avenues for impeachment exist, but evidence of specific instances of conduct is widely recognized to be the most persuasive.[16] Opinion and reputation evidence can be introduced, but the jury has little reason to find the witnesses offering that testimony any more credible than the declarant themselves.[17] Opinion evidence is testimony in which another witness gives a personal view of the declarant's character for truthfulness, while reputation evidence is testimony about how the declarant is regarded for truthfulness within a particular community.[18] Neither is very persuasive. The Advisory

[14] FED. R. EVID. 803.
[15] *Id.*
[16] FED. R. EVID. 405 advisory committee's note.
[17] FED. R. EVID. 608(a).
[18] Michelson v. United States, 335 U.S. 469, 477 (1948).

Committee on Evidence Rules has gone so far as to describe reputation evidence as "the secondhand, irresponsible product of multiplied guesses and gossip."[19] Evidence of criminal convictions is available, too, but only against declarants who have criminal records,[20] which makes it useful in a limited range of cases. Losing the ability to introduce specific instances evidence, then, does not just narrow the options available to the opposition; it strips the one impeachment tool most capable of changing how a jury sees the declarant.

This disadvantage creates a perverse incentive: rather than call a witness live, a party can route damaging testimony through a hearsay exception to shield it from impeachment altogether. As Professor Margaret Cordray put it, "if a party felt that a witness was vulnerable to attack under Rule 608(b), that party might attempt to insulate the witness from this form of impeachment by offering his out-of-court statements, rather than calling him to testify."[21] The witness's absence must be legitimate, but a skilled attorney could likely find a plausible justification for it. This incentive to keep vulnerable witnesses off the stand runs headlong into the FRE's preference for live testimony over out-of-court statements.[22] Live testimony offers three conditions the drafters considered essential to assessing credibility: oath, demeanor, and cross-examination.[23] Demeanor and cross-examination matter most because jurors often judge a witness not only by what they say, but how they say it.[24] If a witness is grilled on cross-examination and claims to have seen no crime while sweating profusely and glancing nervously at the defendant, a juror is unlikely to believe them. Hearsay, by definition, offers none of the three essential conditions.[25] An approach that rewards parties for circumventing all three is difficult to defend on the FRE's own terms.

---

[19] FED. R. EVID. 405 advisory committee's note (quoting 7 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1986 at 167 (3d ed. 1940)).
[20] FED. R. EVID. 609.
[21] Cordray, *Evidence Rule 806 and the Problem of the Nontestifying Declarant*, 56 OHIO ST. L.J. 495, 526 (1995).
[22] FED. R. EVID. 804 advisory committee's note.
[23] FED. R. EVID. 801 advisory committee's note.
[24] NLRB v. Universal Camera Corp., 190 F.2d 429, 430 (2d. Cir. 1951).
[25] FED. R. EVID. 801 advisory committee's note.

The incorporation approach also contradicts both the intent and policy behind Rule 806. The Advisory Committee believed that the witness's "credibility should in fairness be subject to impeachment and support as though he had in fact testified."[26] By refusing to allow opponents of hearsay to introduce questions or evidence about the witness's prior bad acts to undermine their credibility, the incorporation approach leaves opponents of hearsay in a disadvantaged position. Rule 806 was designed to remedy precisely that issue.

By contrast, the Second Circuit's rule hands hearsay opponents a more powerful impeachment tool than they would have if the declarant had testified live. A witness confronted with an allegation of misconduct at trial can simply deny it, regardless of its truth. Under the Second Circuit's approach, referred to in this Contribution as the "permissive approach," a party may introduce virtually unlimited extrinsic evidence to support that same allegation, so long as it satisfies the other Federal Rules of Evidence.[27]

The Tom and Jerry hypothetical illustrates the problem from the opposite direction. Rather than being barred from introducing extrinsic evidence altogether, the defense would be free to unleash a barrage of character attacks without Tom ever taking the stand to answer for himself. It could introduce a landlord's grievance against Tom for clawing the curtains, a school disciplinary report describing Tom biting a classmate, or testimony from Tom's neighbor, Spike, who recently had an argument with him. And because the defense would be incentivized to tear his character down, the prosecution would be equally motivated to build it back up.[28] They could bring in family members to testify to his good manners, introduce videos showing Tom generously leaving food out for Jerry, and marshal whatever

---

[26] FED. R. EVID. 806 advisory committee's note.
[27] *Friedman*, 854 F.2d at n.8.
[28] *See* Attorney-General v. Hitchcock (1847) 1 Exch. 91, 103 (holding that allowing such evidence to be presented would inevitably lead to both sides soliciting testimony irrelevant to the claims at issue).

else they could find to cast him as an upstanding citizen.[29] The trial would drift away from the charged crime and into a referendum on Tom's character for truthfulness.[30]

Permitting extrinsic evidence against an absent declarant would undoubtedly lengthen trials, increase their cost, and confuse the jury by inviting exactly this kind of collateral mini-trial.[31] As the drafters of the FRE warned, once extrinsic evidence is allowed to impeach character for truthfulness, collateral matters like these would "assume a prominence at trial out of proportion to their significance."[32] Parties would burn countless hours and thousands of dollars before trial even begins, hunting for specific-act evidence and tracking down peripheral witnesses.[33] At trial itself, scarce judicial time and resources would go toward presenting that evidence, producing a collateral trial on the witness's character that distracts the jury from the issues that actually matter.[34] The Third Circuit cited precisely these concerns in holding that the potential for confusing the issues and increasing the length and cost of trial outweigh whatever probative value extrinsic evidence might add.[35]

Between them, the two approaches leave the jury with either too little or too much information. The incorporation approach prevents the jury from hearing questions that opponents of hearsay would pose to a witness on the stand. The permissive approach allows parties to introduce extrinsic evidence that would not be available had the declarant been present to testify. Courts are left choosing between either leaving the jury in the dark on relevant character evidence or flooding it with evidence that hijacks the trial's focus. It is a choice between lesser evils, but it need not be the only choice available.

---

[29] *See* FED. R. EVID. 806 ("[T]he declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness.").
[30] R. v. Watson (1817) 2 Stark. 116, 149–52 (K.B.).
[31] *Saada*, 212 F.3d at 222.
[32] Carter v. Hewitt, 617 F.2d 961, 970 (3d Cir. 1980); *accord* United States v. Martz, 964 F.2d 787, 789 (8th Cir. 1992); Foster v. United States, 282 F.2d 222, 223 (10th Cir. 1960).
[33] *Watson*, 2 Stark. at149–52.
[34] *Foster*, 282 F.2d at 222–23.
[35] *Saada*, 212 F.3d at 222.

This Contribution proposes a third option that attempts to strike a balance between the two extreme approaches currently employed by circuit courts. The Goldilocks Solution addresses both deficiencies by allowing parties to present questions and statements to an empty chair as if the witness were present to testify, thus allowing the jury to hear about the prior bad acts while prohibiting parties from going further and offering evidence to prove their allegations.

The Tom and Jerry hypothetical demonstrates how this proposal would function in practice. After Tom's statement is introduced to the jury, the opposition would be given the opportunity to pepper the empty witness chair with questions. Counsel could ask the empty chair: "is it true that you had multiple verbal altercations with Jerry, and on the night of September 23rd, you told your neighbor Spike that you wished you could ship Jerry off to prison?" There would obviously be no answer to this question, but due to the specificity of the question, a jury might be more skeptical about his hearsay statement than they otherwise would have been. The lack of a response is not significantly different from a live cross-examination. If Tom were present at trial, he would be able to deny the allegations, and counsel would have to "take the answer of the witness."[36]

Allowing hearsay opponents to impeach a declarant by asking questions to an empty chair also serves the policy behind Rule 806.[37] Rule 806 was intended to open up the credibility of declarants to impeachment and support as though they had testified.[38] The Goldilocks Solution places the opponent as nearly as possible in the position they would occupy if the declarant were on the stand, minimizing either side's advantage. Counsel examining a live witness may ask questions and must live with the answers, however evasive or improbable.[39] Counsel cannot

---

[36] United States v. Abel, 469 U.S. 45, 52 (1984) (citing E. CLEARY, MCCORMICK ON EVIDENCE, § 40, p. 89 (3d ed. 1984); William G. Hale, *Bias as Affecting Credibility*, 1 HASTINGS L.J. 1 (1949)).

[37] FED. R. EVID. 806 advisory committee's note.

[38] *Id*.

[39] *See Abel*, 469 U.S. at 52 (holding that a cross-examiner must accept the answers of a witness).

produce extrinsic evidence to prove the witness a liar. The Goldilocks Solution thus provides counsel with the same freedom to ask questions and press follow-ups, subject to the same constraint on how far the inquiry may go. In doing so, it resolves the conflict among the circuits while vindicating the purpose Rule 806 was written to serve.

Two existing mechanisms supply the guardrails for the Goldilocks Solution. First, under Rule 403, counsel may ask a question only where its probative value is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or undue delay.[40] That constraint alone forecloses the most obvious abuses: for example, the irrelevant question asked to muddy the record, or the question framed less to elicit information than to plant an insinuation. Second, the Eighth Circuit in *United States v. Monteleone* established that there is a "good faith" requirement for asking questions on cross-examination.[41] The Eighth Circuit articulated a two-part test that maps neatly onto the Goldilocks Solution: the cross examiner "must demonstrate a good faith factual basis for the incidents raised during cross-examination of the witness," and "the incidents inquired about must be relevant to the character traits at issue in the case."[42] Applied here, that test bars counsel from advancing accusations they know to be baseless and from using unrelated misconduct to invite the propensity inferences the FRE otherwise forbid.[43] Notably, both safeguards operate through judicial gatekeeping rather than through the witness's own denial, which is precisely why they remain effective when the declarant cannot take the stand.

While the good faith requirement functions to restrain counsel, it also strengthens the impeachment process itself. Because the declarant is absent, jurors hear a question that no one can confirm or deny, which may cause them to discount it. A skilled attorney can counter that skepticism by explaining to the jury that a lawyer may ask such a question only after showing the court a

---

[40] FED. R. EVID. 403.
[41] 77 F.3d 1086, 1090 (8th Cir. 1996).
[42] *Monteleone*, 77 F.3d at 1090.
[43] FED. R. EVID. 404(a)(1).

good faith factual basis for the question.[44] Once jurors understand that rule, each question carries an implicit assurance that it rests on real evidence, which gives the impeachment more force.

The Goldilocks Solution is not without drawbacks. It is novel, and critics will fairly call it awkward and potentially confusing for juries, litigators, and judges alike. Courts would face early uncertainty about how to administer it, developing guidelines through trial and error as the approach is refined. Juries may struggle to gauge the credibility of questions posed to no one, requiring counsel to explain the procedure before employing it. And there is no getting around the optics: a litigator gravely interrogating an empty chair borders on the theatrical.

These critiques are fair, but none of them warrants dismissing the approach. Novelty and awkwardness are not sufficient reasons to deny a party the tools needed for a fair trial. It is true that courts will need to develop standards for administering this procedure as it is used, but courts do this constantly. The adjustment required here pales beside precedents like the wholesale introduction of the Federal Rules of Civil Procedure, which imposed an entirely new procedural code on every federal court at once.[45] The Goldilocks Solution, by contrast, would be invoked only in the narrow circumstance where an absent declarant's character is genuinely vulnerable and his statement is integral to the case. Some early awkwardness among counsel, judges, and juries is likely, but it should fade as the procedure becomes familiar.

The Goldilocks Solution is an experimental answer to a serious evidentiary problem. It is rough around the edges and will demand flexibility from federal courts as they put it into practice. But it closes a doctrinal gap that the current circuit split has left open, and it spares courts a choice no court should have to make: whether to wholly insulate or expose an absent declarant to impeachment. The rules governing absent declarants go to considerable lengths to ensure that neither the proponent nor the

---

[44] *Monteleone*, 77 F.3d at 1090.

[45] Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 974 (1987).

opponent of hearsay is unfairly advantaged by the simple, unfortunate fact that a witness cannot always be in the courtroom. That careful balance should not collapse over a single unresolved conflict between Rules 608(b) and 806. Courts should adopt the Goldilocks Solution instead and trust litigators to do what they do best: use their skills to reconstruct the adversarial testing that cross-examination was designed to provide. Done well, it offers a way to confront absent declarants without shielding them from scrutiny or subjecting them to a trial they never had the chance to attend.