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IMPEACHING A WITNESS

Impeachment Options

I. There are five acceptable methods for attacking the credibility of a witness:

Untruthful Character
Bias
Prior Inconsistent Statements
Defects in Capacity (Memory, Perception, etc.)
Contradiction

– *United States v. Collicott*, 92 F.3d 973, 980 n. 5 (9th Cir. 1996)

– *United States v. Lindemann*, 85 F.3d 1232, 1243 (7th Cir. 1996)

II. Rules 608 and 609 govern impeachment through a showing of untruthful character. Rule 613 governs impeachment by prior inconsistent statements. The other three techniques are not specifically addressed by the rules, but still fall within the requirements of Rules 401 and 403.

Rule 607

I. Text of Rule

> **The credibility of a witness may be attacked by any party, including the party calling the witness.**

II. Rule 607 is a change from the common-law rule that a party calling a witness to testify on its behalf vouched for that witness and could not, therefore, impeach that witness. Rule 607 accepts the reality of modern trial practice by allowing attorneys to blunt anticipated cross-examination impeachment by revealing the information first on direct examination. All of the impeachment techniques available for use on cross-examination are also available for use on direct examination (e.g. Rule 609 convictions, Rule 608(b)untruthful acts, prior

inconsistent statements, bias, etc.).

- *Chambers v. Mississippi*, 410 U.S. 284, 296 (1973)
- *United States v. Rose*, 12 F.3d 1414, 1424-25 (7th Cir. 1994)
- *United States v. Marroquin*, 885 F.2d 1240, 1246-47 (5th Cir. 1989)
- *United States v. Livingston*, 816 F.2d 184, 191 (5th Cir. 1987)
- *United States v. Ewings*, 936 F.2d 903, 909-10 (7th Cir. 1991)
- *United States v. Abel*, 469 U.S. 45 (1984)

III. A prosecutor may not use this rule as a device for introducing inadmissible hearsay.

- *United States v. Miller*, 664 F.2d 94 (5th Cir. 1981). *But see United States v. Carter*, 973 F.2d 1509 (10th Cir. 1992)(the government is entitled to assume that the witness will testify truthfully).

A. The test is whether the government is calling the witness, sure to be unhelpful to its case, solely as a subterfuge to introduce what would otherwise be inadmissible evidence. If the witness will provide some helpful evidence, the prosecution is not "forced to choose between the Scylla of forgoing impeachment and the Charybdis of not calling the witness at all."

- *United States v. Kane*, 944 F.2d 1406, 1412 (7th Cir. 1991)

Untruthful Character

I. Rule 608(a)

A. Text of Rule

> **(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. Rule 608(a) provides for the admissibility of character evidence to

impeach and rehabilitate any witness, including a defendant. However, this character evidence is again limited to testimony in the form of reputation or opinion, pursuant to the requirements of Rule 405, and the testimony may only refer to "truthfulness or untruthfulness."

- *United States v. Thomas*, 676 F.2d 531, 536-37 (11th Cir. 1982)
- *United States v. Williams*, 822 F.2d 512, 516 (5th Cir. 1987)

C. Rule 608(a)(2) precludes the "bolstering" of a witness' truthful character unless evidence of untruthful character has been introduced by opinion or reputation evidence "or otherwise".

1. While Rule 608(a)(2) clearly was not written to invite evidence of truthfulness after every instance of cross-examination, the determination of whether or when the door for truthfulness evidence has been opened remains within the discretion of the trial court.

    - *Beard v. Mitchell*, 604 F.2d 485, 503 (7th Cir. 1979) (permitting the introduction of a good reputation for truth after the witness had been impeached with a prior inconsistent statement)

2. The circuits are split on the issue of whether the prosecution may elicit from a cooperating witness on direct examination the "truthfulness" portions of a cooperation agreement.

    - *United States v. McKinney*, 954 F.2d 471, 478-79 (7th Cir. 1992) (allowing admission on direct)
    - *United States v. Henderson*, 717 F.2d 135, 137-38 (4th Cir. 1983) (allowing introduction of evidence)
    - *United States v. Brady*, 26 F.3d 282 (2d Cir.1994) (prosecution had the right to bring out evidence on direct)
    - *United States v. Hilton*, 772 F.2d 783, 786-87 (11th Cir. 1985) (truthfulness portions of plea agreement only admissible after credibility attack)

3. By utilizing Rule 607 and attacking the character for truthfulness of its own witness, a party does not make admissible rehabilitative testimony under Rule 608(a) as to the witness' character for truthfulness.

– *United States v. Dring*, 930 F.2d 687, 690 (9th Cir. 1991)

D. The cross-examination of Rule 608(a) credibility character witnesses is governed by Rule 405(a). The requirements and possible techniques for cross-examining a Rule 608(a) character witness are the same as those for cross-examining a Rule 404(a) character witness presenting affirmative character evidence for the defendant.

II. Rule 608(b) (December 2003 proposed changes in italics)

A. Text of Rule

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' *character for truthfulness*, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which the character 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 *that* relate only to *character for truthfulness*.

B. Rule 608(b) provides that every testifying witness may be cross-examined, within the court's discretion, regarding acts committed by the testifying witness, or acts committed by another witness as to whom the testifying witness has offered character testimony. However, the specific instances inquired into must be probative of truthfulness or untruthfulness.

– *United States v. Provoo*, 215 F.2d 531, 537 (2nd Cir. 1954)
– *Tigges v. Cataldo*, 611 F.2d 936, 938-39 (1st Cir. 1979)
– *United States v. Dennis*, 625 F.2d 782, 798 (8th Cir. 1980) (civil tax problems not related to truthfulness)
– *United States v. Robinson*, 956 F.2d 1388, 1397-98 (7th Cir. 1992) (drug use standing alone not related to truthfulness)
– *United States v. Wilson*, 985 F.2d 348, 351-52 (7th Cir. 1993) (perjury, bribery, and use of nominees to purchase assets all probative of

truthfulness)
- *United States v. Amaechi*, 991 F.2d 374, 379 (7th Cir. 1993) (lies on tax forms, immigration forms, etc. probative of untruthfulness)

C. There are a few schools of thought for what constitutes dishonesty for purposes of Rule 608(b). The acts must be sufficiently related and proximate in time to the crime charged to be relevant, or not inadmissible under Rule 403, and there must be some likelihood that the event happened.

- *United States v. Manske*, 186 F.3d 770 (7th Cir. 1999)
- *United States v. Barry*, 814 F.2d 1400 (9th Cir. 1987)
- *United States v. Simonelli*, 237 F.3d 19, 23 (1st Cir. 2001)

D. Since specific instances of conduct relating solely to the character of a witness are, by definition, collateral to the trial issues, the questioner is bound by the witness' answer on cross-examination and the existence of the instances of conduct may not be proved by extrinsic evidence.

- *United States v. Abel*, 469 U.S. 45, 55 (1984)
- *United States v. Tracey*, 675 F.2d 433, 440 (1st Cir. 1982)
- *United States v. Young*, 952 F.2d 1252, 1259 (10th Cir. 1991)
- *United States v. Frost*, 914 F.2d 756, 767 (6th Cir. 1990)

E. While Rule 608(b) excludes as collateral the admission of extrinsic evidence of specific instances of conduct going to the character of a witness, extrinsic evidence of specific acts establishing bias is admissible since evidence of bias is not considered collateral.

- *United States v. Abel*, 469 U.S. 45, 51 (1984)
- *See Bias* this outline

F. Examples of Rule 608(b) impeachment include:

- *United States v. Simonelli*, 237 F.3d 19(1st Cir. 2001) (defendant asked about altering time cards, inflating bills, and stealing record, but should not have been asked about violating anti-gratuity policy)
- *United States v. Lambinus*, 747 F.2d 592 (10th Cir. 1984) (defendant asked about possessing stolen tools)
- *United States v. Girdner*, 773 F.2d 257 (10th Cir. 1985) (defendant asked about particulars of a ballot fraud scheme)
- *United States v. Reid*, 634 F.2d 469 (9th Cir. 1980) (defendant was

cross examined on a letter written to a government agency where the defendant falsified name, occupation, name of business and purpose in seeking information)

– *United States v. Fulk*, 816 F.2d 1202 (7th Cir. 1987) (defendant could not be questioned about the defendant's being accused of misrepresentations, but the government should have been allowed to ask about suspension of defendant's chiropractic license because of deceptive practices)

III. Rule 609

A. Text of Rule

(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 evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; 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.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon, annulment or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based

on a finding of the rehabilitation of the person convicted, and that a person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

B. Rule 404(a)(3) allows the admission of character evidence of a witness, including a testifying defendant, as established by either felony or certain types of misdemeanor convictions.

1. The 1990 amendment to Rule 609(a) removed the limitation that the conviction may only be elicited during cross-examination. Accordingly, what was in fact the prior practice is now sanctioned by the Rule and witnesses may reveal on direct examination their convictions to blunt the effect of cross-examination.

   – *United States v. Bad Cob*, 560 F.2d 877, 882-83 (8th Cir. 1977)
   – *United States v. Handly*, 591 F.2d 1125, 1128 n.1 (5th Cir. 1979)

2. Rule 609(a)(2) makes mandatory the admission of <u>any</u> conviction, regardless of the punishment, if the conviction "involved dishonesty or false statement" *(crimen falsi)*. This means that the impeaching crime must involve, "some element of deceit, untruthfulness, or falsification which would tend to show that an accused would be likely to testify untruthfully." The court may look to the facts, and not only the elements of the conviction.

   – *United States v. Brashier*, 548 F.2d 1315, 1326-7 (9th Cir. 1976)
   – *United States v. Smith*, 551 F.2d 348, 362 (D.C. Cir. 1976)

– *United States v. Mejia-Alarcon*, 995 F.2d 982 (10th Cir. 1993)

3. The Courts have not been unanimous in sculpting the parameters of this "dishonesty and false statement" category. While crimes of violence clearly do not qualify, and classic fraud-type crimes clearly do, the difficult question is the treatment of those offenses, such as property crimes and narcotics offenses, which seemingly do not reflect on veracity but are, nonetheless, often times admitted.

– *United States v. Manske*, 186 F.3d 770 (7th Cir.1999) (alleged threats of violence and intimidation of persons who might incriminate witness admissible)
– *United States v. Yeo*, 739 F.2d 385, 387-88 (8th Cir. 1984) (theft conviction not admissible)
– *United States v. Del Toro Soto*, 676 F.2d 13, 18 (1st Cir. 1982) (grand larceny admissible)
– *United States v. Amaechi*, 991 F.2d 374, 378-79 (7th Cir. 1993) (petty shoplifting conviction not admissible)
– *United States v. Cameron*, 814 F.2d 403, 405-06 (7th Cir. 1987) (weapons (including switchblades) possession conviction not admissible)
– *United States v. Mehrmanesh*, 689 F.2d 822, 833-34 (9th Cir. 1982) (hashish smuggling conviction not admissible)
– *United States v. Ortiz*, 553 F.2d 782, 784-85 (2nd Cir. 1977) (admission of heroin distribution convictions)

4. A second issue concerning Rule 609(a)(2) concerns whether, and if so to what degree, a trial judge should probe into the circumstances surrounding the witness' prior conviction in order to determine whether the actual conduct is indicative of untruthfulness. For example, a misdemeanor assault is neither a felony crime nor an offense of "dishonesty or false statement", but should this assault be admissible impeachment if the assault was accomplished by luring the victim into an alley by deceit and lies. Even though efficiency and convenience would seem to be better served by applying the mechanical rule, some courts have shown an inclination to delve into contextual facts and circumstances.

– *United States v. Grandmont*, 680 F.2d 867, 871 (1st Cir. 1982)
– *United States v. Dorsey*, 591 F.2d 922, 935-36 (D.C. Cir. 1978)
– *United States v. Lipscomb*, 702 F.2d 1049, 1068 (D.C. Cir. 1983)

C. Prosecutors should be alert for any interplay between Rules 608 and 609, as well as between Rules 609 and 404(b). Impeachment by a Rule 609 conviction ordinarily may not involve inquiry into details. If the conviction is one of dishonesty, however, the trial court may be convinced that inquiry into details is permitted, not under Rule 609, but under Rule 608(b) on cross-examination of the witness. Similarly, the details of a Rule 609 conviction may be independently admissible if the facts of the conviction satisfy the requirements of Rule 404(b) as admissible "other acts".

Bias

I. Generally

Bias describes "the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party." Bias also embraces "interest," which results from the relationship between the witness and the issues at bar, as well as "corruption," which refers to a witness's decision to testify falsely due to bribery. Although the federal rules do not specifically address impeachment by bias, the Supreme Court has unequivocally declared that it is a proper impeachment technique. The trial court may, however, place reasonable limits on inquiries into bias.

- *United States v. Abel*, 469 U.S. 45, 52 (1984)
- *Delaware v. Van Arsdall*, 475 U.S. 308, 316-17 (1986) (reasonable limits permissible based on concerns about "harassment, prejudice, confusion of the issues, the witness's safety, or interrogation that is repetitive or only marginally relevant")

II. Bias may arise in a number of ways, including:

A. The witness has a personal relationship with a party or someone related to the litigation.

- *Justice v. Hoke*, 90 F.3d 43 (2d Cir. 1996) (witness motivated to fabricate story because of dispute with the defendant)

B. The witness has a financial stake.

- *United States v. Williams*, 954 F.2d 668, 672 (11th Cir. 1992) (improperly excluding evidence concerning amounts paid to

informant-witness)

C. The witness has a penal interest.

– *Davis v. Alaska*, 415 U.S. 308, 316-17 (1974) (witness's probationary status provides motive to accuse defendant)

D. The witness fears a party.

– *United States v. Gerry*, 515 F.2d 130 (2nd Cir. 1975) (Evidence of fear offered to impeach a recanting defense witness's denial of fear for his personal safety was properly admitted even in the absence of evidence connecting any defendant to any threat to witness's safety)

III. Extrinsic evidence ordinarily is admissible to prove a witness's bias. Thus, an impeaching party is not bound by the witness's answer. An offer of extrinsic evidence may, however, be limited by the trial court pursuant to Rule 403 because of its tendency to prejudice the jury, embarrass the witness or waste time.

– *United States v. Abel*, 469 U.S. 45, 52 (1984)
– *United States v. Weiss*, 930 F.2d 185, 197-98 (2nd Cir. 1991)

IV. No foundation requirement for bias impeachment is contained in the federal rules. Nonetheless, several courts of appeals have indicated that the impeaching party must afford the impeached witness the opportunity to admit or deny facts or statements manifesting the bias.

– *United States v. Manske*, 186 F.3d 770, 778-79 (7th Cir. 1999)
– *United States v. Betts*, 16 F.3d 748, 764 (7th Cir. 1994)
– *United States v. Weiss*, 930 F.2d 185, 197-98 (2nd Cir. 1991)

Prior Inconsistent Statements

I. Rule 613

A. Text of Rule

(a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by the witness,

whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded as opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to the admission of a party-opponent as defined in Rule 801(d)(2).

B. If the inconsistency is admitted by the witness, extrinsic evidence is inadmissible.

1. *United States v. Soundingsides*, 820 F.2d 1232, 1241 (10th Cir.1987) (testimony of police officers about handwritten summaries of prior inconsistent statements by witnesses was inadmissible for impeachment purposes, where witnesses acknowledged making prior statements)
2. *But see United States v. Lashmett*, 965 F.2d 179, 181-82 (7th Cir.1992) (Adverse party was entitled to introduce extrinsic evidence to emphasize fact that witness made prior inconsistent statement, even though witness admitted to making prior inconsistent statement)

C. When a witness's prior inconsistent statement is offered for impeachment, it is being offered merely to show that the witness told a different story at a different time. The statement is not being offered for its truth and is not hearsay when offered for this purpose. A witness's prior inconsistent statement may be admitted for its truth as well as for impeachment purposes in certain situations:

1. When the statement meets the requirements of Rule 801(d)(1)(A), which defines prior inconsistent statements that were given under oath at a trial, hearing or other proceeding under penalty of perjury as non-hearsay.
2. When the statement qualifies as a prior statement of identification, 801(d)(1)(C).
3. When the statement qualifies as an admission of a party opponent, Rule 801(d)(2).

4. When the statement qualifies under an exception to the hearsay rule.

D. A witness may be impeached with any kind of prior statement – oral, written, sworn or unsworn. A witness may also sometimes be impeached with his prior silence. Statements by an accused that were taken in violation of *Miranda*, and thus made inadmissible as substantive evidence, may still be used to impeach the accused's testimony at trial.

– *United States v. Strother*, 49 F.3d 869, 874-75 (2d Cir.1995)
– *Harris v. New York*, 401 U.S. 222 (1971)

Defects in Capacity

I. Generally

A witness may be attacked by showing that he suffered from an infirmity that affected his ability to perceive the event in question, now suffers from an infirmity that affects his ability to testify accurately, or suffered an intervening disability that affected his memory. A witness may also be impeached by establishing that he lacked the opportunity to observe the event.

The rules of evidence do not explicitly address this method of impeachment. It is therefore, governed by reference to Rules 401-403 and 611. A witness's capacity to observe, recall or relate may certainly be probed on cross-examination. Extrinsic evidence is also generally admissible, subject to the court's discretion to place reasonable limits on such evidence.

II. Sources of defects in capacity include:

A. *A mental illness or infirmity affecting the witness*, if it evinces "an 'impairment' of the witness's 'ability to comprehend, know, and correctly relate the truth.'"

– *United States v. Jimenez*, 256 F.3d 330, 343 (5th Cir. 2001) (quoting *United States v. Partin*, 493 F.2d 750, 763 (5th Cir. 1974))

B. *Alcohol or drug use by the witness.* Evidence that the witness was under the influence of drugs or alcohol near the time of the event or is under the

influence while testifying is admissible. Courts are more likely to exclude or limit evidence of drug or alcohol use not contemporaneous with the event or testimony. Alcoholism *per se* is not admissible.

- *United State v. DiPaolo*, 804 F.2d 225, 229-30 (2nd Cir. 1986)
- *United States v. Mojica*, 185 F.3d 780, 788-89 (7th Cir. 1999) (holding evidence inadmissible absent showing that drug use impaired witness's ability to recall or relate events)
- *Poppell v. United States*, 418 F.2d 214 (5th Cir. 1969)

C. *A witness's bad eyesight, memory, hearing, etc.*

- *United States v. Ciocca*, 106 F.3d 1079, 1082-83 (1st Cir. 1997) (memory loss due to accident)
- *Battle v. United States*, 345 F.2d 438, 440 (D.C. Cir. 1965) (eyesight)

Contradiction

I. Generally

The impeaching party can always attempt to elicit testimony from a witness that contradicts part or all of that witness's own testimony. The issue that arises under this method of impeachment is under what circumstances a party is permitted to introduce extrinsic evidence to establish the contradiction.

Evidence that is offered to contradict a witness's testimony as to a material fact is admissible. Evidence offered to contradict a witness's testimony as to a tangential fact or a collateral matter is ordinarily not admissible.

II. The classic standard for whether a matter is collateral is, "Could the fact, have been shown in evidence for any purpose independently of the contradiction?"

- 3A Wigmore, Evidence § 1003, at 961 (Chadbourn rev. 1970)
- *United States v. Scott*, 243 F.3d 1103, 1107 (8th Cir. 2001) (contradiction offered through the testimony of another witness is customarily excluded unless it is independently relevant or admissible)
- *United States v. Williamson*, 202 F.3d 974 (7th Cir.2000) (proffered testimony of defense witness tended to impeach only on a collateral matter and thus was not relevant)
- *United States v. Kozinski*, 16 F.3d 795, 805-06 (7th Cir.1994) (one may not

impeach by contradiction regarding collateral or irrelevant matters and something is collateral if it could not have been introduced into evidence for any purpose other than the contradiction)

III. Courts do sometimes permit extrinsic proof of a contradiction even though the contradiction relates only to a tangential or collateral matter. This happens in a couple of instances:

A. The witness is unlikely to have been mistaken about the "tangential" fact were his story true.

- *United States v. Lopez*, 979 F.2d 1024, 1034 (5th Cir. 1992) ("Extrinsic evidence is material, not collateral, if it contradicts 'any part of the witness's account of the background and circumstances of a material transaction, which as a matter of human experience he would not have been mistaken about were his story true'...") (quoting McCormick, Evidence § 47, at 112 (3d ed. 1984)

B. The witness has volunteered specific testimony that is false. The concern here is that the witness should not be permitted to engage in perjury, mislead the trier of fact, and then shield himself from impeachment by asserting the collateral matter doctrine. Courts are more willing to allow extrinsic evidence to contradict testimony given during direct examination on the assumption that this testimony is more likely to have been volunteered than testimony given during cross.

- 2A Wright and Gold, Federal Practice and Procedure, § 6119 at 116-117 (1993)
- *United States v. Castillo*, 181 F.3d 1129 (9th Cir. 1999)

IV. Ultimately, the admissibility of extrinsic evidence that is offered to contradict a witness's testimony must be judged under Rules 401-403. Among the factors the court should consider are the significance of the contradicted fact to the witness's story, the ease with which the contradiction can be proved, and whether the contradicted fact was elicited on direct or cross examination.

- *United States v. Beauchamp*, 986 F.2d 1 (1st Cir. 1993)
- *United States v. Castillo*, 181 F.3d 1129, 1133 (9th Cir. 1999)