IMPEACHMENT

Weapons of Mass Destruction

By: Terence F. MacCarthy

"Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness." Federal Rule of Evidence 611(b).

WAYS TO IMPEACH

[1] Inconsistent Statements (FRE 613)

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[2] Contradictions - Contrary Evidence

[3] Motivation

[4] Truthfulness (FRE 608)

[5] Convictions (FRE 609)

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[6] What the Witness Could Have Done But Did Not Do

[7] Capacity

[8] Bad Acts, Crimes, and Wrongs (FRE 404(b))

[9] Habit (FRE 406)

[10] Writing Used to Refresh Memory (FRE 612)

[11] Admissions (FRE 801(d)(2))

[12] The Hearsay Declarant (FRE 806)

[13] Character Witnesses

[14] FRE - 412-13-14-15: (all deal with sex crimes or civil sex cases)

EXPERTS ONLY

[15] Qualifications and Curriculum Vitae (FRE 702)

[16] Learned Treatises (FRE 803(18))

1

Impeachment With (Prior) Inconsistent Statements

. **IMPEACHMENT:**

1. **Discredit the witness: show mistaken, lying, or simply a bad person.**

2. **Importance of impeachment to the trial lawyer: you vs. witness in critical credibility conflict.**

3. **Does it come in merely to impeach or as substantive evidence?**

4. **What about impeaching your own witness? (FRE 607)**

. **PRIOR?**

. **INCONSISTENT:**

1. **Contradiction**

2. **Omission**

3. **Lack of Knowledge or Memory ("I don't know, I don't remember")–You Have a Choice: Refresh Recollection or Impeach**

(a) **Refresh Recollection (FRE 612)**

(b) **Impeach**

. STATEMENTS

1. **Must be Those of the Witness** (They need not write it and may not even read it. If they do not read it, you will not be able to kill the fish, but someone else will do it for you.)

2. **Writing** (possibly admissible as substantive evidence, i.e., statements, 302s, letters, tax returns, depositions, testimony)

3. **Oral**

4. **Trial Considerations**

5. **Exceptions:** Legislation may, for public policy reasons, except or exclude such things as accident reports by someone involved or hospital incident reports.

. ORGANIZING OUR INCONSISTENT STATEMENT IMPEACHMENT

1. **What do you do to impeach?**

2. **What do you want to accomplish?**

3. **How to do - let's go fishing!**

. OFFICIAL INCONSISTENT STATEMENT IMPEACHMENT "FISHING RULES"

RULE 1: **Let the Small Fish Go:** A rule of common sense.

(a) Exception:

- No big fish,
- Very hungry, and
- A lot of little ones

RULE 2: **Set the Hook:** But not all of the time. Many call this "recommitting" the witness.

(a) How to set the hook

(b) Exceptions:

- Fish swallowed
- Inconsistent with purpose

(c) Collateral v. non-collateral (this is the time to learn this distinction)

RULE 3: **Reel in the Fish:** Take it easy and play with the fish–bring it in *slowly*. This is the most important rule.

(a) Exalt, extol, enshrine the statement

(b) Trappings of truthfulness, reliability, accuracy: fresh in mind, wanted to help, this was important to you, truthful, accurate, details, important details, wanted others to rely upon, asked to look over, did look over, opportunity to correct, did make corrections, read it, understood it, agreed with it.

(c) Close escape routes

RULE 4: **Net the Fish into the Boat:** The old way is the best way.

(a) FRE 613(a): "the statement need not be shown"

(b) <u>The Queen's Case</u>, 129 Eng. Rep. 976, 976-77 (1820):

(c) Show witness the statement (if you have a witness statement)

(d) How to show the statement

1. Judge

2. Opponent

3. Witness ("You know what this is," or "This is your official police statement")

(e) Loop: Select three (i.e., accurate, complete, truthful statement)

RULE 5: **Kill the Fish:** Time to end the sport.

(a) Who reads the statement? (three views)

1. You

   - Emphasis

   - Witness no opportunity to read or explain

2. Witness

   - Same mouth

   - Looks better (fairer)

3. Both - TFM

EXAMPLE

Q. "Read to us your answer when you were asked . . . ."

- OR -

Q. "Read to us what you said you saw when you left the bar."

– Take back the statement.

– Now, loop the operative term or terms:

"You said you saw (operative term) after you left the bar."

"You said you knew the driver of the (operative term)."

"You said the (operative term) was going west."

(d) If witness denies you cannot kill the fish

- Collateral/non-collateral:

- Extrinsic evidence (someone else will kill the fish)

- Persuasive (possibly phantom) document

- Comes in as evidence (not necessarily substantive)

- <u>Publish</u> (but do not use the term).

RULE 6: **Put the Fish in the Bag:** Do not play with it! It was fun but it is now over.

- **Finally, what do you do with the second impeachment?**

- **Clean, cook, and serve the fish (during closing argument**

2

Motivation

. **Bias, Prejudice, Animus, Interest**

1. Sixth Amendment – confrontation (but also available to prosecutors and civil lawyers)

2. *De novo* review – not plain error

3. Harmless error can be considered but is seldom used (Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986))

. **Goes to "credibility" – but do not call it that**

. **Not found in or based on a specific FRE.** Is mentioned in Commentary to FREs 607, 608, and 611(b). Also relates to "relevant evidence" under FRE 401.

. **Relevance.** (The polestar case is: Davis v. Alaska, 415 U.S. 308, (1974))

E. Never collateral (may use extrinsic evidence)

See **United States v. Abel, 469 U.S. 45, 51 (1984)** (the courts of appeals have upheld the use of extrinsic evidence to show bias).

F. Obvious example in criminal cases: "THE DEAL"

1. Extremely broad

2. If bad acts – crimes – the concern is not what but when

3. Obviously pending charges

4. Probation (even juvenile)

5. Arrests and crimes without arrests

6. Crimes need not be known to prosecutor – need not be incorporated in the DEAL

How to impeach on the DEAL

1. Witness expectations, hopes, what the witness would like

2. Setup: do not like jail; do not want to go to or stay in; do most anything to avoid or go for shorter time; know you committed crime(s); talked to lawyer; concern; maximum penalties; to avoid (only way), you made the DEAL. In writing. Prosecution decides *after* you tell your story.

3. "All I have to do is 'tell the truth'" (see Robert Fogelnest "truth letter" on the following page)

September 17, 1999

Re: United States v. Defendant

Mr./Ms. Rat
c/o Rat Lawyer
Address

Via First Class Mail and
Certified Mail/Return Receipt Requested

Dear Mr./Ms. Rat:

I represent [CLIENT] in regard to criminal charges which are pending against him in [LOCATION]. In order to properly represent [CLIENT], and to get all the facts before the jury so that they can determine the truth, it is important for me to investigate the case and to interview all of the witnesses. Because you have been identified as a witness I need to speak with you. My investigator and I are willing to meet with you under any arrangements that you want, at a time and place convenient to you. You may refuse to answer any questions asked and, of course, have your lawyer present during the interview. The purpose of this interview is not to embarrass you or to make you feel uncomfortable. My only purpose is to have you provide a completely truthful statement of all the facts and circumstances in this case.

Although the prosecutors can promise you many things, and even help you to avoid going to jail for the crimes which you have committed, I can't give you anything for speaking to us. However, since you have discussed this case with the prosecutor and other law enforcement agents, it seems fair that you speak with us as well so that we can determine the truth. Your attorney will confirm that witnesses do not belong to any one side. He or she will also confirm that it would be improper for the prosecutor or agents to prevent, or even suggest, that you not speak with us. It is solely your decision. It is, however, appropriate to discuss this request with your attorney, and I suggest that you do so.

Thank you for reading this letter. I hope that out of a sense of fairness and justice, you will do what is right. I believe that it is right for you to speak with us so that we may be better able to help the jury determine the truth. I hope that after consultation with your attorney you agree and decide to cooperate with us as you have with the prosecutors.

Yours truly,

Counsel for Defendant

4. Demonstrative aid – chart, blackboard, etc. (see examples on the following pages)

THE "DEAL"

Maximum sentence you will receive = 10 years

Hoping to do much better = Probation

OTHER CRIMES	POSSIBLE MAX. SENTENCE
• **Crack Cocaine (5 grams or more) with Enhancement for Prior Felony Drug Conviction (*WILL NOT CHARGE*)**	**MANDATORY MINIMUM 10 YEARS UP TO LIFE**
• **Failure to Pay Income Tax (5 years) (*WILL NOT CHARGE*)**	**5 YEARS**
• **Probation Revocation (*WILL NOT CHARGE*)**	**5 YEARS**
• **Aggravated Assault (Domestic Violence) (*WILL NOT CHARGE*)**	**1 YEAR**
• **DWI (*WILL NOT CHARGE*)**	**1 YEAR**
TOTAL	**22 YEARS TO LIFE**

THE DEAL = 22 YEARS TO LIFE VS. PROBATION

DEAL

Expects: 12-1/2 (max) - Probation (min)

Prosecutor will not charge:

• Crack Cocaine	3
• Felony Enhancement (mandatory minimum)	20
• Income Tax	6
• Probation Revocation	5

Prosecutor made "go away":

• Aggravated Assault	4
• DWI	1
	39 years

39 Years vs. Probation

3

Truthfulness (FRE 608)

A. NOT "Did you ever lie?"–Must be specific

. "Good faith" basis test

. Lies:

– any

– all

– no limit (except obviously commonsense)

1. Investigation sources

. More than lies

– See excellent opinion in **United States v. Mansky, 186 F.3d 770 (7th Cir. 1999)** (adopting a "middle view" on the spectrum of how to view the application of Rule 608(b), which view considers behavior seeking personal advantage by taking from others in violation of their rights as reflecting on veracity, e.g., dishonesty; integrity; taking from others; theft; stealing, buying, receiving or using stolen goods; bribery; deceptive practice; failure to file income tax returns; and finally the facts in the case, threats to witnesses in earlier case).

. **Collateral (no extrinsic evidence)**

. **Use the persuasive document**

G. ALIAS

. **Problems in using**

. **Foundation:**

– born

– arrested

– reason

. **Negative character witnesses on direct examination**

EXAMPLE

1. Introduction:

a) Name–introduce self to jury

b) Where do you live?

c) Where do you work / what do you do?

d) How long have you known John Jones?

e) Have you seen or do you see him often?

f) How do you know him?

2. Reputation:

a) Explain reasons for questions

b) Do you know other persons who know him? How?

c) Have you talked to these other people about him?

d) Have you talked to these other people about John Jones' reputation for _____?*

(or) Have you heard his reputation for _____ talked about?

(or) Have you ever heard any of these people say anything bad about his reputation for _____?

e) Mrs. Smith, would you tell the ladies and gentlemen of the jury what John Jones' reputation for _____ is?

3. Opinion:

a) Based upon your own association with, your own dealings with John Jones, do you have a personal opinion as to whether or not he is a _____* person?

4. **Extra if Truth and Veracity Used**

a) Knowing his reputation for truth and veracity, if John Jones were to take an oath and testify in this case, would you believe him? (U.S. v. Bambulas, 471 F.2d 501, 504 (7th Cir. 1972); U.S. v. Walker, 313 F.2d 236 (10th Cir. 1963).

5. Conclusion

a) Your witness for cross-examination

**Use a separate but similar question for each character trait.*

4

Convictions (FRE 609)

. Must be <u>Felony</u> or <u>Dishonesty</u> / <u>False Statement</u>

1. Felonies

2. Dishonesty and false statement are usually interpreted *narrowly*

3. Many cases demonstrate a lack of understanding of these rules of impeachment

<u>United States v. Cavender</u>, 228 F.3d 792 (7th Cir. 2000), is an example. In this drug case, the "linchpin witness" for the government testified on direct that during a certain period of time, he did not sell, use, or deal drugs in Chicago. This was not a good idea. Again, on cross, he made the same denials. The defendant's lawyer wanted to impeach the witness, but apparently did not know what he could do or how to do it. He certainly had the material, for the witness was convicted of possession of drugs in Chicago during this time period. In this case, conviction impeachment under FRE 609 and truthfulness impeachment under FRE 608 are both obvious. Neither was used, in part because of the lawyer and in part because of the trial judge's rulings. The Seventh Circuit Court of Appeals continued the confusion. As to all the defendants but one (i.e., Campbell, the one against whom the case was the weakest), the failure to allow FRE 609 impeachment was held to be harmless error. Notably, truthfulness impeachment under FRE 608 was not mentioned by the Seventh Circuit though the court acknowledged that the witness had lied (this is, in part, understandable in that truthfulness was never mentioned in the trial court). The Seventh Circuit briefly mentioned motivation impeachment but did nothing with it because motivation was not mentioned in the trial court. Finally, the court allowed that FRE 609 impeachment could raise Sixth Amendment issues. Unfortunately,

the court did not consider these issues because the defense was allowed to impeach in other ways.

. Two Limitations:

1. Balancing Tests – probative value vs. prejudice (does NOT apply to dishonesty/false statement impeachment)

There are actually TWO different balancing tests:

a) **<u>for criminal defendants</u>**, probative value must outweigh prejudice (as spelled out in Rule 609)

b) **<u>for all other witnesses</u>**, the less demanding Rule 403 balancing test applies: the probative value must be "substantially outweighed" by the danger of prejudice

2. Remoteness – not more than ten years from release

a) Give notice

C. NOT COLLATERAL (certified copy)

. How <u>not</u> to do

. How <u>to</u> do

5

What the Witness Could Have Done But Did Not Do

A. Prosecution witnesses failure to:

- **Include key facts in a police report, affidavit, or other document**. **See, e.g., Bailey v. Town of Smithfield, 1994 U.S. App. LEXIS 3950, at *12-13 (4th Cir. Mar. 4, 1994)** (specific facts were omitted from the affidavit for the warrants for the defendant's arrest; however, the omissions did not negate probable cause).

- **Take fingerprints or collect other evidence**

- **Give an adequately detailed description of the culprit**

- **Call the police**

- **Obtain adequate expert evaluation/perform certain tests**

- **Etc.**

B. Criminal defendants: constitutional considerations

- **See Jenkins v. Anderson, 447 U.S. 231, 240 (1980)** (holding that impeachment by the use of pre-arrest silence did not violate the Fourteenth Amendment where the defendant, who testified at his trial for murder and claimed self-defense, killed a man and did not turn himself in until two weeks after the killing, since the failure to speak occurred before the defendant was taken into custody and given Miranda warnings).

6

Capacity

A. Cognitive – Perception – Recollection

– "It is true that in all branches of jurisprudence instances are frequent in the cases, and illustrations common in the books, of the fallibility of direct testimony, from honest mistake. Such instances and illustrations occur and are drawn, throughout the history of the law of evidence, from one general class of oral testimony. It is that which depends for credence upon the unaided memory of the witness, in relation to some ordinary thing, not unusual, unnatural or striking, in and of itself. Thus, the testimony of an honest witness to the fact merely, that at a certain time and place, he saw two individuals together might be successfully assailed, while the statement of the same witness that he saw them together, and saw one of them strike the other or shoot the other, would be invulnerable. So, by the same rule, direct testimony by the average witness as to ordinary conversations or statements at a distance of time, may be as unreliable as his recollection of the contents in detail of a letter, which, intrinsically, or to the witness, was of no particular interest; in both instances becoming less reliable in proportion to the lapse of time. Such evidence, while it may be competent, has little weight." **Telephone Cases, 126 U.S. 1, 487-88 (1888)**.

. Senses: sight, touch, taste, smell, feel

1. Eyewitness identification

– "A plethora of recent studies show that the accuracy of an eyewitness identification depends on how the event is observed, retained and recalled. Memory and perception may be affected by factors such as: (1) the retention interval, which concerns the rate at which a person's memory declines over time; (2) the assimilation factor, which concerns a witness's incorporation of information gained subsequent to an event into his or her memory of that event; and (3) the confidence-accuracy relationship, which concerns the correlation between a witness's confidence in his or her memory and the accuracy of that memory. Other relevant factors include: (4) stress; (5) the violence of the situation; (6) the selectivity of perception; (7) expectancy; (8) the effect of repeated viewings; (9) and the cross-racial aspects of identification, that is where the

eyewitness and the actor in the situation are of different racial groups." **United States v. Smithers, 212 F.3d 306, 312 n.1 (6th Cir. 2002) (quoting Alan K. Stetler, Particular Subjects of Expert and Opinion Evidence, 31A Am. Jur. Expert § 371 (1989)).**

– "Effective cross-examination is indispensable if a lawyer wants to present modern psychological thinking, which is cautious about eyewitness performance, as anything beyond a naked assertion. Jurors are unlikely to apply a general principle–that perception is subject to many errors, for example–unless they are shown in a compelling fashion why that general principle is evident in the specific case which they are asked to judge. If counsel hopes to argue that the eyewitness process is a complex one, it will be necessary to generate a wealth of tiny pieces of data (about light, position, stress, expectation, and so forth) out of which to construct the argument. Generating that specific data is the business of cross-examination, which in an eyewitness case, perhaps more than in many others, demands preparation, patience, and attention to detail." **Elizabeth F. Loftus & James M. Doyle, Eyewitness Testimony: Civil and Criminal, § 10.26, at 304 (2d ed. 1992).**

2. Capacity impairment (mind, memory)

- **time of event or trial**

- **not collateral**

- **must set up**

3. Mental disorder

4. What about abuse of drugs or alcohol?

– **General rule - no**

– **Exception:**

7

Contradictions

A. **No specific Rule of Evidence**

B. **It might also be an <u>inconsistent statement</u> or <u>truthfulness</u>**

C. **Often on direct as well as cross – still set the hook**

D. **<u>Examples</u>: "he was working that day," "cold," "car was red"**

E. **May be collateral (but unlike truthfulness, may be non-collateral)**

F. **Some appear to either eliminate or at least liberalize the collateral / non-collateral test**

G. **Again, consider the persuasive document**

8

Bad Acts (FRE 404(b))

. **Motive, opportunity, intent, plan, knowledge, identity, absence of mistake or accident**

. **Need not be a crime**

. **Not limited to prosecution – for that matter, criminal defense has lower standard – no need to weigh (FRE 403) for prejudice**

D. Some states allow far more extended "bad person" impeachment not limited to the narrow exceptions allowed in Rule 404(b).

– **New York:** any criminal, immoral or vicious acts that go to a witness' credibility.

  – "There can, of course, be no doubt as to the propriety of cross-examining a defendant concerning the commission of other specific criminal or immoral acts. A defendant, like any witness, may be 'interrogated upon cross-examination in regard to any vicious or criminal act of his life' that has a bearing on his credibility as a witness." **People v. Sorge, 93 N.E.2d 637, 638 (N.Y. 1950).**

  – But see **United States v. Provoo,** 215 F.2d 531, 536 (2d Cir. 1954) ("In the Federal courts . . . [a]s generally held, specific acts of misconduct not resulting in conviction of a felony or crime of moral turpitude are not the proper subject of cross-examination for impeachment purposes.")

- **Illinois:** a witness' disreputable occupation as it bears on credibility.

  - "The general rule in Illinois . . . is that it is proper to cross-examine a witness to bring out the witness's unlawful and disreputable occupation and activity **as** a matter affecting credibility." **People v. Crump, 125 N.E.2d 615, 620 (Ill. 1955).**

  - "In general, a witness can be cross-examined about and contradicted on his unlawful and disreputable occupation. The theory is that if a witness is engaged in an unlawful and disreputable occupation, the witness should not be permitted to appear before the jury as a person of high character who is engaged in a lawful and respectable occupation. Thus, if the witness denies, or refuses to concede, engaging in the unlawful occupation when cross examined about it, the witness may and must be contradicted with admissible evidence. . . . To even cross examine a witness about these matters, the occupation must be both disreputable and unlawful. . . . Occupations qualifying as unlawful and disreputable have included: 'keeper of a house of ill fame,' prostitution and being an operator of an illegal gambling house, drug dealer, and 'loan shark.'" **John E. Corkery, Illinois Civil & Criminal Evidence, § 608.110, at 313 (2000).**

9

Habit (FRE 406)

A. What a person (or corporation) usually does

. Will not see used often

10

Writing Used to Refresh Memory (FRE 612)

A. As distinguished from "refreshing recollection," this Rule contemplates the use of a writing to prepare a witness (i.e., refresh her memory) either before testifying or while testifying

. Must first show witness needed memory refreshed

C. Need not be witness' own writing

D. The writing need not be admissible

E. Opposing party has limited access to the writing

11

Admissions (FRE 801(d)(2))

. Key elements of an admission:

1. Statement

a. Oral, written, or nonverbal conduct

– "A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." **FRE 801(a).**

b. Made by a party

– individually

– in a representative capacity

c. Offered against the party who made the admission

– In criminal cases, most commonly offered against defendants

– May–or may not–be offered against the government

Traditional view

Modern developments

- **Statements by prosecutors**
- **Statements by federal agents**
- **Statements by police officers**
- **Statements by informants**
- **Other government statements**

d. Not hearsay

e. Can be of fact, opinion, conclusions (of fact or law) and need not be based on personal knowledge

2. Declarant need not testify at trial

3. No guarantee of trustworthiness required

4. Need not reach an ultimate issue

a. Can be anything contrary to party's testimony at trial

b. Subject to relevancy requirements

5. Comes in as substantive evidence

. Types of admissions

1. FRE 801(d)(2)(A): Party's own statement

2. FRE 801(d)(2)(B): Party's adopted statement

3. FRE 801(d)(2)(C): Statement of person authorized by party

4. FRE 801(d)(2)(D): Statement of party's agent

5. FRE 801(d)(2)(E): Co-conspirator statements

a. Must establish existence of conspiracy

1. Conspiracy need not be charged
2. Need not be same conspiracy

b. Declarant is member of conspiracy

c. Statement made during course of conspiracy

d. Statement made in furtherance of conspiracy

12

Learned Treatises (FRE 803(18))

A. Applies to EXPERTS only

. May be used on <u>Direct</u> or <u>Cross</u>

. Recall Fishing Rules and inconsistent statements – even though statement is <u>not</u> that of witness:

1. No small fish
2. Set hook unless . . .
3. No
4. No
5. Kill Fish (<u>Read</u>)
6. Not play with fish

- **Published treatises, periodicals, pamphlets**

- **On a subject of history, medicine, other science, or art**

- **Must establish as RELIABLE Authority (by any means)**

    1. Witness (show)

    2. Another (expert) witness

    3. Judicial notice

- **Substantive evidence**

- **May be READ by both – (use chart)**

I. May not be received as Exhibit

13

Expert's Qualifications (FRE 702)

. **Ideally, "experts" with limited qualifications are not allowed to testify in the first place**.

B. Unfortunately, "the rejection of expert testimony is the exception rather than the rule." FRE 702 Advisory Committee Notes.

C. Impeachment of expert qualifications is the next best thing (after the court's preliminary determination to admit the testimony as reliable and helpful under Daubert and Kumho Tire).

D. Expert qualifications may be impeached at trial by showing inadequacies in the expert's:

1. Knowledge

2. Skill

3. Experience

4. Training

5. Education

E. Specifically, cross-examination may focus on the following considerations:

– Type of knowledge, skill, experience, training, or education

– How obtained

– Where obtained

– Extent/duration
– Degree of specialization

– Methods relied on

– Degree to which the expert's knowledge, skill, experience, training, or education are recognized as "expert" in the field

– Extent to which expert has published relative to others in the field

– Failure to obtain certain knowledge, skill, experience, training, or education

– Etc.

A final note on the

Credibility of Hearsay Declarants (FRE 806)

A. Declarant need not testify at trial

1. May be accomplished by:

prior convictions

reputation

inconsistent statements

any other appropriate impeachment method

. Need not give an opportunity to explain or deny

RELATED RULES OF EVIDENCE

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes . . .

(b) Other Crimes, wrongs, or acts. 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. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Rule 607. Who May Impeach

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

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' 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.

Rule 609. Impeachment by Evidence of Conviction of Crime

(a) General rule. For the purpose of attacking the credibility of witness, (The credibility of a witness may be attacked by any party, including the party calling the witness.)

1) evidence that a witness order 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 tot he 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 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.

Rule 611. Mode and Order of Interrogation and Presentation.

(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination. . . .

Rule 612. Writing Used to Refresh Memory

Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh memory for the purpose of testifying, either –

1) while testifying, or

2) before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal case when the prosecution elects not to comply, the order shall be on striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

Rule 613. Prior statements of Witnesses

(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 an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. The provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

Rule 801. Definitions

(d) Statements which are not hearsay.

A statement is not hearsay if:

1) Prior statement by witness.

The declarant testifies at the trial or hearing and is subject to cross-examination concerning the

statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person . . . .

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule even though the declarant is available as a witness.

(18) Learned Treatises.

To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits. . . .

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in Rule 801(d)(2), (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by an evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.