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## **Impeachment Methods Illustrated: Movies, Novels, and High Profile Cases**

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## IMPEACHMENT METHODS ILLUSTRATED: MOVIES, NOVELS, AND HIGH PROFILE CASES

*Martin A. Schwartz*<sup>\*</sup> & *John Nicodemo*<sup>\*\*</sup>

### I. INTRODUCTION

**PROSECUTION FOR MURDER: *PEOPLE V. ARMSTRONG*  
MENARD COUNTY COURTHOUSE, ILLINOIS (1858)  
CROSS-EXAMINATION OF PROSECUTION’S EYE WITNESS  
CHARLES ALLEN:**

**Question:** Did you actually see the fight?

**Answer:** Yes.

**Question:** And you stood near them?

**Answer:** No, it was a hundred and fifty feet or more.

**Question:** In the open field?

**Answer:** No, in the timber.

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**Question:** What kind of timber?

**Answer:** Beech.

**Question:** Leaves on it rather thick in August?

**Answer:** Yes.

**Question:** What time did all this occur?

**Answer:** Eleven o'clock at night.

**Question:** Did you have a candle?

**Answer:** No, what would I want a candle for?

**Question:** How could you see from [the] distance of a hundred and fifty feet or more without a candle at eleven o'clock at night?

**Answer:** The moon was shining real bright.

**Question:** A full moon?

**Answer:** Yes, a full moon.<sup>1</sup>

**Question:** Does the almanac not say that on August twenty-ninth (the night of the murder), the moon had disappeared, the moon was barely past the first quarter instead of being full?

[No Answer]

**Question:** Does the almanac also say that the moon had disappeared by eleven o'clock?

[No answer]

**Question:** Is it not a fact that it was too dark to see anything from fifty feet, let alone one hundred and fifty feet?

[No Answer]<sup>2</sup>

Irving Younger,<sup>3</sup> the legendary Evidence professor, provided

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<sup>1</sup> At this point, the cross-examiner asked the judge to take judicial notice of an astronomical table contained in an almanac. "[A] court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." FED. R. EVID. 201(b).

<sup>2</sup> Irving Younger, *The Art of Cross Examination*, 1 SEC. LIT. MONOGRAPH SERIES 1, 29-30 (1976) (additional commentary by Irving Younger omitted).

<sup>3</sup> "Irving Younger [was] a leading scholar on trial techniques. . . . In his 30-year career, Mr. Younger was a Federal prosecutor, judge, professor, trial lawyer and author. Thousands of law students have seen or heard him in some of the more than 10,000 video and audio tapes he made on evidence, trial practice and civil procedure." Stephen Labaton, *Irving Younger, Lawyer, 55, Dies; Judge, Law Professor, and Author*, N.Y. TIMES, Mar. 15, 1988,

the above example of a cross-examiner's attempt to impeach the credibility of a witness during cross-examination. The attorney representing the defendant conducting the cross-examination was Abraham Lincoln.<sup>4</sup> Younger's example illustrates the goal of impeachment—to discredit a witness's testimony, or, in other words, convince the jury that the witness's testimony on direct is not worth believing. The outcome of many cases may turn on a witness's credibility. If an attorney's cross-examination successfully impeaches a witness by demonstrating to the jury that the witness's testimony is not believable, the attorney may have successfully negated key opponent testimony. Jurors, of course, are not likely to place much reliance, if any, on testimony coming from the mouths of witnesses with suspect credibility.

This article will review and illustrate the various methods of impeachment authorized by the law of evidence. The methods fall under seven categories: (1) physical or mental disability relating to an attribute to be a competent witness, (2) bias, (3) convictions, (4) bad or immoral acts, (5) bad character for truth and veracity, (6) prior inconsistent statements, and (7) specific contradiction.<sup>5</sup> This article focuses on the Federal Rules of Evidence, although, in many instances, state rules of impeachment, with some exceptions and variations, are

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<http://www.nytimes.com/1988/03/15/obituaries/irving-younger-lawyer-55-dies-judge-law-professor-and-author.html>.

<sup>4</sup> JOHN EVANGELIST WALSH, *MOONLIGHT: ABRAHAM LINCOLN AND THE ALMANAC TRIAL* 33 (2000). Legend has it that the so-called "blue" almanac was a counterfeit designed by Lincoln for the purpose of impeaching the witness. WALSH, *supra*, at 33.

<sup>5</sup> Not all of the several impeachment methods are covered in the Federal Rules of Evidence. Impeachment by attacking the credibility of a witness by introducing reputation or opinion evidence relating to a witness's truth and veracity and immoral acts is covered by Federal Rule of Evidence 608 (Evidence of Character and Conduct of Witness); Federal Rule of Evidence 609 (Impeachment by Evidence of Conviction of Crime) allows the introduction of evidence of a witness's conviction in prescribed circumstances to attack his or her character; Federal Rule of Evidence 613 (Prior Statements of Witnesses) allows a cross-examiner to introduce evidence of a witness's prior statement which is inconsistent with his or her in-court statement in an effort to discredit his or her believability. The Federal Rules do not expressly codify impeachment by showing a witness's disability (e.g., poor eyesight, hearing difficulties, and mental incapacity), bias, or specific contradiction, but these are well-established impeachment methods and authorized by federal law. *E.g.*, *United States v. Owens*, 484 U.S. 554, 559 (1988) (stating that "It is sufficient that the defendant has the opportunity to bring out such matters as the witness' bias, his lack of care and attentiveness, his poor eyesight, and even . . . the very fact that he has a bad memory."); *United States v. Abel*, 469 U.S. 45, 49 (1984) (regarding bias); *Behler v. Hanlon*, 199 F.R.D. 553, 558 (D. Md. 2001) (stating that "evidence that impeaches by contradiction . . . can be both substantively admissible[, as well as admissible] for its impeachment value").

consistent with the federal impeachment rules.<sup>6</sup> The impeachment methods are illustrated with references to movies, novels, and high-profile trials.

## II. WHO MAY IMPEACH?

The novel, *Judge and Jury*,<sup>7</sup> by James Patterson and Andrew Gross, provides a colorful application of Federal Rule of Evidence 607, which allows “[a]ny party including the party that called the witness,” to “attack the witness’s credibility.”<sup>8</sup> In *Judge and Jury*, a government witness, Mr. Machia, is on the stand facing direct examination by the prosecuting attorney.<sup>9</sup> The direct examination begins with the prosecutor’s attempt to reveal the witness’s rather extensive criminal past, including a laundry list of felonies, with Mr. Machia acknowledging that he has been breaking the law “since [he] learned to use a fork.”<sup>10</sup>

In the poignant 1992 film, *Philadelphia*,<sup>11</sup> the plaintiff, Andrew Beckett (played by Tom Hanks), a former successful trial attorney, sues his former law firm under the Americans with Disabilities Act.<sup>12</sup> The plaintiff claims he was fired from the firm because he has AIDS, and he chose to call his former employer to the stand.<sup>13</sup> The plaintiff’s attorney, played by Denzel Washington, attempts to im-

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<sup>6</sup> Compare, e.g., FED. R. EVID. 609(a)(1) (“[F]or a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence: (A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and (B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant[.]”), with OHIO R. EVID 609(a)(2) (“[N]otwithstanding Evid. R. 403(A), but subject to Evid. R. 403(B), evidence that the accused has been convicted of a crime is admissible if the crime was punishable by death or imprisonment in excess of one year pursuant to the law under which the accused was convicted and if the court determines that the probative value of the evidence outweighs the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.”), and IND. R. EVID. 609(a) (“For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime or an attempt of a crime shall be admitted but only if the crime committed or attempted is (1) murder, treason, rape, robbery, kidnapping, burglary, arson, criminal confinement or perjury; or (2) a crime involving dishonesty or false statement.”).

<sup>7</sup> JAMES PATTERSON & ANDREW GROSS, *JUDGE AND JURY* (2006).

<sup>8</sup> FED. R. EVID. 607.

<sup>9</sup> PATTERSON & GROSS, *supra* note 7, at 58.

<sup>10</sup> *Id.* at 58-59.

<sup>11</sup> *PHILADELPHIA* (TriStar Pictures 1993).

<sup>12</sup> *Id.* See generally 42 U.S.C. § 12101(b)(1) (2006).

<sup>13</sup> *PHILADELPHIA*, *supra* note 11.

peach his own witness, one of Beckett's former clients, by showing that the client, who testified on direct that Beckett's work was merely satisfactory, had testified at an earlier deposition that he was "impressed, and delighted" with Beckett's work.<sup>14</sup> The plaintiff's attorney argued, "[F]ive months ago this witness characterized Andrew Beckett as caviar. Now he's [calling him] a bologna sandwich."<sup>15</sup>

Why might the proponent want to impeach his *own* witness? Suppose, as in *Judge and Jury*, a party is faced with having to call a witness whose testimony is essential, but whose past misdeeds subjects his credibility to an impeachment attack. The direct examiner may attempt to mitigate "the sting" of a cross-examiner's attack on the witness's credibility by exposing the witness's shortcomings on direct.<sup>16</sup> The jury then learns of the witness's "baggage," and the direct examiner can proceed with the testimony that may be useful to his or her case.<sup>17</sup> It is not a perfect solution for the proponent, but perhaps less damaging than having the negative baggage brought out for the first time on cross-examination. Also, in some cases, a direct examiner, upon realizing that his or her witness appears uncooperative, recalcitrant, evasive, or hostile, may impeach the witness in an

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<sup>14</sup> *Id.*; see also FED. R. EVID. 801(d)(1):

A statement that meets the following conditions is not hearsay:

(1) A Declarant-Witness's Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

(B) is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(C) identifies a person as someone the declarant perceived earlier.

*Id.*

<sup>15</sup> PHILADELPHIA, *supra* note 11.

<sup>16</sup> See FED. R. EVID. 609 advisory committee's note.

The amendment to Rule 609(a) makes two changes in the rule. The first change removes from the rule the limitation that the conviction may only be elicited during cross-examination, a limitation that virtually every circuit has found to be inapplicable. It is common for witnesses to reveal on direct examination their convictions to "remove the sting" of the impeachment.

*Id.*

<sup>17</sup> *Id.*

effort to discredit the witness's unexpected negative testimony.<sup>18</sup>

In *Philadelphia*, the plaintiff's attorney impeached the witness by introducing the witness's prior inconsistent statement.<sup>19</sup> Rule 801(d)(1)(A) provides that if a statement "is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition," the inconsistent statement is exempt from the rule against hearsay and thus admissible both to impeach and to prove the truth of the matter the inconsistent statement asserts.<sup>20</sup> Because Beckett's attorney impeached his witness by reiterating his testimony from an earlier deposition, under the Federal Rules of Evidence, this inconsistent statement is exempt from the rule against hearsay. In these circumstances, the trial judge would *not* give the jury a limiting instruction that the inconsistent statement may be considered only for the purpose of evaluating the witness's credibility. The judge may, but is not required, explain to the jury that the inconsistent statement may be considered both for its truth and in evaluating the witness's credibility.

Rule 607 lies in direct opposition to the English common law rule,<sup>21</sup> which forbade a party from impeaching his or her own witness.<sup>22</sup> The common law rule flowed from the notion that a party who calls a witness vouches for the credibility of that witness. Further, by forbidding the impeachment of one's own witness, a party may be deterred from calling unreliable witnesses.<sup>23</sup> However, the common law rule, in some instances, operated to dissuade a party from calling a necessary witness because of the witness's questionable credibility.<sup>24</sup> Therefore, because parties sometimes have a press-

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<sup>18</sup> FED. R. EVID. 607 (A direct witness's hostility, or lack of cooperation, may be countered with leading questions, which are allowed under FED. R. EVID. 611(c)).

<sup>19</sup> See *PHILADELPHIA*, *supra* note 11.

<sup>20</sup> FED. R. EVID. 801(d)(1)(A).

<sup>21</sup> See FED. R. EVID. 607 advisory committee's note ("The traditional rule against impeaching one's own witness is abandoned as based on false premises. A party does not hold out his witnesses as worthy of belief, since he rarely has a free choice in selecting them. Denial of the right leaves the party at the mercy of the witness and the adversary.").

<sup>22</sup> See RICHARD O. LEMPert, SAMUEL R. GROSS, JAMES S. LIEBMAN, JOHN H. BLUME, SPEPHAN LANDSMAN, & FREDRIC I. LEDERER, *A MODERN APPROACH TO EVIDENCE* 396 (West Group, eds., 4d ed. 2011) ("[A] party presenting a witness may 'impeach' any unfavorable aspect of the witness's testimony, even if the bulk of the testimony is friendly.").

<sup>23</sup> *Id.* at 395.

<sup>24</sup> *Id.* The Lempert book rejects the notion that unethical attorneys armed with the ability to impeach their own witnesses would somehow use this rule to coerce their own witnesses to "secure falsely favorable testimony" by threatening to expose unsavory information about

ing need to impeach their own witnesses on direct examination, the common law in time was modified to allow an exception permitting direct examiners to impeach their own witnesses if they could show surprise or prejudice from the testimony given by the witness. The Federal Rules effectively dispense with the need to demonstrate surprise or prejudice. Although a party may, under Rule 607, impeach his or her own witness by offering the witness's prior inconsistent statement, most federal courts have not allowed this to occur if the proponent called the witness in order to introduce the inconsistent statement to evade the rule against hearsay.<sup>25</sup>

### III. THE SEVEN METHODS OF IMPEACHMENT

The evaluation of a witness's credibility is solely a question for the trier of fact.<sup>26</sup> Courts, therefore, do not allow experts to give an opinion about the credibility of another witness. Nor are lay witnesses ordinarily allowed to opine about the believability of another witness's credibility. But the law does authorize plentiful methods for attacking a witness's credibility. We have grouped these methods into seven categories.

The question arises whether the impeaching party is limited to questioning the witness and accepting the witness's answer, or whether the impeaching party may seek to contradict the witness's testimony with other evidence, i.e., extrinsic evidence.

The answer depends on whether the particular method of impeachment is considered as either non-collateral or collateral.<sup>27</sup> The

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them; nothing prevents these unethical attorneys from making the same threats outside of court. *Id.* at 395. The authors state that the rule simply prevents ethical attorneys from presenting a proper case. *Id.*

<sup>25</sup> See, e.g., *United States v. Webster*, 734 F.2d 1191, 1192 (7th Cir. 1984) (recognizing that the proponent may not impeach his or her own witness with prior inconsistent statements if the purpose is to obviate the rule against hearsay).

<sup>26</sup> See FED. JURY PRAC. & INSTR. § 15:01 (5th ed. 2011) ("You, as jurors, are the sole and exclusive judges of the credibility of each of the witnesses called to testify in this case and only you determine the importance or the weight, if any, that their testimony deserves. After making your assessment concerning the credibility of a witness, you may decide to believe all of that witness' testimony, only a portion of it, or none of it.").

<sup>27</sup> See Emily Stern, IMPEACHMENT BY WAY OF EXTRINSIC EVIDENCE § 40:6 (Robert L. Haig, ed., 3rd ed. 2010) ("As to collateral matters (those matters not related to issues in the case, but related only to the witness's credibility), the examining attorney is bound by the witness's answers and cannot attempt to disprove those answers through extrinsic evidence.").



“non-collateral” methods are considered the more important impeachment methods; for convenience, one may refer to them as the “vital” methods. When cross-examiners choose to employ a vital method of impeachment, they are not limited to simply questioning the witness on cross-examination. The cross-examiner may seek to contradict the witness’s testimony by introducing extrinsic evidence—that is, any type of evidence other than the in-court testimony of the witness being impeached, e.g., documents, photographs, or a second witness in his or her attempt to discredit the witness.<sup>28</sup> For example, if a witness denies on cross-examination that he was bribed to testify in the case, the cross-examiner may be permitted to introduce the testimony of a second witness, a document, or an audio tape to demonstrate the bribe. However, the right to introduce extrinsic evidence is not unlimited and is still subject to Federal Rule 403.

Collateral methods of impeachment, on the other hand, while authorized under the laws of evidence, are less vital than non-collateral methods. Unlike the vital methods, collateral methods allow a cross-examiner to impeach only by questioning the witness on cross-examination. In other words, extrinsic evidence may not be introduced to contradict the witness’s answer.

The only means of impeachment that the Federal Rules explicitly state as inadmissible relates to a witness’s religious beliefs.<sup>29</sup> Evidence of a witness’s religious beliefs or opinions is inadmissible for the purpose of demonstrating that his or her credibility is affected by the nature of those beliefs.<sup>30</sup> However, “an inquiry for the purpose of showing interest or bias because of [religious beliefs or opinions] is not within the prohibition.”<sup>31</sup> For example, a witness’s affiliation with a church that is a party to the action may be admissible to show the witness’s bias.

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<sup>28</sup> See, e.g., *United States v. Abel*, 469 U.S. 45 (1984) (extrinsic evidence admissible to impeach by showing bias).

<sup>29</sup> FED. R. EVID. 610; see *United States v. Sampol*, 636 F.2d 621, 666 (D.C. Cir. 1980) (“The purpose of the rule is to guard against prejudice which may result from disclosure of a witness’s faith. The scope of prohibition includes unconventional or unusual religions.”).

<sup>30</sup> FED. R. EVID. 610 (“Evidence of a witness’s religious beliefs or opinions is not admissible to attack or support the witness’s credibility.”).

<sup>31</sup> FED. R. EVID. 610 advisory committee’s note.

## A. The Vital Methods of Impeachment

### 1. *Impeachment by Disability: A Witness' Perception, Memory, Ability to Communicate, and Obligation to Give Truthful Testimony Under Oath*

The 1992 Academy Award-winning comedy, *My Cousin Vinny*,<sup>32</sup> pointedly illustrates the use of impeachment by showing a witness's disability. In the movie, two defendants are charged with robbery and the murder of a convenience store clerk. In a memorable courtroom scene, Defense Attorney Vincent Gambini (played by Joe Pesci) cross-examines an elderly prosecution eyewitness who, on direct, identified the defendants as the perpetrators of the crime. Gambini then asked the witness to put on her eyeglasses, a pair of super-thick lensed spectacles, which suggest extreme near-sightedness. After Gambini established that on the day of the crime the witness wore those glasses, he asked the witness to tell the court the number of fingers he is holding up; she answered "four," when he actually displayed only two. The comedic moment arrives when the witness, after having sworn that her current prescription allowed her to see perfectly, acknowledged that she may need *thicker* glasses.

The classic scene demonstrates impeachment by disability. Under the law of evidence, a cross-examiner may impeach a witness by disability by demonstrating that a witness is deficient in one or more of the four traditional categories of characteristics required to be considered a competent witness: (1) perception; (2) memory; (3) communication; or (4) the ability to understand the obligation required to give truthful testimony.<sup>33</sup> The Federal Rules of Evidence expressly require every witness to affirm under oath or affirmation that her testimony is truthful and based on personal knowledge.<sup>34</sup>

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<sup>32</sup> MY COUSIN VINNY (Twentieth Century Fox Film Corp. 1992).

<sup>33</sup> FED. R. EVID. 603; LEMPET ET AL., *supra* note 22, at 440-45.

<sup>34</sup> See FED. R. EVID. 602.

A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703.

*Id.*

The rules, however, do not set forth express rules regarding impeachment by disability. Regardless, impeachment by disability is a well-established impeachment method used in federal and state courts to show, for example, a witness's mental disabilities, drug dependency, alcoholism, and recollection deficiencies.<sup>35</sup>

Impeachment by disability is a vital method of impeachment, allowing an examining attorney to introduce extrinsic evidence to impeach her witness, subject to Rule 403.<sup>36</sup> An excellent example of a cross-examiner's use of extrinsic evidence to effectively impeach a witness by disability occurred in *United States v. Accetturo*,<sup>37</sup> which is the subject of Robert Rudolph's "The Boys from New Jersey: How the Mob Beat the Feds."<sup>38</sup> In *Accetturo*, the defendants were charged with a laundry list of federal crimes.<sup>39</sup> The prosecution called its purported "star witness," Joseph Alonzo, a life-long friend of the defendants, to testify that he had personally known the defendants and can attest to their murderous venture.<sup>40</sup> During cross-examination, the defense, in an attempt to show that Alonzo was insane, introduced "psychiatric records showing that [Alonzo] had once been diagnosed as 'schizophrenic' and had been given electroshock treatments on at

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<sup>35</sup> See, e.g., *Sampol*, 636 F.2d at 667 (finding that it was proper to impeach a witness by showing the witness's drug influence at the time of the event or while testifying); *Roberts v. Hollocher*, 664 F.2d 200, 203 (8th Cir. 1981) (stating that the plaintiff's drug use was relevant to his ability to recall specific incidents in question); *Brandon v. Village of Maywood*, 179 F. Supp. 2d 847, 853 (N.D. Ill. 2001) (stating that the plaintiff's consumption of alcohol on the day he was shot by a police officer "may be relevant to his memory and perception of events").

<sup>36</sup> FED. R. EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.").

<sup>37</sup> 623 F. Supp. 746 (D.N.J. 1985).

<sup>38</sup> ROBERT RUDOLPH, *THE BOYS FROM NEW JERSEY: HOW THE MOB BEAT THE FEDS* (Rutgers Univ. Press 2009).

<sup>39</sup> *Accetturo*, 623 F. Supp. at 748-49 (charging "conducting a racketeering enterprise in violation of 18 [U.S.C. §] 1962(c), which included conspiracy to distribute and possession with intent to distribute cocaine and marijuana in violation of 18 [U.S.C. §] 2 and 21 [U.S.C. §] 841; conduct of an illegal gambling business in violation of 18 [U.S.C. §] 1955; mail fraud in violation of 18 [U.S.C. §§] 1341 and 2; wire fraud in violation of 18 [U.S.C. §§] 1343 and 2; Hobbs Act extortion in violation of 18 [U.S.C. §§] 1951 and 2; extortionate credit transactions in violation of 18 [U.S.C. §§] 892-894 and 2; and extortion in violation of N.J.S.A. 2C:20-5.").

<sup>40</sup> ROBERT RUDOLPH, *THE BOYS FROM NEW JERSEY: HOW THE MOB BEAT THE FEDS* 151 (Rutgers Univ. Press 2009).

least six occasions.”<sup>41</sup> The psychiatrist’s records constitute an example of extrinsic evidence used to impeach by showing disability. As a result, Alonzo “was forced to admit that he lied to the psychologist who examined him for the government.”<sup>42</sup>

The much-publicized criminal prosecution against three New York City detectives for the shooting of Sean Bell provided a textbook example of the introduction of extrinsic evidence to impeach a witness’s credibility by disability.<sup>43</sup> After the prosecution introduced the testimony of Trent Benefield, a passenger in Bell’s car who purportedly witnessed the alleged murder, the defense, on cross-examination, attempted to impeach his credibility by introducing evidence indicating that he may have been intoxicated or incoherent as a result of drug use at the time of the shooting.<sup>44</sup> The defense showed Mr. Benefield his medical reports from the hospital from the morning of the shooting in which Benefield admitted to drinking beer and smoking marijuana each day for the previous six years; Benefield claimed to have had no recollection of reporting his alcohol and drug habits to the treating physicians.<sup>45</sup> Again, introduction of the medical reports illustrate extrinsic evidence introduced to impeach by showing the witness’s disability.

## 2. *Bias, Motive, and Interest*

Very few cases in recent memory have received the notoriety and the overwhelming public interest as the 1994 California double murder prosecution against former National Football League star O.J. Simpson. During the trial, Police Detective Mark Fuhrman testified

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<sup>41</sup> *Id.* at 151-52, 198.

<sup>42</sup> *Id.* at 198.

<sup>43</sup> See *Sean Bell*, N.Y. TIMES, [http://topics.nytimes.com/top/reference/timestopics/people/b/sean\\_bell/index.html?inline=nyt-per](http://topics.nytimes.com/top/reference/timestopics/people/b/sean_bell/index.html?inline=nyt-per) (last updated Dec. 1, 2011) (“In the early morning hours of Nov. 25, 2006, Sean Bell, a 23-year-old New York City man due to be married later that day, walked out of a Queens strip club, climbed into a gray Nissan Altima with two friends who had been celebrating with him—and died in a hail of 50 bullets fired by a group of five police officers.”).

<sup>44</sup> Michael Wilson, *Passenger in Sean Bell’s Car Recounts Shooting*, N.Y. TIMES, Apr. 1, 2008, <http://www.nytimes.com/2008/04/01/nyregion/01bell.html?scp=1&sq=passenger%20in%20sean%20bell%20car%20recounts&st=cse> (attempting to discredit Mr. Benefield’s eyewitness testimony of the incident, the defense also introduced evidence that Mr. Benefield accepted \$10,000 from Al Sharpton’s National Action Network, possibly creating a presumptive financial interest in the case’s outcome.).

<sup>45</sup> *Id.*

for the prosecution that he found a key piece of evidence near Simpson's residence that linked him to the murders of his former wife and her friend, specifically the famous "bloody glove" found at the murder scene.<sup>46</sup> The defense, attempting to discredit Fuhrman's testimony, cross-examined him about his racial biases and use of the term "nigger," both of which he denied. The defense was allowed to introduce audiotapes, i.e., extrinsic evidence, of statements in which Fuhrman used the term "nigger" several times in a conversation with Laura Hart McKinney.<sup>47</sup>

The defense's attempt to impeach the credibility of Detective Fuhrman by showing his racial bias illustrated effective use of extrinsic evidence of bias. Although bias is not codified within the Federal Rule of Evidence, the Supreme Court has held that this time-honored method of impeachment remains available under the Federal Rules.<sup>48</sup> Because bias is a vital method of impeachment, extrinsic evidence may be used to discredit witness testimony (subject to Rule 403).<sup>49</sup> In Simpson's case, Furman's bias was established by the audiotape on which he was heard using the term "nigger."

In the federal perjury prosecution against former professional baseball superstar Barry Bonds, in which he was accused of lying under oath about his steroid use, his defense attorneys sought to discredit the prosecution's witnesses by showing their biases.<sup>50</sup> During the cross-examinations of the two witnesses, Bonds' former girlfriend, Kimberly Bell, and Bonds' childhood friend-turned-business associate, Steve Hoskins, the defense introduced evidence that both Bell and Hoskins not only had personal reasons to testify against Bonds, but also "benefitted" from the government by agreeing to testify

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<sup>46</sup> GERALD F. UELMEN, *THE O.J. FILES: EVIDENTIARY ISSUES IN A TACTICAL CONTEXT* 170 (1997).

<sup>47</sup> *Id.* at 169-170.

<sup>48</sup> *See Abel*, 469 U.S. at 51 (stating that "it is permissible to impeach a witness by showing his bias under the Federal Rules of Evidence just as it was permissible to do so before their adoption").

<sup>49</sup> *Id.*; 27 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 6095 (2d ed. 2011) ("Bias usually can be shown through extrinsic evidence. Thus, if a witness does not admit to the facts establishing bias those facts may be proved with other evidence.").

<sup>50</sup> Laird Harrison, *Evidence Against Bonds from Enemies, Defense Says*, REUTERS, Apr. 7, 2011, available at <http://www.reuters.com/article/2011/04/08/us-barrybonds-trial-idUSTRE73668L20110408> (noting that Bonds' perjury charge arose from his alleged lying to officials regarding his use of prohibited performance enhancing drugs while playing professional baseball).

against him.<sup>51</sup> First, the witnesses acrimoniously ended their relationships with Bonds, calling into question their highly personal motives.<sup>52</sup> Additionally, the defense uncovered factual information regarding the government's leniency of the two witnesses regarding charges against them (Bell for extortion and Hoskins for embezzlement).<sup>53</sup> Essentially, each had an interest in testifying against Bonds that called into question the veracity of their testimony. The defense's introduction of the information regarding the government's "leniency" deals presented another example of the use of extrinsic evidence for the purpose of impeachment by bias.

### 3. *Impeachment by Conviction: Can a Jury Trust a Witness who has a Record of Conviction?*

Many classic Hollywood films offer dramatic illustrations of impeachment by conviction. One well-known example is the 1959 motion picture courtroom drama, *Anatomy of a Murder*.<sup>54</sup> This vital method of impeachment is governed by Federal Rule of Evidence 609.<sup>55</sup> In an unforgettable scene, the noir courtroom drama depicts a

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> ANATOMY OF A MURDER (Columbia Pictures 1959). In the film, Lieutenant Manion is on trial for killing a man whom he believed raped his wife. *Id.* The excerpted scene here portrays testimony at trial from "snitch" Mr. Miller, Manion's cellmate. *Id.*

<sup>55</sup> FED. R. EVID. 609 states.

**(a) In General.** The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

(1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:

(A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and

(B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and

(2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement.

**(b) Limit on Using the Evidence After 10 Years.** This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if:

highly charged cross-examination of a key government witness. The defendant, Lieutenant Manion was accused of killing a man whom he believed raped his wife. At trial, Mr. Miller, Manion's cellmate and government "snitch," testified for the prosecution on direct regarding Manion's reputation for brutal violence by offering several statements he claims Manion made to him. On cross, the defense, much to Miller's and the prosecutor's chagrin, produced a history of Miller's violent criminal past. After a deft and highly dramatic wearing down of the witness's credibility, the defense attorney, played by James Stewart, ends the cross stating, "Your Honor, I don't think I can dignify this-creature-with anymore questions."<sup>56</sup>

Federal Rule 609 is fairly detailed, and the best way to understand its provisions is to follow the category of conviction prescribed in the rule. Let us start with subdivision (a)(2) of Rule 609, which pertains to convictions involving an element of *deceit or false statement*—that is, "if the court can readily determine that establishing the elements of the crime required proving—or the witness's admitting—

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(1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and

(2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

**(c) Effect of a Pardon, Annulment, or Certificate of Rehabilitation.** Evidence of a conviction is not admissible if:

(1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding that the person has been rehabilitated, and the person has not been convicted of a later crime punishable by death or by imprisonment for more than 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 a juvenile adjudication is admissible under this rule only if:

(1) it is offered in a criminal case;

(2) the adjudication was of a witness other than the defendant;

(3) an adult's conviction for that offense would be admissible to attack the adult's credibility; and

(4) admitting the evidence is necessary to fairly determine guilt or innocence.

**(e) Pendency of an Appeal.** A conviction that satisfies this rule is admissible even if an appeal is pending. Evidence of the pendency is also admissible.

<sup>56</sup> See ANATOMY OF A MURDER, *supra*, note 54.

a dishonest act or false statement.”<sup>57</sup> Congress intended this specific category to be relatively narrow,<sup>58</sup> because the rule requires the cross-examiner to “have ready proof that the conviction required . . . an act of dishonesty or false statement.”<sup>59</sup> These “*crimen falsi*” convictions may be used to impeach any witness in both civil and criminal cases, regardless of whether the conviction was a misdemeanor or a felony.<sup>60</sup> Further, these convictions are *not* subject to Federal Rule of Evidence Rule 403—that is, an attorney employing impeachment by one of these convictions need not be concerned that the evidence will be excluded because its probative value is substantially outweighed by the risk of “unfair prejudice, confusing the issues, [or] misleading the jury.”<sup>61</sup> Because of the convictions’ high probative value on the

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<sup>57</sup> FED. R. EVID. 609(a)(2).

<sup>58</sup> See, e.g., *United States v. Kelly*, 510 F.3d 433, 438 (4th Cir. 2007) (exemplifying the narrowness of the precepts of Rule 609(a)(2) by stating that issuing “‘worthless checks could conceivably involve forgery, false pretenses . . . or [could be as] innocuous as a check returned for insufficient funds,’” underscoring the fact-specific nature of Rule 609(a)(2) (quoting *United States v. Cunningham*, 638 F.2d 696, 699 (4th Cir. 1981)); *Medrano v. Los Angeles*, 973 F.2d 1499, 1507 (9th Cir. 1992), *cert. denied*, 508 U.S. 940 (1993) (holding that drug use and shoplifting are not considered crimes that involve dishonesty or false statement); *United States v. Brackeen*, 969 F.2d 827, 830 (9th Cir. 1992) (citing *United States v. Seamster*, 568 F.2d 188, 190 (10th Cir. 1978)). “[R]obbery, burglary and theft are ordinarily considered to be dishonest, but the term *as used in Rule 609(a)(2)* is more restricted.” *Id.* We think the legislative history of this provision shows that Congress intended to limit the term to prior convictions involving some element of deceit, untruthfulness, or falsification which would tend to show that an accused would be likely to testify untruthfully.” *Id.*

<sup>59</sup> See FED. R. EVID. 609(a)(2) advisory committee’s note (“The amendment requires that the proponent have ready proof that the conviction required the factfinder to find, or the defendant to admit, an act of dishonesty or false statement. Ordinarily, the statutory elements of the crime will indicate whether it is one of dishonesty or false statement. Where the deceitful nature of the crime is not apparent from the statute and the face of the judgment—as, for example, where the conviction simply records a finding of guilt for a statutory offense that does not reference deceit expressly—a proponent may offer information such as an indictment, a statement of admitted facts, or jury instructions to show that the factfinder had to find, or the defendant had to admit, an act of dishonesty or false statement in order for the witness to have been convicted.”).

<sup>60</sup> See FED. R. EVID. 609(a)(2) advisory committee’s note (stating that, once the past conviction is shown to possess the required elements of either dishonest or false statement, it is admitted “regardless of punishment”). Further, there is no provision in the rule distinguishing between use of 609(a)(2) in criminal or civil trials. *Id.*

<sup>61</sup> *Id.*; see also FED. R. EVID. 403 (“The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”); *United States v. Jefferson*, 623 F.3d 227, 234 (5th Cir. 2010) (stating that convictions for bribery constitute crimes of dishonesty); *Cree v. Hatcher*, 969 F.2d 34, 37 (3d Cir. 1992) (stating that “[u]nlike other crimes evidence of which is ad-



issue of credibility, they are automatically admissible to impeach.<sup>62</sup>

The second category of convictions is subdivision (a)(1) of Rule 609, which governs “other felony” convictions.<sup>63</sup> The reference to “other felony” reflects that, unlike the convictions governed by Rule 609(a)(2), subdivision (a)(1) convictions have no elements of dishonesty, deceit, or false statement.<sup>64</sup> When a criminal defendant testifies on his own behalf, his “other felony” convictions are subject to a type of “reverse 403” balancing test that presumes *inadmissibility*; in other words, the burden is on the prosecutor to show that the probative value of the conviction on the issue of the defendant’s credibility outweighs the danger of unfair prejudice.<sup>65</sup>

The third category, the “other felony” convictions of all other witnesses—that is, defense and prosecution witnesses in criminal cases and witnesses in civil cases—are subject to the usual Rule 403 principles that presume admissibility.<sup>66</sup>

The last Rule 609 category, misdemeanors without an element of false statement or deceit, are inadmissible to impeach.<sup>67</sup> Additionally, mere arrests are inadmissible for impeachment purposes as well,<sup>68</sup> although it should be noted that the conduct underlying an arrest may be the proper object of “bad” or “immoral act” impeachment under Rule 608(b).<sup>69</sup>

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missible for the purpose of impeachment, evidence of crimes involving dishonesty or false statement is automatically admissible; the district court is without discretion to weigh the prejudicial effect of admitting the evidence against its probative value”).

<sup>62</sup> See sources cited *supra* note 61 and accompanying text.

<sup>63</sup> FED. R. EVID. 609(a)(1).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> See, e.g., *McDonald v. Hewitt*, 196 F.R.D. 650, 652 (D. Utah 2000) (finding that a conviction of driving under the influence (a misdemeanor) was not admissible for impeachment by past conviction).

<sup>68</sup> See, e.g., *Sanders-El v. Wenciewicz*, 987 F.2d 483, 485 (8th Cir. 1993) (affirming a lower court decision that evidence of a witness’s arrest was not admissible under the Federal Rules for impeachment purposes).

<sup>69</sup> FED. R. EVID. 608(b).

**(b) Specific Instances of Conduct.** Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness’s conduct in order to attack or support the witness’s character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

- (1) the witness; or
- (2) another witness whose character the witness being cross-

Rule 609(d) allows impeachment by conviction of juvenile delinquency adjudications only if “(1) it is offered in a criminal case; (2) the adjudication was of a witness other than the defendant; [and] (3) an adult’s conviction for that offense would be admissible to attack the adult’s credibility; and (4) admitting the evidence is necessary to fairly determine guilt or innocence.”<sup>70</sup> In civil trials, delinquency adjudications are inadmissible for impeachment purposes.<sup>71</sup>

Impeachment by conviction is a vital method, and the impeaching party may use extrinsic evidence, but only the record of conviction. When a cross-examiner introduces evidence of a conviction to impeach, the decisional law holds that he or she generally may show only the name of the crime, and the time and place of the conviction; sordid details are prohibited.<sup>72</sup> Rule 609 additionally prescribes that convictions more than ten years old are presumptively inadmissible—that is, they may be introduced only if the court determines that the probative value of the conviction substantially outweighs its prejudicial effect.<sup>73</sup> “The ten-year time limit thus runs from the date of conviction or ‘the release of the witness from the confinement imposed for that conviction,’ whichever is later,” but a period of parole or probation may not be considered confinement for the purpose of impeachment by conviction.<sup>74</sup> Although pendency of an appeal from the conviction does not render evidence of the conviction inadmissible to impeach, “[e]vidence of the pendency [of the ap-

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examined has testified about.

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness’s character for truthfulness.

*Id.*

<sup>70</sup> FED. R. EVID. 609(d).

<sup>71</sup> *See, e.g., Powell v. Levit*, 640 F.2d 239, 241 (9th Cir. 1981), *cert. denied*, 454 U.S. 845 (1981) (finding that the lower court, in allowing in evidence regarding a witness’s past convictions to impeach in a civil case, violated Rule 609(d), and that Congress specifically added “in a criminal case” when drafting the Rule).

<sup>72</sup> *Wilson v. City of Chicago*, 6 F.3d 1233, 1236-37 (7th Cir. 1993) (noting that unless the details of a crime bear directly on a witness’s credibility, a cross-examiner “[cannot be] permitted to elicit the *details* of the crimes underlying [the witness’s] conviction”).

<sup>73</sup> FED. R. EVID. 609(2)(b). This Rule invokes a “Reverse 403”—that is, the introduction of evidence is presumed to be *inadmissible* unless the proponent can show that its probative value substantially outweighs its prejudicial effect. *Id.*

<sup>74</sup> *United States v. Rogers*, 542 F.3d 197, 200 (7th Cir. 2008) (quoting the language of Rule 609(2)(b) to determine both the calculation of the ten-year period and the fact that the text of 609(2)(b) makes no “mention of periods of probation or parole”).

peal] is also admissible.”<sup>75</sup>

A party may introduce prior conviction evidence to impeach his or her own witness in an effort to “remove the sting” and avoid a potential assault on cross-examination.<sup>76</sup> This direct examination tactic, however, carries with it two potential consequences. First, if a defendant testifies about his or her own past convictions on direct, he or she waives the right to challenge its admissibility on appeal.<sup>77</sup> Additionally, once a party testifies about his or her own conviction(s), it “opens the door” for opposing counsel to present further evidence regarding the conviction(s).<sup>78</sup>

## B. Impeachment by Collateral Methods

### 1. *Impeachment of a Witness by Evidence of Bad or Immoral Acts—You Can Ask, But That’s All You Can Do*

Federal Rule of Evidence 608(b) governs the introduction of evidence of a witness’s prior “bad or immoral” acts for the purpose of impeachment.<sup>79</sup> Author Shana Alexander in her book, *The Pizza Connection*,<sup>80</sup> illustrates the use of this method of impeachment. *The Pizza Connection* recounts the 1985 federal trial of twenty-two Mafia defendants accused of running a billion dollar drug-smuggling and money-laundering enterprise. Nearly all of the defendants were in the pizza business. At one point, defense attorney Lee Ginsberg fe-

<sup>75</sup> FED. R. EVID. 609(e); see *Wilson*, 6 F.3d at 1237 (stating that, pursuant to Rule 609(a)(1), a convicted criminal’s conviction was admissible for impeachment purposes regardless of the fact that the conviction was pending appeal).

<sup>76</sup> *Ohler v. United States*, 529 U.S. 753, 757-58 (2000).

<sup>77</sup> *Id.* at 760 (concluding that “a defendant who preemptively introduces evidence of a prior conviction on direct examination may not on appeal claim that the admission of such evidence was error”).

<sup>78</sup> See *Ohler*, 529 U.S. 753. See also *Gee v. Pride*, 992 F.2d 159, 161 (8th Cir. 1993). “At trial, [the defendant] testified on direct examination that he had previously been convicted of possession of a concealed weapon and that he was appealing three robbery convictions.” *Id.* at 160. On cross-examination, opposing counsel introduced evidence of the three convictions, which the trial court allowed. *Id.* at 160-61. On appeal, the Eight Circuit affirmed, holding that “[the defendant] ‘opened the door’ to evidence regarding his prior robbery convictions by volunteering on direct examination that he was appealing the convictions,” as well as his concealed weapon conviction. *Id.* at 161.

<sup>79</sup> See FED. R. EVID. 608.

<sup>80</sup> SHANA ALEXANDER, *THE PIZZA CONNECTION* (1988).

verishly grilled prosecution witness, Mafia turncoat Tomasso Buscetta, on cross-examination about a history of less-than truthful behaviors including, lying to the Immigration and Naturalization Service, lying about his age, and lying about his residency status. For each of these attacks on his moral character for truth-telling, he answered in the affirmative, admitting to having previously lied to authorities. Ginsberg then asked Mr. Buscetta if he lied when he said he “spoke only Spanish,” to which he defiantly answered, “si.”<sup>81</sup> Buscetta, after having testified for several days, told Ginsberg, “I speak English to live, but not well enough to get along in this courtroom.”<sup>82</sup>

Rule 608(b) sets forth the governing principles. First, the conduct described under this rule did not result in a conviction; the rule plainly pertains to “specific instances of a witness’s *conduct*.”<sup>83</sup> The conduct must be “probative of the character for truthfulness or untruthfulness . . . .”<sup>84</sup> Rule 608 is subject to Rule 403; therefore, specific act evidence may be excluded if its “probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”<sup>85</sup> Additionally, a witness may assert his or her Fifth Amendment right against self-incrimination when asked about the conduct that may incriminate him or her.<sup>86</sup>

Because Federal Rule of Evidence 608(b) other act evidence is a collateral method of impeachment, if the witness denies having engaged in the particular conduct extrinsic evidence may not be introduced to prove that the witness in fact engaged in the conduct.<sup>87</sup>

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<sup>81</sup> *Id.* at 65-66.

<sup>82</sup> *Id.* at 65-66, 68.

<sup>83</sup> *See* FED. R. EVID. 608 (emphasis added). When the conduct did result in a conviction, the operative impeachment rule is FED. R. EVID. 609.

<sup>84</sup> *Id.*; *see also* *United States v. Weeks*, 611 F.3d 68, 71 (1st Cir. 2010) (allowing testimony pertaining to a witness’s use of false social security numbers because it “went to credibility and was therefore admissible under Federal Rule of Evidence 608(b)”).

<sup>85</sup> *See* FED. R. EVID. 403.

<sup>86</sup> FED. R. EVID. 608(b); *see* FED. R. EVID. 608(b) advisory committee’s note (“While it is clear that an ordinary witness cannot make a partial disclosure of incriminating matter and then invoke the privilege on cross-examination, no tenable contention can be made that merely by testifying he waives his right to foreclose inquiry on cross-examination into criminal activities for the purpose of attacking his credibility.”); *see also* U.S. CONST. amend V (stating that no person “shall be compelled . . . to be a witness against himself”).

<sup>87</sup> FED. R. EVID. 608; *see, e.g., Deary v. City of Gloucester*, 9 F.3d 191, 197 (1st Cir. 1993) (“The purpose of the ban on extrinsic evidence is ‘to avoid holding mini-trials on

However, the cross examiner need not necessarily accept the witness's initial denial of the conduct. In other words, the cross-examiner may continue to press the witness to acknowledge committing the act until, of course, the judge determines that "enough is enough." The following example from the federal criminal prosecution of Senator Harrison A. Williams, illustrates this trial tactic of "pressing" the witness:

Q: Mr. Weisberg, would you agree with me, yes or no[,] that you would describe yourself as having [spent] most of your life living by your wits end living off money you got from other people under false pretenses; yes or no?

A: Yes.

Q: Would you also agree with me, sir, that a confidence man such as yourself would lie, cheat, swindle whenever it serves your purpose to do so?

A: That's not correct.<sup>88</sup>

Upon Mr. Weisberg's denial, the cross-examiner pressed the witness who ultimately acknowledged that he previously testified "that a confidence man would lie, cheat, swindle, whenever it serves his purpose to do so."<sup>89</sup> Unless the court determines that the cross-examiner's repeated probing violates that tenets of Rule 403, the cross-examiner may continue to attempt to "wear down" a witness in an effort to elicit an affirmative response.

## 2. *Impeachment by Evidence of Bad Reputation for Truthfulness*

In the highly-celebrated case of *State v. Von Bulow*,<sup>90</sup> defendant Clause von Bulow was on trial for the attempted murder of his

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irrelevant or collateral matters' " (quoting *United States v. Beauchamp*, 986 F.2d 1, 3 n.1 (1st Cir. 1993)).

<sup>88</sup> IRVING YOUNGER ET AL., *PRINCIPLES OF EVIDENCE* 317 (3rd ed. 1997). In the prosecution of United States Senator Harrison A. Williams, Jr., for "conspiracy, bribery, receipt of unlawful gratuities, and conflict of interest," key government witness Melvin Weisberg, a co-operating government witness, was grilled by defense counsel on cross concerning his prior acts pertaining to truthfulness. *Id.* at 317-18.

<sup>89</sup> *Id.* at 318.

<sup>90</sup> 475 A.2d 995 (R.I. 1984).

heiress wife, Martha.<sup>91</sup> The prosecution alleged that Clause injected Martha with insulin, causing a coma and, eventually, her death.<sup>92</sup> In an attempt to damage the prosecution's theory, the defense called Joy O'Neill, one of Martha's fitness instructors to testify that after Joy complained to Martha about her weight problem, Martha suggested Joy take a shot of insulin. Martha explained that insulin consumed sugar in one's system. The prosecution then called Nancy Raether, a rather pleasant, intellectual and poised woman. After testifying that she knew O'Neill, when asked about O'Neill's reputation for truthfulness, Ms. Raether "lowered her head and said softly, 'I'm afraid it wasn't very good.'"<sup>93</sup>

An examining attorney may introduce evidence to show a witness's bad character for truth and veracity, pursuant to Federal Rule of Evidence 608(a).<sup>94</sup> We have placed this method of impeachment in the collateral category, mainly for convenience in organizing the material pertaining to the various impeachment methods. In fact this is the only impeachment method that *requires* the impeaching party to call a second witness. In order to impeach a witness's credibility under this method, the attorney must call a second "character" witness, who may testify in the form of either an opinion or reputation of the prime witness's character for truth or veracity.<sup>95</sup> Evidence of specific conduct of the prime witness is not permissible for this purpose. Prior to the introduction of either opinion or reputation testimony, the examining attorney must lay a proper foundation

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<sup>91</sup> *Id.* at 999.

<sup>92</sup> *Id.*

<sup>93</sup> WILLIAM WRIGHT, *THE VON BULOW AFFAIR* 305 (1983); *see also* *REVERSAL OF FORTUNE* (Sovereign Films 1990).

<sup>94</sup> FED. R. EVID. 608(a).

A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

*Id.*

<sup>95</sup> *Id.*; *see also* FED. R. EVID. 405(a).

When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct.

*Id.*

establishing that the character witness knows the prime witness to the extent that the character witness is in a position to know either the prime witness's reputation or to offer an opinion.<sup>96</sup> For matters of reputation evidence, the attorney must first establish that the character witness belongs to the same community as the prime witness in order for the character witness to readily know the "bad" reputation at issue.<sup>97</sup> The "community" at issue must be "sufficiently numerous" to comprise a community for the purpose of this impeachment method<sup>98</sup> and must include both the prime and character witnesses as members.<sup>99</sup> For example, the community may consist of the area in which they reside, work, or attend school.

Once the examining attorney establishes that the character witness both knows the primary witness and belongs to the same community as the primary witness, the examining attorney may inquire about the reputation or opinion of the primary witness.<sup>100</sup> Rule 405(a), which governs the admissibility of character evidence, limits questions about reputation or opinion on direct examination, but on cross-examination, an attorney may inquire into relevant instances of the prime witness's conduct.<sup>101</sup> The rationale is that if the character witness does not know about these specific acts, she may not be in a position to testify about the prime witness's reputation or offer an opinion. On the other hand, if she acknowledges the specific acts,

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<sup>96</sup> See *Wilson*, 6 F.3d at 1239 (holding that a journalist's opinion testimony regarding a witness's character for untruthfulness to be relevant because the journalist spent a great deal of time with the witness and became accustomed to his lack of veracity).

<sup>97</sup> See *Michelson v. United States*, 335 U.S. 469, 478 (1948) ("[This testimony] is accepted only from a witness whose knowledge of defendant's habitat and surroundings is intimate enough so that his failure to hear of any relevant ill repute is an assurance that no ugly rumors were about.").

<sup>98</sup> *People v. Fernandez*, 950 N.E.2d 126, 127-28 (N.Y. 2011) (holding that the County Court erred when it precluded reputation testimony by finding that an extended family was not large enough to be considered a community).

<sup>99</sup> See *United States v. Augello*, 452 F.2d 1135, 1140 (2d Cir. 1971) (finding that "[the character witness] probably was not a member of the communities in which [the primary witness] lived or worked and it is unclear whether his categorical answer 'poor,' based on interviews of [twelve] members of those communities, referred to [the primary witness's] community reputation or to his reputation with the particular individuals interviewed"); see also *Maine v. Ricker*, 770 A.2d 1021, 1024 (Me. 2001) (noting that the "community must be sufficiently numerous for the opinion of reputation to be reliable"); *People v. Bouton*, 405 N.E.2d 699, 704 (N.Y. 1980) ("A reputation may grow wherever an individual's associations are of such quantity and quality as to permit him to be personally observed by a sufficient number of individuals to give reasonable assurance of reliability.").

<sup>100</sup> FED. R. EVID. 405(a).

<sup>101</sup> *Id.*

there may be a question about the accuracy of her opinion as to the character witness's reputation.

We reemphasize that while the authors have placed this method of impeachment in the collateral category, in fact it is not important where it is placed. The impeachment method requires a specific method of proof, namely testimony, of a character witness who testifies in the form of reputation or opinion.

**a. In New York, It's All About Reputation: Keep Your Opinions to Yourself**

The rule of evidence in New York State regarding impeachment by evidence of character differs from the federal rule in that New York courts allow the introduction only of *reputation* evidence.<sup>102</sup> Much like the federal rules, the New York rule allows a character witness who “resides, moves, circulates or does business within the natural radius of repute of the witness who has previously testified” to proffer evidence of bad reputation.<sup>103</sup> However, unlike the federal rules, the New York rule prohibits testimony of the witness's *opinion* and limits the character witness to testify solely on the primary witness's bad reputation for veracity within a particular community.<sup>104</sup>

**C. Hybrid Methods**

**1. Impeachment by Showing a Prior Inconsistent Statement**

Few Hollywood courtroom classics have been able to match the intensity of the scene in the 1957 classic, *Witness for the Prosecution*,<sup>105</sup> in which Leonard Vole, played by Tyrone Power, is prosecut-

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<sup>102</sup> See GARY SHAW, CANUDO ON EVIDENCE LAWS OF NEW YORK 154-55 (2010).

<sup>103</sup> *Id.* at 155.

<sup>104</sup> See *People v. Hanley*, 833 N.E.2d 248, 250 (N.Y. 2005) (“The trial court must allow [reputation] testimony, once a foundation has been laid, so long as it is relevant to contradict the testimony of a key witness and is limited to general reputation for truth and veracity in the community.”).

<sup>105</sup> WITNESS FOR THE PROSECUTION (MGM Studios 1957).



ed for the murder of a wealthy widow, Emily French.<sup>106</sup> Defense attorney Sir Wilfred Roberts, played by Charles Laughton, impeaches the beautiful, but sinister Christine Helm Vole, memorably played by screen legend Marlene Dietrich. In the film, Christine testified that her husband, Leonard Vole, after returning home on the night of the murder with blood on his clothes, confessed to murdering the victim. A letter that Christine wrote to her lover that evening, which stated that she planned to lie on the witness stand in order to send her husband to prison and to be free of playing the part of a loving, grateful wife, came into defense counsel Sir Wilfred's possession.<sup>107</sup> The next day, upon re-calling Christine to the stand, he read the letter aloud into the record, forcing Christine, with an icy stare, to admit writing it. Finally, Vole went free.

Federal Rule of Evidence 613 covers prior inconsistent statements of witnesses for purposes of impeachment.<sup>108</sup> Oral as well as written inconsistent statements, or even silence, may be admissible, provided the out-of court statement in some way contradicts the witness's in-court testimony.<sup>109</sup> A testifying witness's out-of-court inconsistent statement is not hearsay when offered solely to impeach, because the out-of-court statement is not being offered for its truth, but only to prove that the inconsistent statement was made.<sup>110</sup> The

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<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> FED. R. EVID. 613.

**(a) Showing or Disclosing the Statement During Examination.** When examining a witness about the witness's prior statement, a party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party's attorney.

**(b) Extrinsic Evidence of a Prior Inconsistent Statement.** Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

*Id.*

<sup>109</sup> See FED. R. EVID. 613 advisory committee's note; see also *United States v. DeSimone*, 488 F.3d 561, 572 (1st Cir. 2007) ("Although 'statements need not be directly contradictory in order to be deemed inconsistent within the purview of Rule 613(b),' . . . the decision whether an inconsistency exists 'lies within the sound discretion of the district court.' " (quoting *Udemba v. Nicoli*, 237 F.3d 8, 18 (1st Cir. 2001))).

<sup>110</sup> See FED. R. EVID. 801(c) (" 'Hearsay' means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement."); see also, Fed. R. Evid. 801(d)(1) ("The declarant testifies and is subject to cross-examination about a prior statement, and the

mere making of the inconsistent statement, apart from its truth or falsity, bears relevance to the credibility of the witness's testimony. An inconsistent statement introduced for the sole purpose of impeachment should be followed by limiting instructions to the jury that the statement was introduced not to prove the truth of the matter asserted, but solely for the mere fact that it was formerly made by the witness in order to assess his or her credibility.<sup>111</sup>

Impeachment by prior inconsistent statement may be either a collateral or vital method, depending on whether it relates to an important or tangential fact in the case.<sup>112</sup> Rule 613 explicitly prescribes that once extrinsic evidence of the inconsistent statement is introduced, the witness must be "afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate [the witness] thereon . . . ."<sup>113</sup> Whether the witness's opportunity to explain or mitigate the inconsistency occurs prior to the introduction of the statement or after, or whether the opportunity is provided on cross-examination or redirect examination, is irrelevant; the rule simply prescribes that the witness must be afforded the opportunity at some point to explain or deny the inconsistent statement.<sup>114</sup>

The Advisory Committee note to Federal Rule of Evidence 613(a) refers to the common law rule established by *The Queens Case*, also referred to as the case of *Queen Caroline*, that a witness

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statement: (A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition; (B) is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or (C) identifies a person as someone the declarant perceived earlier.").

<sup>111</sup> See FED. R. EVID. 105 ("If the court admits evidence that is admissible against a party or for a purpose—but not against another party or for another purpose—the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly.").

<sup>112</sup> See *United States v. Int'l Bus. Machines Corp.*, 432 F. Supp. 138, 139-40 (S.D.N.Y. 1977) (noting that Rule 613 does not explicitly prohibit the introduction of extrinsic evidence, but, according to 613(b), "[e]xtrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires").

<sup>113</sup> *Id.* at n.7; see also *United States v. Hudson*, 970 F.2d 948, 955 (1st Cir. 1992) (quoting the advisory committee's note to Rule 613(b), "the traditional insistence that the attention of the witness be directed to the statement on cross[-]examination is relaxed in favor of simply providing the witness an opportunity to explain and the opposite party an opportunity to examine the statement, with no specification of any particular time or sequence . . .").

<sup>114</sup> *Hudson*, 970 F.2d at 955.

first be shown a written inconsistent statement before being cross-examined about it.<sup>115</sup> The case was a scandalous divorce proceeding brought by King George IV of Wales and Queen Caroline. The King had many love affairs and drank heavily, while the Queen had her own sexual affairs. One individual described her as a “sensual wanderer.”<sup>116</sup> Federal Rule of Evidence 613 (a) abolished the English common law rule that required the cross-examiner first to show the witness a written inconsistent statement, or tell the witness about the time, place, and circumstance of an oral inconsistent statement, before questioning the witness about the statement. According to the Advisory Committee Note to Rule 613, Rule 613 “abolishes this useless impediment to cross-examination. Both oral and written statements are included.”<sup>117</sup>

The example provided from *Witness for the Prosecution* provides a dramatic cinematic turn of events. In the film, the cross-examining defense attorney offered the letter written by Christine not only for the purpose of discrediting her prior statement, but also for the truth of the letter’s contents.<sup>118</sup> Christine not only lied on the witness stand, but the words contained within the letter to her lover stating that she would lie served to free the defendant. It may be assumed that the jurisdiction in which the diabolical Christine was subject to cross-examination allowed introduction of evidence of prior inconsistent statements for their truth. Under Federal Rule of Evidence 801(d)(1)(A), a witness’s prior inconsistent statement is exempt from the rule against hearsay if the inconsistent statement was made under oath at some type of judicial or quasi-judicial proceeding, or deposition.<sup>119</sup> Note that Rule 801(d)(1)(A) does not require

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<sup>115</sup> The Queen’s Case, 129 Eng. Rep. 976 (1820).

<sup>116</sup> See Marcelle Mouledoux, *The Divorce Trial of Queen Caroline: Contemporary Responses and Social Attitudes*, <http://www.loyno.edu/history/journal/mouledoux.htm>.

<sup>117</sup> FED. R. EVID. 613 advisory committee’s note.

<sup>118</sup> WITNESS FOR THE PROSECUTION, *supra* note 105.

<sup>119</sup> FED. R. EVID. 801(d)(1)(A).

A statement that meets the following conditions is not hearsay:

(1) A Declarant-Witness’s Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant’s testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition.

*Id.*

that there be a right of cross-examination at the proceeding.<sup>120</sup> As a result, a witness's inconsistent statement made during grand jury testimony is exempt from the rule against hearsay and thus admissible both for impeachment purposes and for its truth.

## 2. *Impeachment by Contradiction*

During his direct examination [in *United States v Gilmore*,<sup>121</sup> the criminal defendant] and his attorney had the following exchange:

**Q:** After you were indicted in this case, you got a chance to go through the evidence?

**A:** Uh-huh.

**Q:** That they had against you to show that you were a drug dealer, correct?

**A:** Yes.

**Q:** And we went through that evidence, didn't we?

**A:** Yes, we did.

**Q:** And you see any evidence in this case that you're a drug dealer, sir?

**A:** No, I didn't sell no drugs. *I never did.*

Before beginning its cross-examination, the Government advised the District Court that it intended to ask [the defendant] about two prior felony drug distribution convictions in order to contradict his sworn statement that he never sold drugs. [The defendant] objected. The District Court overruled the objection, stating that it was "going to permit the government to cross examine [the defendant] on that conviction, to contradict his statement that he's never sold drugs." The District Court, however, would not allow the Government to offer the certified judgments into evidence unless Gilmore denied the convictions. The District Court also informed the parties that it would

<sup>120</sup> *Id.* (referring to "a trial, hearing, or other proceeding or in a deposition . . .").

<sup>121</sup> 553 F.3d 266, 269-70 (3d Cir. 2009).

issue a limiting instruction to the jury to use the convictions only for credibility purposes and not as evidence of guilt.

Pursuant to the District Court's ruling, the Government cross-examined Gilmore about his prior drug convictions:

**Q:** Mr. Gilmore, you testified on direct that you never sold drugs, correct?

**A:** Yes, I did.

**Q:** Isn't it a fact, Mr. Gilmore, that you were convicted here in the Superior Court of Camden County on May 22nd, 1992 of possession with intent to distribute [controlled dangerous substances]? And possession of [controlled dangerous substances] with intent to distribute within a thousand feet of a school?

**A:** That was a long time ago.

**Q:** But you were convicted of selling drugs?

**A:** Yes, I was, a long time ago, and I changed my life around when I got out.<sup>122</sup>

Although not expressly set forth in the Federal Rules of Evidence, federal courts permit the use of specific contradiction for the purposes of impeachment.<sup>123</sup> Under this method of impeachment, the cross-examiner attempts to show that a fact or facts testified to on direct is inaccurate, making all or part of the witness's direct testimony not believable. Some federal courts, in determining whether to allow specific contradiction evidence, apply Federal Rule of Evidence 403,<sup>124</sup> while others allow extrinsic evidence of impeachment by con-

<sup>122</sup> *Id.* at 269-70 (footnote omitted).

<sup>123</sup> *See, e.g., id.*; *see also* *Mason v. Okla. Tpk. Auth.*, 115 F.3d 1442, 1456-57 (10th Cir. 1997).

<sup>124</sup> *See, e.g., United States v. Kincaid-Chauncey*, 556 F.3d 923, 932 (9th Cir. 2009) (stating that "when making the decision whether to permit impeachment by contradiction, trial courts should consider the Rule 403 factors, such as confusion of the jury or the cumulative nature of the evidence"); *see also United States v. Gilmore*, 553 F.3d 266, 271 (2009) (stating that "the Government may impeach a defendant's testimony with contradictory evidence unless the 'probative value [of the evidence] is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.' " (alterations in the original)).

tradition on non-collateral, or vital matters only—that is, the courts will allow it if “ ‘the matter itself is . . . relevant in the litigation to establish a fact of consequence, i.e., . . . relevant for a purpose other than mere contradiction of the in-court testimony of the witness.’ ”<sup>125</sup> Further, because evidence of specific contradiction is not provided for in the federal rules, the evidence must “satisf[y] the Rule 403 balancing test and is not barred by any other rule of evidence.”<sup>126</sup> It is unlikely that the application of one of these methods rather than another will lead to a different result because if the issue is tangential or collateral, the probative value of the extrinsic evidence is likely to be quite low, leading to exclusion under Rule 403. Essentially, “[i]mpeachment by contradiction is a means of ‘policing the defendant’s obligation to speak the truth in response to proper questions.’ ”<sup>127</sup>

#### IV. IN TYPICAL HOLLYWOOD STYLE . . . THE END

Impeachment plays a vital role in so many trials. Because impeachment presents numerous possibilities for high drama scenarios and sometimes even a few laughs, Hollywood screenwriters and crime fiction novelists have come to employ impeachment methods throughout film scenes and book excerpts, both fiction and non-fiction. Crime reporters for high-profile trials anxiously await possible page-turning real-life dramas in which witnesses are attacked by keen defense attorneys. Moviegoers’ eyes remained glued to the screen when Marlene Dietrich, as the femme fatale Christine in *Witness for the Prosecution*, admitted her malicious lies. Avid crime drama enthusiasts have turned the pages awaiting trial scenes in James Patterson novels in which the cross-examiner nabs the perjurer. And no one alive in the 1990’s can forget the furor over discovering Detective Mark Fuhrman’s racist tendencies during the notorious O.J. Simpson murder trial. These tactics were seen and witnessed by millions, and they were all examples of impeachment.

Law students, law professors, and legal practitioners take notice. The study of the rules of impeachment is not simply limited

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<sup>125</sup> *Beauchamp*, 986 F.2d at 4.

<sup>126</sup> *Id.*

<sup>127</sup> *Gilmore*, 553 F.3d at 271 (quoting *United States v. Greenidge*, 495 F.3d 85, 99 (3d Cir. 2007)).

to the Federal or State evidence rule volumes, or judicial decisional law. The rules spell out the recurring evidentiary principles for purposes of trial practice. The cases in reported decisions amplify the meaning of the rules, fill in the details, and apply the rules on an ongoing basis. However, we must not overlook that there exists another resource, one that is also right within our reach. The next time you purchase a movie ticket, pick up the remote control, begin flipping through the pages of a great crime novel, or peruse the newspaper, remain aware of the evidentiary educational possibilities that lie within the realm of entertainment.