
IMPEACHMENT

Weapons of Mass

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“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).

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.*

Convictions (FRE 609)

- . **Must be Felony or Dishonesty / False Statement**
 1. **Felonies**
 2. **Dishonesty and false statement are usually interpreted *narrowly***
 3. **Many cases demonstrate a lack of understanding of these rules of impeachment**

United States v. Cavender, 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) **for criminal defendants**, probative value must outweigh prejudice (as spelled out in Rule 609)
- b) **for all other witnesses**, 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 not to do**

. **How to do**

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:**

Learned Treatises (FRE 803(18))

- A. Applies to EXPERTS only
- . May be used on Direct or Cross
 - . Recall Fishing Rules and inconsistent statements – even though statement is not that of witness:
 1. No small fish
 2. Set hook unless . . .
 3. No
 4. No
 5. Kill Fish (Read)
 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)**

- . **May not be received as Exhibit**

WAYS TO IMPEACH

[1] Inconsistent Statements (FRE 613)

[2] Contradictions - Contrary Evidence

[3] Motivation

[4] Truthfulness (FRE 608)

[5] Convictions (FRE 609)

[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

EXPERTS ONLY

[14] Qualifications and Curriculum Vitae (FRE 702)

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