



A Guide to Impeachment in Federal and Alabama State Courts

By Terry McCarthy

As long as we have had trials, the witnesses at those trials have been impeached. Some impeachment techniques, such as catching a witness in an inconsistency, have been around since the beginning of litigation as we know it. Other techniques, however, had their genesis in the 1975 adoption of the *Federal Rules of Evidence*.

Like most states, Alabama adopted evidentiary rules that were patterned after the *Federal Rules*. Alabama's *Rules of Evidence* went into effect on January 1, 1996 and most of them are identical to the *Federal Rules*. For those parallel rules, federal cases construing them are persuasive authority in the Alabama courts. *Ala. R. Evid.* 102, advisory committee notes. While there are many similarities between the Alabama and federal rules, there are also many differences. Some differences are obvious. Some are not so obvious. In addition, there are many impeachment techniques that are not codified under the rules, but that remain alive and well as impeachment techniques in Alabama and federal courts. The purpose of this article is to highlight the major impeachment techniques, and to note the major differences between the *Alabama* and *Federal Rules of Evidence* with regard to impeachment.

Who may impeach?

The threshold question to ask in any impeachment situation is who may actually impeach a witness? According to Rule 607 of both the *Alabama* and *Federal Rules of Evidence*, “[t]he credibility of a witness may be attacked by any party, *including the party calling the witness.*” Fed. R. Evid. 607; Ala. R. Evid. 607 (emphasis added). In other words, in most circumstances, it is perfectly acceptable for an attorney to impeach the very witness he called. Before Rule 607 was adopted, the common law generally precluded a party from impeaching his own witness. *See* Fed. R. Evid. 607 & Ala. R. Evid. 607 advisory committee notes. Rule 607 rejects this old “voucher rule,” so that now a party is no longer expected to “vouch” for the credibility of the witnesses that the party chooses to call. *Id.*

There is at least one major exception to this rule. Despite the inviting language of Rule 607, a party is not allowed to impeach a witness if the sole purpose for calling that witness would be to impeach the witness with otherwise inadmissible evidence. Here is the most common scenario: suppose the prosecuting attorney obtained a witness statement from George in which George says that the defendant committed the

crime. Before the trial, however, the prosecutor learns that George has recanted that statement and, if called at trial, he would testify that George did not commit the crime and is not guilty. Because George's prior statement is hearsay, the only way to get the statement admitted would be for the prosecutor to call George to the stand, knowing that he would provide unfavorable testimony, and then impeach him with the prior statement. Both Alabama and federal cases have held that this is impermissible—i.e., a party cannot call a witness solely to impeach that witness with otherwise inadmissible evidence. Litigants must have a good faith intention to elicit admissible evidence from every witness they call. As Judge Posner noted in the leading case of *U.S. v. Webster*, 734 F.2d 1191 (7th Cir. 1984), “Impeachment by prior inconsistent statement may not be permitted where employed as a mere subterfuge to get before the jury evidence not otherwise admissible.” *Id.* at 1192 (quoting *U.S. v. Morlang*, 531 F.2d 183, 190 (4th Cir. 1975).

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To summarize, it is acceptable for an attorney to impeach a witness who he calls, but he must have a good faith belief that the witness will likely say some things that will help his case. If the only reason for calling the witness is to admit otherwise inadmissible evidence, this “back door” approach is not allowed and the witness should not be called to begin with.

Impeachment by Prior Inconsistent Statements

While Rule 613 of both the Alabama and federal rules allows for impeachment via prior inconsistent statements, the foundations that are required are different under the two rules. It is not uncommon for even the most experienced trial lawyers to miss the foundational elements in Rule 613. Rule 613 answers two basic questions: (1) When can you examine a witness about a prior inconsistent statement? and (2) When can you use extrinsic evidence to prove the prior inconsistent statement? The answer to

the first question is the same in Alabama and federal courts, but the answer to the second question is different.

When can you examine a witness about a prior inconsistent statement?

At common law, under the infamous *Queen Caroline's Case*, 2 Brod. & Bing. 284, 129 Eng. Rep. 976 (1820) and its progeny, before a witness could be impeached with an inconsistent writing, the witness had to be given the opportunity to read that writing. This longstanding common law requirement was abrogated with the passage of Rule 613(a) under Alabama and federal rules for both written and oral statements. See Fed. R. Evid. 613(a) and Ala. R. Evid. 613(a) advisory committee notes. Since the passage of Rule 613(a), a party can ask a witness about a prior inconsistent statement without first showing it to the witness or informing the witness of its contents. The only requirement of Rule

613(a) is that the prior inconsistent statement must be shown or disclosed to opposing counsel upon request. See e.g., *Ex parte Flowers*, ___ So. 2d. ___, 2008 WL 821056 at n. 3 (Ala. March 28, 2008).

When can you use extrinsic evidence of a prior inconsistent statement?

Alabama and federal rules differ considerably on when a party may use extrinsic evidence to prove a prior inconsistent statement. Extrinsic evidence simply means proving the prior inconsistent statement using something other than the live testimony of the witness on the stand. Perhaps the most common illustration is a deposition, but extrinsic evidence can also be written statements, audio or video statements, or another witness who testifies that he heard the person make the inconsistent statement.

Under Alabama Rule 613(b), extrinsic evidence of a prior inconsistent statement

may not be used until the witness is confronted with the particular circumstances of the prior statement (i.e., time, place, content and to whom it was made) and given the opportunity to admit or deny having made it. If the witness admits having made the prior inconsistent statement, extrinsic evidence is generally not allowed because it would be cumulative to allow extrinsic evidence to prove something that a witness has already admitted. *Ala. R. Evid.* 613(b) advisory committee's notes; *Usrey v. State*, 36 Ala. App. 394, 56 So. 2d 790 (Ala. 1952). If the witness denies having made the statement, it is only at that time that the party is allowed to go extrinsic to prove it.

Consider the following scenario in which the witness testified on direct examination that A ran the red light, and he had previously given an audio statement that B ran the red light. Here is an exchange that would be permissible under *Ala. R. Evid.* 613(b):

Q: You just testified on direct that A ran the red light, correct?

A: Yes.

Q: Immediately after the accident you were interviewed by the police? [Time]

A: Yes.

Q: And that was on January 1, 2007? [Time]

A: Yes.

Q: At that time the accident was fresh on your mind? [Time]

A: Yes.

Q: And he interviewed you right there at the accident scene, right? [Place]

A: Yes.

Q: At the corner of Fifth Avenue and Twentieth Street? [Place]

A: Yes.

Q: The police officer asked you who ran the red light, correct? [Content and to whom the statement was made]

A: I'm sure he did.

Q: And you told him, that B ran the red light, didn't you? [Giving the opportunity to admit or deny it]

A: No.

At this point, because the witness denied having made the prior inconsistent statement, the impeaching party is allowed to use extrinsic evidence to prove it. In this case, the prior statement was recorded, so with the court's permission, the impeaching party should be allowed to play the tape.

Federal Rule 613(b) handles the extrinsic evidence issue in a different way. The Federal Rule 613(b) rejects the common law requirement (and Alabama Rule 613(b)) that requires the witness to be confronted with the specifics of the prior inconsistent statement before extrinsic evidence is used. "[Federal] Rule 613 makes it clear that an attorney examining a witness in federal court as to prior inconsistent statements need not first show the statement to the witness as was required at common law." Prof. William A. Schroeder & Prof. Jerome A. Hoffman *Alabama Evidence* 3d § 6:64 (2008). The only requirement for using extrinsic evidence is that the impeached witness must be given an opportunity at some point in the trial to explain away the inconsistency.

So, under the federal rules, in theory, you may call a witness to the stand, and never ask him about the prior inconsistent statement. Then you may call another witness to the stand and present evidence of that prior inconsistent statement through that second witness. The only requirement is that the first witness must be given the opportunity at some point in the trial to explain away the inconsistency. In Alabama, of course, you cannot present extrinsic evidence of the prior inconsistent statement until you confront the witness with the specifics of the prior inconsistent statement and give him the opportunity to admit or deny having made it. It should be noted that, even in federal courts, most attorneys prefer to confront a witness with the prior inconsistent statement before going extrinsic, even though Rule 613(b) does not require them to do so.

There are four additional points to remember. First, as already stated, if the witness admits to having made the prior inconsistent statement, you generally cannot use extrinsic evidence to prove it.

Second, if the prior inconsistent statement was made in a hearing, deposition, trial or some other formal proceeding where the witness was under oath, that prior inconsistent statement is not only

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admissible to impeach, but it is also admissible as substantive evidence of the truth. *Fed. R. Evid.* 801(d)(1)(A); *Ala. R. Evid.* 801(d)(1)(A). In other words, the trier of fact can disregard the statement made at trial and use the prior inconsistent statement for its truth.

Third, the foundational requirements for Rule 613 do not apply when the witness is a party and the statement is an admission. There is no foundational requirement for using an admission in Alabama or federal courts. *Fed. R. Evid.* 613(b) ("This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2)"); *Ala. R. Evid.* 613(b) (same).

Finally, the Alabama and federal courts are both guided by the collateral matter rule. This longstanding rule provides that the impeaching party may not use extrinsic evidence to prove a collateral matter. See Charles W. Gamble, *McElroy's Alabama Evidence*, § 156.01(1) (5th ed. 1996). So, if a witness denies having made a prior inconsistent statement, if the matter is collateral, extrinsic evidence

is not allowed as a matter of judicial economy.

Impeachment by Convictions

It has long been the law in Alabama and federal courts that a witness may be impeached with certain prior convictions. Historically, Alabama law limited these past convictions for impeachment purposes to crimes of moral turpitude. Charles W. Gamble, *Gamble's Alabama Rules of Evidence*, § 609 (2nd ed. 2002); *Ala. R. Evid.* 609 advisory committee's notes. With the adoption of Rule 609 of the *Alabama and Federal Rules of Evidence*, two categories of convictions are now allowed to impeach a witness: (1) felonies and (2) crimes of dishonesty or false statement.

Impeachment by Felony Convictions

According to the Alabama and federal rules, a witness may be impeached if that witness has been convicted of a crime punishable by death or at least one year in



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prison—the common definition of a felony. *Fed. R. Evid.* 609(a)(1); *Ala. R. Evid.* 609(a)(1)(A). For any witness other than the criminally accused, the court must perform a Rule 403 analysis to determine if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. Because Rule 403 favors inclusion of evidence rather than exclusion, it is typically difficult for an attorney to argue that the conviction of someone other than the criminally accused would be inadmissible under Rule 403. By contrast, it is a much tougher burden to impeach the criminally accused under Rule 609. Under those circumstances, the impeaching party must show that the probative value of the evidence outweighs its prejudicial effect to the accused—a reverse Rule 403 test. Thus, it is often difficult to successfully impeach the criminally accused with a prior conviction due to this exacting balancing test.

A long-standing conflict in the federal courts over how to decide whether a conviction qualifies as one for dishonesty or false statement was resolved in 2006 with an amendment to Federal Rule 609(a)(2). Prior to the amendment, some courts looked solely at the elements of a particular crime, and if none of them required proof of falsity or deceit, the crime was not one of dishonesty or false statement. Other courts looked beyond the conviction to decide whether the witness committed some act of dishonesty during the course of the crime. There were problems with both approaches. Under the “strict elements” test, for example, a conviction for obstruction of justice would not be a crime of dishonesty or false statement because deceit is not a required element for that crime. For its part, the “look beyond the conviction” approach could be very time consuming and potentially take the court far afield from the case before it.

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Impeachment by Crimes of Dishonesty or False Statement

Rule 609(a)(2) says that a witness can be impeached with prior convictions that involve dishonesty or false statement. Unlike Rule 609(a)(1), if a witness has been convicted of a crime involving dishonesty or false statement, the conviction must be admitted if it is less than ten years old. In other words, the trial court does not perform a Rule 403 analysis or any balancing test—if a conviction meets the definition of a crime of dishonesty or false statement, then it gets in. Charles W. Gamble, *Gamble’s Alabama Rules of Evidence*, § 609(a) (2nd ed. 2002).

Alabama and federal courts diverge on precisely what constitutes a crime of dishonesty or false statement. According to the advisory committee notes to Federal Rule 609, simple theft is not a crime of dishonesty or false statement. The Alabama Court of Criminal Appeals, however, has rejected this view and has held that theft is a crime of dishonesty or false statement in Alabama state courts. *Huffman v. State*, 706 So. 2d 808 (*Ala. Crim. App.* 1997).

The federal drafters ultimately reached a compromise. Under the new federal Rule 609(a)(2), a crime qualifies as one of dishonesty or false statement “if it can readily be determined that the elements of the crime, as proved or admitted, required an act of dishonesty or false statement by the witness.” This allows a limited inquiry behind the conviction, but avoids a full blown mini-trial on the matter. Alabama has not passed this amendment.

Impeachment with Remote Convictions

Even if a the witness has been convicted of a crime that qualifies under Rule 609(a)(1) or (2), an entirely separate analysis must be applied if the conviction is more than ten years old. A remote conviction will only be admitted if the probative value of the conviction substantially outweighs its prejudicial effect. *Fed. R. Evid.* 609(b); *Ala. R. Evid.* 609(b). This balancing test, which is the opposite of Rule 403, makes it very hard to use a remote conviction. Even if the proponent is somehow able to pass this difficult balancing test, the conviction is still not admissible if the proponent fails

to give the adverse party sufficient advance written notice of intent to use the remote conviction. Rule 609(b).

Form of Question to Elicit Impeachment by Conviction

Case law places some limits on how a party can bring out the Rule 609 conviction. “Some courts limit the opponent’s proof to evidence that, in a certain jurisdiction in a certain year, the witness suffered ‘a felony conviction.’” Terry L. Butts, Charles W. Gamble, and Edward J. Imwinkelreid, *Alabama Evidentiary Foundations*, p. 144 (1999). In Alabama courts, the impeaching party is allowed to identify the crime for which the witness was convicted and the sentence that was imposed. *Id.* However, the impeaching party is not allowed to delve into the prejudicial specific details of the conviction. “The law of Alabama, in keeping with the general rule in the country, is that one generally cannot go beyond the name of the crime, the time and place of conviction and the punishment.” *McElroy’s*, § 145.01(11). For example, it would be appropriate to ask the witness the following on cross-examination, “Isn’t it true that you were convicted of manslaughter in Calhoun County in 2002 and sentenced to five years in prison?” By contrast, it would not be appropriate to ask, “Isn’t it true that you took out a knife and stabbed someone three times in the chest and were then convicted for it?”

Extrinsic Evidence of a Conviction

If the witness denies having been convicted of the crime, the impeaching party is allowed to use extrinsic evidence to prove it. Most commonly, this will be the record of the conviction.

Impeachments by Non-Convictions

Prior to the adoption of the *Federal Rules of Evidence*, past acts relevant to truth-telling for which there was no conviction were inadmissible. Federal Rule 608(b) revolutionized this concept. Since the passage of Federal Rule 608(b), past acts relevant to truth-telling may be inquired about on cross-examination for impeachment purposes. For example, on cross-examination, the impeaching party may ask, “Isn’t it true that you made false statements on your tax returns last

year?” This can be inquired about even if there has been no conviction.

This concept frightened many practitioners, and many believed it was ripe for abuse. To prevent any potential abuses, there are some safeguards. First, the impeaching party must have a good-faith basis for asking the question. In other words, if you are going to ask a witness if he made false statements on his income taxes, you need to have some reason to believe in good faith that he actually did it. Second, the impeaching party is precluded from using extrinsic evidence to prove that the witness actually committed the act. *Fed. R. Evid.* 608(b). So, if the witness answers no when asked if he had made false statements on his tax returns, the impeaching party may not call a witness, show the tax returns, etc., to prove that the event actually occurred. The impeaching party is stuck with whatever answer the witness gives.

The Alabama rule drafters decided to reject Federal Rule 608(b). Alabama Rule 608(b) essentially says that the drafters have no intention of creating a new method of impeaching a witness

with past acts for which there is no conviction. Just because the drafters did not create a new method of impeachment under 608(b) does not mean that non-convictions cannot be used for impeachment. Indeed, there are several situations in which a witness can be impeached with non-convictions and the Alabama drafters made it clear that those traditional methods of impeachment are alive and well. For example, a non-conviction may be used to show that a witness is biased.

Impeachment by Bias

Bias has long been an acceptable form of impeachment in federal and Alabama courts. In federal courts, there is no specific rule of evidence that pertains to bias. The federal drafters chose not to codify it under the *Federal Rules of Evidence*.

However, bias is alive and well under the federal case law and continues to be a commonly used method of impeachment. Under the Alabama rules, bias is codified as *Ala. R. Evid.* 616.

Bias is commonly regarded as “[o]ne of the broadest forms of impeachment. *Gamble’s*, § 616. The types of bias that can be brought out on cross-examination are limited only to the creativity of counsel. Extrinsic evidence is allowed if the witness denies the matter brought out to show bias. *Id.*

Impeachment by Reputation and Opinion Evidence

Many lawyers often forget that Rule 608(a) of the Alabama and federal rules

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allow for impeachment via reputation and opinion evidence. By way of example, suppose that Witness A testifies and gives favorable testimony for the plaintiff. The defense can then call Witness B to testify that Witness A has an unfavorable reputation in the community for lying. Or, that in Witness B's opinion, Witness A does not tell the truth and should not be believed under oath.

To use this impeachment technique, it is imperative that counsel understand the foundational requirements. If Witness B is going to testify that Witness A has a bad reputation in the community for lying, the impeaching attorney must show the following: (1) that Witness A has sufficient contacts in the community in order to have formed a reputation in that community; and (2) that Witness B has sufficient contacts in the community in order to be familiar with Witness A's reputation. Assuming those foundational elements are met, the impeaching attorney may ask Witness B about Witness A's reputation in a particular community for lying. While the community may be a geographic one, such as a town or city, it does not have to be. It can be a church, a

school or any group of people where the person at issue has formed a reputation. *Gamble's*, § 608(a)(1).

The impeaching attorney may also ask Witness B whether Witness A is a liar in his opinion. If this medium is selected, the impeaching attorney must establish that Witness B has had sufficient enough contacts with Witness A to be familiar with whether Witness A tells the truth.

Rehabilitation of an Impeached Witness

Whenever a witness is impeached, the opposing party should be ready to rehabilitate that witness in any way possible. This is typically done on redirect examination, and is often done just through good, common-sense examination. For example, if it is revealed on cross-examination that the witness is a friend and co-worker of the criminally accused, on redirect examination the attorney may get the witness to tell the jury that his friendship with the witness would not cause him to lie under oath. Many forms of rehabilitation are simply the lawyer relying on his gut to decide what it will take for the witness to look credible before the jury.

It is important for counsel to be aware of two specific rehabilitation techniques that are provided for under both the Alabama and federal rules. First, Rule 608(a) allows for a witness to be rehabilitated with reputation and opinion character witnesses, but only after the character of that witness has been sufficiently attacked. "Those methods of impeachment which open the door to rehabilitation evidence under Rule 608(a) are: (1) reputation and opinion character evidence; (2) convictions; (3) prior inconsistent statements; and (4) corruption." *Gamble's*, § 608(a)(2).

Second, while prior consistent statements generally are not allowed to rehabilitate a witness, Rule 801(d)(1)(B) in the Alabama and federal rules allows an exception. Specifically, when a witness has been charged with fabricating his testimony, or improper influence or motive, prior consistent statements are allowed to rebut these charges, as long as these prior consistent statements pre-date the alleged fabrication, improper influence or motive. *Gamble's*, § 801(d)(1), Practice Pointer 4. For example, suppose that Witness A says that the plaintiff ran the red light. On cross-examination, the plaintiff's lawyer shows that just before he took the stand, the defendant paid him \$500. If Witness A had said that the plaintiff ran the red light at some time before this improper influence, that prior consistent statement would be admissible.

Conclusion

This article has by no means exhausted all the available means for impeaching a witness in Alabama and federal courts, but has sought only to highlight some of the more common techniques. In practice, impeachment techniques are only limited by creativity of counsel. ▲▼▲



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