EVIDENCE NUGGET SCENARIOS
IMPEACHMENT OF A WITNESS BY USE OF EXTRINSIC EVIDENCE

1. **A prosecutor, in preparation for cross examination of a criminal defendant, obtains a copy of the defendant's prior criminal history, showing convictions of armed robbery in 1992, possession of a firearm by felon in 1997 and assault on a female in 2004. Armed with this information, the prosecutor launches a cross examination that includes the following:**

Q: Of what crimes have you been convicted during the past 10 years that consisted of Class 2 Misdemeanors or greater?
A: Nothing.
Q: Nothing?
A: Not a thing.
Q: Are you sure?
A: Absolutely.
Q: I will ask if you weren't convicted of armed robbery in 1992?
OBJECTION – Your honor, Rule 609(b).
Q: Well, then I will ask if you weren't convicted of possession of a firearm by a felon in 1997?
A: Not that I recall. So far as I know, I have not been convicted of anything during the past 10 years.

PROSECUTOR: Your Honor, I would like to offer into evidence a copy of the Defendant's criminal history.
DEFENSE COUNSEL: OBJECTION. The State has not given notice of its intent to use this record. Further, the State is seeking to use extrinsic evidence to impeach a witness as to a matter that is not material to the issues in this case. The Defendant's criminal record is a collateral matter and, therefore, the questioner is bound by the witness' answer. Professor Brandis' treatise on Evidence specifically addresses this issue in section 161. Further, with respect to any convictions occurring more than 10 years ago, the State has not made the "necessary showing" for the admissibility of such evidence.

WHAT IS YOUR RULING?
WHAT IS THE "NECESSARY SHOWING?"
WOULD YOUR ANSWER CHANGE FOR A 1992 CONVICTION OF PERJURY?

2. **In a civil trial, a Plaintiff is suing for injuries sustained in an automobile collision at an intersection controlled by a stoplight. The essential fact in dispute is the question of which driver had the green light. As part of her investigation of the case, Plaintiff's attorney finds a friend of the Defendant in whom the Defendant confided on the day following the accident that she had "run a red light and hit a car." During cross examination of the Defendant, the following occurs:**

Q: Ms. Jones, what color was the traffic light for your lane of travel at the time of this collision?
A: It was green.
Q: Green? Are you sure?
A: I am absolutely positive, and I have witnesses to prove it.
Q: Did you talk with your friend and neighbor, Annie Smith, about this accident on the day after it occurred?
A: I did not.
Q: You don't recall telling Ms. Smith that you ran a red light and hit another car?
A: I absolutely never said such a thing, because I did not run a red light. My light was green.
Q: We will just have to let the jury decide that point, after we call Ms. Smith as a witness.

DEFENSE COUNSEL: OBJECTION. Your Honor, may we approach? First, we object to the argumentative statement by counsel and request a curative instruction. Second, we object to Ms. Smith being called as a witness to contradict our client on this point. That would be using extrinsic evidence to impeach the testimony of a witness. If you allow another witness to establish every point of my client's testimony that is disputed by the cross examiner, this trial will last a year.

WHAT IS YOUR RULING?

3. Ray Jones is charged with taking Indecent Liberties with his stepdaughter Julie Reems, the 13 year old daughter of Ray's wife, Mary Reems Jones. Julie spends alternating weekends with her father, Joe Reems. Joe has made no secret of his bitterness over the breakup of his marriage and Mary's subsequent remarriage. As the trial unfolds, it becomes quite apparent that Defendant's theory of the case is that Joe has encouraged his daughter to falsely accuse Ray of the crime so as to gain leverage for full custody of Julie. Cross examination of Julie includes the following:

Q: Julie, on how many occasions have you talked with your Dad about this incident?
A: Only once, immediately after I reported Ray to my School Resource Officer.
Q: Isn't it true that you and your father have talked many times about what could be done so that you could always live with your Dad?
A: I would like to live with my father, but no, we haven't talked about that.
Q: Isn't it true that you made up this whole incident, just so a judge would let you live with your father?
A: No, I am only telling the truth and I would much rather not be here today.

During the Defendant's evidence, his attorney calls Nikki Bliss, who is a friend of Julie. She identifies a letter she received from Julie two months before the alleged incident that describes how she hated seeing her mother with Ray and wished that she could find some way to live with her father. Before the letter is read into evidence, the prosecutor objects, saying:

"Your Honor, we object to the admission of this letter. It is extrinsic evidence offered to impeach the testimony of the victim, Julie Reems. Besides, no mention whatsoever was made of this letter during Julie's testimony. She should have an opportunity to admit, deny or explain the contents of this letter before it is offered into evidence."

DEFENSE COUNSEL: That is exactly the reason I did not show it to Julie. She has fabricated this entire incident and certainly would have found some convenient excuse or explanation for the letter. The jury is entitled to see this clear evidence of bias against the Defendant.

WHAT IS YOUR RULING?

4. **Gloria Caldwell hires Hans Franslik, a well known interior designer, for consultation on the redecorating of the family home. Approximately halfway through the project, at roughly the same time that Gloria's husband sees an interim bill, Gloria reluctantly discharges Hans due to "artistic differences." Hans then presents Gloria and Jesse with his final bill for services rendered, showing a balance due of $75,000. When the couple refuses to pay, Hans sues. Having already spent a bundle on the redecorating project, Jesse decides to defend Gloria and himself in the lawsuit, confident that he still has plenty of litigation prowess. His background investigation of Hans reveals that Gloria has hired a fraud. Hans provided a resume claiming that he holds a Masters in Design from NYU and that he studied under the world famous Stuart Blackwell, both of which are false. Jesse obtains certified letters from NYU and Mr. Blackwell documenting the falsehoods, then uses a Request for Admission to establish that "the attached letters are true copies provided by persons having personal knowledge of the facts recited therein, accurately express the testimony that would be offered by the authors of the letters if they were called to testify in this matter and to the extent that the information contained in the letters would be admissible through live testimony, said information may be received into evidence in the form of said letters." Having learned the lesson derived from Example 3 above, Jesse first shows the letters to Hans during his cross examination and allows him an opportunity to admit or deny that he gave false information in his resume. When Hans stands by his resume and insists that all of his statements were true, Jesse offers the letters into evidence. Hans' attorney objects, saying:**

> **"Your Honor, this is extrinsic evidence offered to impeach the testimony of the witness. We are talking about a collateral matter, on which the questioner is bound by the answer of the witness. It cannot be received."**

WHAT IS YOUR RULING? (for purposes of this question, please ignore any complications arising from the lack of opportunity to cross examine the authors of the letters)

EXTRINSIC EVIDENCE OFFERED TO IMPEACH A WITNESS

by Don Bridges, Senior Resident Superior Court Judge, Shelby, NC

Every trial is a series of battles. As the trial proceeds, each side seeks to discredit the evidence and witnesses of its opponent while working to bolster its own evidence and witnesses. This paper attempts to assist the trial judge in setting appropriate boundaries for those efforts.

The most common techniques used for impeachment of witnesses include:

1. Proof of conviction of a crime;
2. Proof of commission of other bad acts;
3. Prior inconsistent statements of the witness;
4. Proof of bias;
5. Character or reputation for truthfulness;
6. Contradiction of testimony by other witnesses;
7. Attack on an element of competency of the witness.

An attorney seeking to discredit a witness may attack the credibility of the witness by *intrinsic* methods, through information elicited directly from the witness on cross examination or, in some instances, resort to *extrinsic* evidence from sources other than the witness himself. Among the techniques listed above, contradiction of testimony by other witnesses is an example of extrinsic evidence; all of the other methods might be attempted through the use either of intrinsic or extrinsic evidence. One of the complications for the trial judge is the fact that the ruling on this point is determined in some instances by the Rules of Evidence and in others by case law pre-dating the Rules.

One such restriction on the use of extrinsic evidence to impeach a witness arising from case law is the "common law collateral fact rule." This principle holds that an attorney seeking to impeach the credibility of a witness is limited to intrinsic impeachment when *the impeaching fact relates only to the witness's credibility.* Under this rule, the attorney is "bound by" or must accept the answer of the witness and cannot offer extrinsic evidence to contradict the answer given. Although the attorney could "sift" the witness by pressing for a truthful answer (reminding the witness of his oath, showing him documents to refresh his memory), the attorney is not permitted to introduce extrinsic evidence to rebut the testimony of the witness as to matters of credibility. Imwinkleried, p. 164; *State v. Goode,* 341 N.C. 513, 544, 461 S.E.2d 631, 649 (1995). The collateral fact rule has been specifically incorporated into Rule 608(b) of the Rules of Evidence, which states:

> "Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness…"

On the other hand, this rule is expressly rejected by Rule 609, which provides that evidence of a witness' prior conviction "shall be permitted if elicited from the witness or established by public record during cross examination or thereafter." In certain other applications, Rules of Evidence are silent, leaving the issue to be "governed by case law." (*See, .e.g., The Commentary on N.C.R. Evid*. 613(b)). Therefore, the trial judge must be

familiar both with the Rules of Evidence and common law evidentiary principles in understanding and applying the law to these rulings.

The context in which this issue most often arises is with respect to prior inconsistent statements of the witness. Virtually every trial includes episodes of lawyers trying to pin down a witness on some difference between his testimony in court and a statement made at some earlier time. If the witness will not admit the inconsistency, then the attorney often seeks to prove it by extrinsic evidence. Professor Broun delineates three categories of situations in which extrinsic evidence might be offered:

> 1. A statement or conduct relating to material facts in the testimony of the witness may be impeached by extrinsic evidence, without first calling it to the attention of the witness.
>
> 2. A statement or conduct that is "collateral," must first be called to the attention of the witness, giving opportunity for the witness to admit, explain or deny it. If denied, the matter may be proven by extrinsic evidence.
>
> 3. A statement or conduct relating to collateral matters, not offered for purposes of showing bias is conclusive and may not be impeached by extrinsic evidence. Broun, *Brandis & Broun on North Carolina Evidence*, Fifth Edition (1998) section 161; *State v. Green,* 296 N.C. 183, 250 S.E.2d 197 (1978).

Applying these principles, extrinsic evidence will be permitted for impeachment of a witness as to matters that are "pertinent and material to the pending inquiry." *State v. Jones,* 347 N.C. 193, 205, 491 S.E.2d 641, 648-49 (1997), but generally will not be permitted for impeachment as to "collateral matters" (except as to bias). *State v. Patterson,* 24 N.C. 346 (1842). The first step, then, in determining the admissibility of extrinsic evidence offered to impeach the testimony of a witness, is to decide whether the evidence offered relates to a material issue in the case, as distinguished from a collateral matter.

How does one determine whether a matter is collateral or material? The definition of materiality usually followed by the North Carolina courts is enunciated in *State v. Long,* 280 N.C. 633, 187 S.E.2d 47 (1972):

> "The proper test for determining what is material and what is collateral is whether the evidence offered in contradiction would be admissible if tendered for some purpose other than mere contradiction; or in the case of prior inconsistent statements, whether evidence of the facts stated would be so admissible." 280 N.C. at 640, 187 S.E.2d at 14-15.

Other cases have similarly defined "material" as "involving matters pertinent and material to the pending inquiry," *State v. Jones,* 347 N.C. 193, 205, 491 S.E.2d 641, 648-49 (1997), "constituting a part of the evidence of the witnesses upon the transaction under investigation," *State v. Patterson,* 24 N.C. 346, 353 (1842), and "concern[ing] the subject matter in regard to which he is examined," *State v. Green,* 296 N.C. 183, 193-94, 250 S.E.2d 197, 204-05 (1978). In other words, would the proffered evidence be admissible for purposes other than impeachment? If so, then

the extrinsic evidence relates to a material issue and generally should be admitted. If the extrinsic evidence relates only to the matter of impeachment, then it is collateral and admissible only in specifically recognized exceptions, such as proof of bias.

Some examples of extrinsic evidence admitted to impeach prior testimony on material points include:

(1) testimony concerning a defendant's flight after commission of a crime, *State v. Jones,* 347 N.C. 193, 205, 491 S.E.2d 641, 648-49 (1997);

(2) testimony that the State's witnesses had been paid for their testimony, *State v. Patterson,* 24 N.C. 346, 353 (1842);

(3) testimony contradicting a defendant's alibi witness, *State v. Green,* 296 N.C. 183, 193-94, 250 S.E.2d 197, 204-05 (1978); *State v. Wellmon,* 222 N.C. 215, 22 S.E.2d 437 (1942).

Extrinsic evidence of collateral matters ruled inadmissible has included:

(1) the State sought to introduce extrinsic evidence of witness' credentials and activities as a nurse, *State v. Burke,* 343 N.C. 129, 469 S.E.2d 901 (1996);

(2) a newspaper article contradicting a defense witness' testimony as to what he read in the newspaper, *State v. Gardner*, 226 N.C. 310, 37 S.E.2d 913 (1946);

(3) State was bound by a witness' answer concerning participation in a shoplifting incident, *State v. Perry*, 69 N.C. App, 317 S.E.2d 428 (1984).

Unless the point of impeachment also involves a material issue, witness credibility is generally a collateral issue. As such, extrinsic evidence normally would not be received on an issue of credibility *but for* any exception provided by the Rules of Evidence. Indeed, Rule 608 is consistent with this proposition, noting that "specific instances of conduct of the witness, for the purpose of attacking or supporting his credibility, *other than conviction of crime as provided in Rule 609,* may not be proved by extrinsic evidence. Consequently, impeachment of a witness by proof of bad acts other than criminal convictions may be accomplished only by intrinsic methods, that is, by eliciting the information from the witness himself. If the witness denies the bad act, the attorney will not be permitted to call another witness to establish that the act was committed. Note, however, that the Rule leaves it to the discretion of the trial judge, if probative of truthfulness or untruthfulness, to allow inquiry to one witness into specific instances of conduct concerning another about whose character he has testified. N.C. R. Evid. 608(b).

Rule 609 specifically authorizes the use of extrinsic evidence to prove prior convictions, stating "evidence that the witness has been convicted of a felony, or of a Class A1, Class 1, or Class 2 misdemeanor, shall be admitted if elicited from the witness *or established by public record* during cross-examination or thereafter." (emphasis added). As noted by the Commentary, the enactment of this Rule brought about a change in (then) current practice, whereby a witness' denial of a prior conviction "may not be contradicted by introducing the record of his conviction or otherwise proving by other witnesses that he was, in fact, convicted." *See, e.g., State v. Gaiten,* 277 N.C. 236, 176 S.E.2d 778 (1970). Obviously, this is no longer the

case. A witness may now be impeached by proof of the commission of crimes, either by cross examination or by introduction of the public record.

Rule 609 also includes some foundational requirements. Evidence of convictions more than 10 years old may be admitted only when (1) the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence and (2) the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. This Rule has been interpreted to require findings of fact by the trial judge on the probative value of the prior conviction as it relates to truthfulness or untruthfulness. A conclusory finding that the evidence attacks the defendant's credibility without prejudicial effect is not sufficient and does not satisfy the "specific facts and circumstances" requirement of this rule. *State v. Hensley,* 77 N.C. App. 192, 334 S.E.2d 783 (1985), *cert. denied,* 315 N.C. 393, 338 S.E.2d 882 (1986). In making these determinations, the trial judge should discern whether or not the evidence is probative of the Defendant's credibility, taking into account what the past convictions indicate about his credibility, as distinguished from what they indicate about his general character. *See, e.g., State v. Carter,* 326 N.C. 243, 388 S.E.2d 111 (1990) (13 year old convictions of prior assaults erroneously admitted in murder trial as showing use of violence by defendant).

In summary, the following rules can be applied by a trial judge in ruling upon the admissibility of extrinsic evidence offered for impeachment of a witness:

1. Determine first whether the extrinsic evidence is *material* or *collateral*, using the tests of materiality from *Long, Jones, Patterson* and *Green.* If the evidence is *material,* then it may be received. If it is *collateral,* then further determinations are necessary.

2. If the evidence is *collateral,* relating only to impeachment, then determine whether the impeachment is based on bias, interest or disposition toward the case or parties. If these factors are involved, then the witness must first be confronted with the extrinsic evidence before it is offered, giving an opportunity to deny or explain it. If the evidence is denied, then the matter may be proven by extrinsic evidence.

3. If the evidence is *collateral* not involving bias, interest or disposition, then the examiner must accept the answer of the witness, subject to the court's discretion as to "pressing" or "sifting" the witness.

4. If the impeaching evidence consists of a criminal conviction, then the conviction may be established through cross examination of the witness or by public record.

5. If the impeaching evidence consists of specific bad acts other than conviction of a crime, such acts may not be proved by extrinsic evidence, but the court has discretion to permit cross examination of the witness concerning specific bad acts of himself , or another about whose character he has testified, if the acts are probative of truthfulness or untruthfulness.

Rule 608. Evidence of character and conduct of witness.

(a) Opinion and reputation evidence of character. – The credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion as provided in Rule 405(a), but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

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

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility. (1983, c. 701, s. 1.)

Rule 609. Impeachment by evidence of conviction of crime.

(a) General rule. – For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a felony, or of a Class A1, Class 1, or Class 2 misdemeanor, shall be admitted if elicited from the witness or established by public record during cross-examination or thereafter.

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

(c) Effect of pardon. – Evidence of a conviction is not admissible under this rule if the conviction has been pardoned.

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

(e) Pendency of appeal. – The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible. (1983, c. 701, s. 1; 1999-79, s. 1.)