Witnesses and Impeachment

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Judge Catherine C. Eagles, "Impeachment, Corroboration, Rehabilitation, and Opening the Door," http://www.judges.unc.edu/200411conference/ 200411EaglesImpeachRehab.pdf (referred to herein as Judge Eagles, at)

Judge Don Bridges, "Extrinsic Evidence Offered to Impeach a Witness," http://www.judges.unc.edu/200610conference/200610BridgesEvid.pdf

I. Witnesses, Generally

A. Competence

Rule 601(a) provides that **"[e]very person is competent to be a witness except as otherwise provided in these rules."** Subsection (b) of the rule addresses the subject of disqualification providing that a person who is **(1) incapable of expressing himself concerning the matter as to be understood, either directly or through interpretation by one who can understand him, or (2) incapable of understanding the duty of a witness to tell the truth** is disqualified as a witness. N.C.R. Evid. 601(b).

This principle of presumed witness competency differs from the rule at common-law under which certain classes of individuals were deemed incompetent to testify. Issues of infirmity that barred a witness' testimony at common-law now are considered issues of credibility, if considered at all.

While the presumed competency principle means that judges are not ordinarily required to make a preliminary determination of the witness' competency, the North Carolina rule requires that such determinations be made when a witness is claimed to be incompetent or "disqualified" under the rule. The determination rests within the trial judge's discretion.

Sometimes counsel will use the principle of presumed competence to challenge testimony that more accurately falls under the rubric of privilege. This tendency is as a result of the common-law treatment of certain witnesses, such as spouses, as incompetent. A good discussion of the relevant law of privileges in North Carolina can be found in Judge W. David Lee's materials on the topic at http://www.judges.unc.edu/200606Conference.htm.

B. Personal Knowledge

The general foundational requirement for any lay witness' testimony is that the witness has personal knowledge. Rule 602 provides that a **"witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter."** The proponent of a witness' testimony may establish that the witness has personal knowledge through the witness' own testimony or otherwise. N.C. R. Evid. 602.

The personal knowledge requirement is couched in absolute terms, but the Court of Appeals recently interpreted it less rigidly. In *State v. Watkins*, 181 N.C. App. 502 (2007), the appellate court quoted the commentary to the rules which state that "[p]ersonal knowledge is not an absolute but may consist of what the witness thinks he knows from personal perception." The court allowed a witness to identify defendant as the person who shot him based upon the circumstances and what the witness heard, although he testified that he did not see the defendant shoot.

C. Oath

The obligation that testimony in a criminal trial be given under oath or affirmation is a "part of the constitutional right to confrontation." *State v. Robinson*, 310 N.C. 530, 539 (1984), *but see State v. Beane*, 146 N.C. App. 220, 225-26 (2001)(concluding that trial court's deliberate decision not to administer an oath to a child witness who did not understand its meaning was not fundamental error having a probable impact on the jury's verdict). Rule 603 provides that **"[b]efore testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so."** N.C. R. Evid. 603.

While the witness' oath is specific in its terms, an affirmation is simply a "solemn undertaking to tell the truth." This flexibility of Rule 603 allows atheists, conscientious objectors, those with mental handicaps, and children to be witnesses and may be inconsistent with specific statutes. *See* Broun, at §146. In order to emphasize the significance and solemnity of the oath or affirmation, witnesses should be sworn individually before their testimony.

D. Interpreters

"An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation that he will make a true translation." N.C.R. Evid. 604.

E. Exclusion of Witnesses

Rule 615 provides that, upon request, the judge may sequester witnesses. The purpose of the rule is to facilitate the discovery of the truth by preventing one witness from conforming his or her testimony to that of another witness. The rule provides:

> **[a]t the request of a party the court may[1] order witnesses excluded so that they cannot hear the**

[1] The Federal Rule counterpart, and many state rules, contain the word "shall" instead of the word "may."

> **testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party that is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause, or (4) a person whose presence is determined by the court to be in the interest of justice.**

N.C. R. Evid. 615.

Because the rule is discretionary in North Carolina, the judge may exercise discretion in appropriate cases to not require sequestration. Additionally, under the provisions of Rule 615, certain categories of witnesses ordinarily are not subject to sequestration even if the court grants sequestration. A common example of such a witness is an expert witness whose testimony will be based upon other evidence presented in the case. The trial judge must determine, as a preliminary question whether the witness' presence is "essential to the presentation." The party who wishes to avoid the exclusion of the witness has the burden of demonstrating the necessity. Similarly, under subsection (4), the judge must determine as a preliminary matter whether a witness' presence is required "in the interest of justice."

North Carolina statutes also address sequestration. Section 15A-1225 of the North Carolina General Statutes provided that "[u]pon motion of a party the judge may order all or some of the witnesses other than the defendant to remain outside of the courtroom until called to testify, except when a minor child is called as a witness the parent or guardian may be present while the child is testifying even though his parent or guardian is to be called subsequently." Under the statute as well as the rule, the courts regularly hold that the judge has discretion to refuse to sequester witnesses under appropriate circumstances.

When the rule of exclusion is in effect and is violated, the trial judge retains the discretion to take remedial measures to punish the violation. While the rule doe not specify a remedy, courts may cite the witness for contempt, strike all[2] or part of the witness' testimony, issue a jury instruction regarding the violation, or allow counsel to argue the violation as it relates to the witness' credibility. All of these remedial measures have drawbacks, since even when

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[2] Courts should be cautious in ordering the exclusion of a witness' testimony, particularly when the witness is testifying for the defendant in a criminal case, because of the potential constitutional implications. *See generally Michigan v. Lucas*, 500 U.S. 145 (1991)(allowing exclusion for failure to comply with rape-shield notice under particular circumstances of case); *Taylor v. Illinois*, 484 U.S. 400 (1988)(allowing exclusion for failure to comply with discovery order).

the rule is technically violated, the witness' truthfulness may not have been affected.

II. Impeachment

A. Generally

The term "impeachment" includes all efforts at undermining a witness' credibility or truthfulness. The North Carolina Supreme Court has explained that the purpose of impeachment is "to reduce or discount the credibility of a witness for the purpose of inducing the jury to give less weight to his testimony in arriving at the ultimate facts in the case." *State v. Nelson*, 200 N.C. 69 (1930). Thus, impeachment may include attempts to show that a person has lied, cannot remember, cannot articulate, is biased, is inept, or is uncertain. At common-law, lawyers were prohibited from impeaching their own witnesses, except under the most unique circumstances.[3] This so-called voucher rule was replaced with the provision in the rules of evidence that provides that "**[t]he credibility of a witness may be attacked by any party, including the party calling him.**" N.C.R. Evid. 607.

Any witness, including a hearsay declarant, may be impeached. Rule 806 provides that **"[w]hen a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness."** N.C. R. Evid. 806. For this reason, it is important to differentiate between an out of court statements offered for its truth, and thus, subjecting the declarant to impeachment, and one offered for another purpose.

B. Limitations on Impeachment

While providing for broad impeachment, the rules neither enumerate nor detail methods of impeachment. Nor do they clearly establish the limitations. They do provide some substantive limitations and procedural guidance, while leaving other issues to case law determination. For example, the following rules cover some aspects of impeachment: (1) impeachment based on character for untruthfulness and specific instances of untruthfulness, N.C.R. Evid. 608; (2) impeachment based on criminal convictions, N.C. R. Evid. 609; and (3) limitations on impeachment based on religious beliefs, N.C. R. Evid. 610. In addition, Rules 401 and 403 are generally applicable to impeachment issues. Many other issues, including whether, and if so how, the impeaching matter may be proved is left to case law and is most often a matter of judicial discretion.

[3] The most common exception to the common-law voucher rule was the "surprise principle" by which counsel could impeach a witness whose testimony was unanticipated and damaging.

1. Efficiency Limitations

a. Collateral Matters/Extrinsic Evidence Rule

Many of the general principles of impeachment relate to efficiency and fairness. Thus, for example, it is generally held that impeachment is complete when a witness admits the impeaching matter. If the witness does not admit the matter, then, in fairness, counsel usually is required to prove the impeachment. In some circumstances, however, because the impeachment is collateral, it would be inefficient to require, or allow, the proof. Under the common-law collateral matters principle, if the subject matter of the impeachment is collateral, counsel will not be allowed to offer extrinsic evidence to establish the impeachment but rather must accept the witness' answer even if it is false.

When a witness is asked about a collateral matter for purposes of impeachment, the witness' answer ends the inquiry even if counsel has other evidence to prove that the witness has answered untruthfully. Counsel may not offer extrinsic evidence to prove the collateral impeaching matter. But if the subject matter of the impeachment is noncollateral, the untruthfulness of a witness' answer must be established by extrinsic evidence.

Collateral matters are those that do not tend to prove or disprove a material proposition in the case. *See State v. Whitley*, 311 N.C. 656, 663 (1984)(collateral matters are those which are irrelevant or immaterial to the issues before the court). Noncollateral matters include those that tend to prove or disprove a material proposition in the case.

Some impeachment matters are, by their very nature, always noncollateral. Impeachment related to a witness' bias, motive, or intent; the witness' character for untruthfulness; and designated types of criminal convictions are noncollateral. These matters may be established on cross-examination or by the use of extrinsic evidence in the form of other testimony or documentary evidence.[4]

For a discussion of the collateral matters and extrinsic evidence rule, *see* Judge Don Bridges, "Extrinsic Evidence Offered to Impeach a Witness," http://www.judges.unc.edu/200610conference/200610BridgesEvid.pdf.

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[4] According to Professor Broun, under North Carolina law, if a prior inconsistent statement or conduct is used to impeach, and the content of the statement or conduct is collateral, but relates to bias, interest, or motive, the matter must first be called to the witness' attention so that the witness may explain or deny it. If the witness denies the matter, it may be proved by extrinsic evidence. *See generally* Broun, §161, nn. 438-49. The cases are noted to be flexible, indicating a relaxation of this stringent rule so long as the witness at some time has an opportunity to explain or deny the prior statement or conduct.

b. Anti-Bolstering Rule

Evidence of a witness' truthful character may only be offered after evidence of untruthful character has been introduced. This rule, informally referred to as the "no bolster before attack" rule also promotes trial efficiency. The rule, set forth in Rule 608(a), provides that **"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."** N.C.R. Evid. 608(a). While the rule does promote efficiency, it is premised on the presumption that all witnesses testify truthfully and that issues of their credibility are collateral to the principle issues in the case.

When an objection is made that evidence constitutes improper bolstering, the trial judge must determine whether the witness' "character for *truthfulness*" has been attacked. If the witness has been impeached on some other basis, such as by demonstrating the witness' bias or confusion, although that evidence affects the witness' credibility, it is not evidence of an untruthful character and therefore, does not trigger the right to introduce evidence of a truthful character under Rule 608(a). If, however, the court finds that evidence of the witness' untruthful character has been introduced, then the court should allow the introduction of evidence of the witness' truthful character.

Evidence of the witness' truthful character also must be in the form of opinion or reputation evidence unless the trial judge allows inquiry into specific instances of untruthfulness on cross-examination. **N.C.R. Evid. 608(a) & (b)(providing that "[t]he credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation . . . . Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility . . . may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness . . . .").**

2. Fairness Limitations

Some limitations on impeachment have developed out of concerns for fairness in the proceedings. Two such limitations – the rule requiring a good-faith basis for impeachment and the rule prohibiting the use of impeachment as a subterfuge – are not addressed in the evidence rules, but nonetheless have legal support and form the basis for legitimate objections.

a. Good-Faith Basis Rule

The general requirement that counsel have a good-faith basis for all inquiry is set forth in the professional conduct rules. Rule 3.4(e) of the North Carolina Rules of Professional Conduct prohibits an attorney, in trial, from "allud[ing] to any matter that the lawyer does not reasonably believe is relevant

or that will not be supported by admissible evidence." N.C.R. Prof. C. 3.4(e). This is the rule that prohibits counsel from exploring prejudicial matters on cross-examination for which counsel has no reasonable basis.

b. Impeachment as Subterfuge for Admissibility of Inadmissible Evidence

A second limitation on impeachment that has developed out of concern for fairness is the prohibition against the use of impeachment as a subterfuge for the admission of inadmissible evidence. This limitation was first recognized in the federal courts but has been endorsed by the North Carolina courts. If during cross-examination about a prior inconsistent statement, the witness denies the statement, counsel may not, under the guise of impeachment, call another witness to testify to the denied statement's content.

This principle, recognized in the federal courts, and in the North Carolina Court of Appeals, *State v. Bell,* 87 N.C. App. 626 (1987), was adopted by the North Carolina Supreme Court in *State v. Hunt*, 324 N.C. 343 (1989). There, the Court held that "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 349 (quoting *United States v. Morlang*, 531 F.2d 183, 190 (4th Cir. 1975)). To allow this use of impeachment would allow counsel to "tak[e] advantage of the jury's likely confusion regarding the limited purpose of impeachment evidence . . . ."

In order to determine whether evidence was offered in good faith, rather than as a subterfuge for the admission of inadmissible evidence, courts have looked at a variety of factors, all held to be "guides" for North Carolina courts. Among those factors are whether the "witness' testimony was extensive and vital to the government's case, whether the party calling the witness was genuinely surprised by his reversal, and whether the trial court followed the introduction of the statement with an effective limiting instruction." 324 N.C. at 350 (citations omitted). In *Hunt*, the Court found that the confusing jury instructions made it more likely that the jury would fail to differentiate between the substantive and impeachment use of the evidence, thus requiring a reversal of the case.

C. Judicial Application of Impeachment Rules and Limitations

In order to properly monitor the use of impeachment evidence, trial judges must mesh several common-law principles, constitutional guarantees, the rules of evidence, and the rules of professional conduct and must carefully and deliberately exercise sound judicial discretion. The judge's difficult task may be lessened if the judge is careful to require counsel to articulate the purpose for which the evidence is offered, rather than speculating or assuming counsel's intention. By requiring counsel to state the purpose for which the evidence is

offered once an objection has been made, the trial judge can more readily analyze the objection and apply the appropriate rule or principle.

D. Methods of Impeachment

At common law, seven basic methods of impeachment existed. Impeachment could be by proof of (1) bias, motive, or interest; (2) mental or physical impairment affecting perception, memory, narration, or veracity; (3) contradiction; (4) prior inconsistent statements or conduct; (5) character for untruthfulness; (6) criminal convictions; and (7) certain religious beliefs or the absence of religious belief.

Rules of evidence have abolished the use of religious belief or its absence as a basis for arguing either enhanced or impaired credibility, but North Carolina Rule 610 provides that "**such evidence may be admitted for the purpose of showing interest or bias."** N.C.R. Evid. 610. Whether the evidence is actually being offered to show interest or bias is a preliminary question for the trial judge.

For summaries of cases in which Rule 610 has been applied, *see* Judge Eagles, at 12-13.

1. Bias, Motive, or Interest

A witness' credibility may be influenced by the witness' bias, motive for testifying, or interest in the outcome of the case.[5] Though not specifically addressed by the rules, impeachment by bias is a function of the application of Rules 401 and 403. Moreover, the United States Supreme Court has specifically authorized impeachment by bias under the federal rules, even though those rules likewise do not specifically address the topic. *United States v. Abel*, 469 U.S. 45, 51 (1984)(providing that "proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony").

At common law and under modern rules of evidence, bias is not considered a collateral matter and may be established through the introduction of extrinsic evidence. Presumably, however, through the use of Rules 403 and 611, a judge could limit the admissibility of extrinsic evidence when, for example a witness admits the bias. *See generally* Broun, §157 n. 378. In North Carolina, if bias is implicated on cross-examination, the witness must be given an opportunity to explain or deny it on redirect examination "after which the cross-examiner may produce evidence nullifying the effect of the explanation." Broun, §157 nn. 382-83.

If impeachment demonstrates that the degree of a witness' interest is sufficient, upon request a party may be entitled to an "interested witness" instruction. The general rule as to whether a requested instruction must be given is set forth in *State v. Corn,* 307 N.C. 79, 86 (1982). A trial judge must "declare and explain the law arising on the evidence. . . . Although a trial judge is not required to give requested instructions verbatim, he is required to give the requested instruction at least in substance if it is a correct statement of the law and supported by the evidence." 307 N.C. at 86(citations omitted).

The pattern jury instruction for interested witnesses states:

> You may find that a witness is interested in the outcome of this trial. In deciding whether or not to believe such a witness, you may take his interest into account. If, after doing so, you believe his testimony in whole or in part, you should treat what you believe the same as any other believable evidence.

N.C.P.I. Crim. 104.20. If evidence of a witness' interests exists and the instruction is requested, it should be given. *But see State v. Dendy*, 165 N.C. App. 276 (2004)(relying on *State v. Williams,* 6 N.C.App. 611, 613 (1969) for the proposition that it is error to give instruction with regard to the prosecuting witness because it would "improperly and prejudicially discredit the testimony of the prosecuting witnesses and would be an unwarranted extension of the interested witness rule beyond the reasons underlying its existence.")).

For summaries of cases in which impeachment by bias has been discussed, *see* Judge Eagles, at 5-6.

2. Mental or Physical Impairment

A witness may be impeached by virtue of mental or physical impairment that affects the witness' ability to perceive, recollect, explain, or truthfully relate. The witness' mental capacity at the time of the trial and at the time of the event about which the witness is to testify may both be relevant. Mental or physical impairment may include mental deficiency, drug or alcohol intoxication, or senility. In order to be relative on the issue of credibility, the deficiency should evidence some impairment of the witness' ability to comprehend, know, remember, and correctly relate the truth.

The appropriateness of impeachment based on mental deficiency was discussed in a January 2008 decision of the North Carolina Supreme Court. In *State v. Whaley*, 362 N.C. 156 (2008), an assault case, the testifying witness admitted that she had visited a mental health facility to speak with a counselor. When defense counsel sought to question the witness about the answers she had given to inquiries on an intake questionnaire, the state objected. After a jury out

colloquy, the trial judge sustained the objection on three bases. First, the court ruled that the witness' mental state at the time she filled out the questionnaire was not relevant to her mental state on the date of the incident or the date of trial; second, the court ruled that "there [is] no evidence that the victim actually suffered from a mental defect and knowledge of the victim's responses would put [] the jury in the position of making some diagnosis;" and third, the court ruled that the evidence was more prejudicial than probative.

On appeal, the North Carolina Supreme Court held that the trial court had abused its discretion. The Court's opinion relied upon both the importance of assessing credibility and the prominence of the witness in the case. The Court emphasized that the admission of the evidence did not depend upon proof of past mental problems or defects because the evidence bore upon the witness' credibility "such as to cast doubt upon the capacity of the witness to observe, recollect, and recount." 362 N.C. at 159 (quoting *State v. Williams*, 330 N.C. 711, 719). "When testimony constitutes 'the State's sole direct evidence on the ultimate issue, . . . credibility [takes] on enhanced importance. . . . Moreover, 'impeachment' [is] particularly critical in light of the testimony of defendant's witnesses that contradicted [the State's evidence.]" 362 N.C. at 159 (quoting 330 N.C. at 724).

Just as mental impairment may affect a witness' ability to observe and recollect, so might a witness' use of drugs or alcohol. If a witness is under the influence of an intoxicant or drug at the time of the event about which the witness is testifying, counsel may offer evidence of that fact. Generally, though, evidence that the witness is a habitual drunk or drug user will not be allowed absent some connection to the event and date in question. Impairments that could have affected the witness at the relevant time or that could be affecting the witness while testifying at trial are generally admissible, but a wholesale exploration of a witness' alcohol, drug, and mental health history will rarely be allowed. These parameters, as well as limitations imposed by the collateral matters and extrinsic evidence rules, are enforced by the judge under Rules 403 and 611.

For summaries of cases in which impeachment by defective ability to observe, remember, or recount has been discussed, *see* Judge Eagles, at 12.

3. Contradiction

Impeachment by contradiction is accomplished by showing, either through the witness' own testimony or through the testimony of others, that the witness is mistaken about some relevant fact. When a witness is asked about a contradiction that is collateral, the collateral matters rule applies to bind examining counsel to the witness' answer. Only if the contradiction is noncollateral in that it concerns a material issue in the case may counsel offer extrinsic evidence to establish the contradiction. Thus, upon objection, the court

should disallow the admission of extrinsic evidence to prove a collateral contradiction.

For case summaries in which impeachment by contradiction has been discussed, *see* Eagles, at 14 – 15.

4. Prior Inconsistent Statements or Conduct

a. Impeachment Use vs. Substantive Use

A witness' prior inconsistent statement or conduct may be used to impeach the witness at trial.[6] A witness may also be impeached by silence, when the prior silence is inconsistent with the witness' present testimony and no constitutional impediment to its introduction exists. *See Doyle v. Ohio*, 426 U.S. 610 (1976)(explaining that impeachment use of defendant's silence after receiving *Miranda* warnings violates due process).

The impeachment use of prior inconsistent statements or conduct must be carefully distinguished from the substantive use of the evidence. The inconsistency does not make the statement or conduct admissible as substantive evidence. The prior statement or conduct is admitted as substantive evidence only when some other rule of evidence permits their introduction. Since all prior statements are out of court statements if offered for their truth, they are classic hearsay; thus, some hearsay exception must apply to render the evidence admissible as substantive evidence.

b. Statement of the Witness and Inconsistency Requirements

Before a prior inconsistent statement may be used to impeach a witness' trial statement, it must be both the statement of the witness and inconsistent with the present testimony. If the witness admits having made the prior statement, impeachment by that statement is permissible. *State v. Wilson,* 135 N.C.App. 504, 507(1999). Similarly, when a witness fails to remember having made certain parts of a prior statement, denies having made certain parts of a prior statement, or contends that certain parts of the prior statement are false, the witness may be impeached with the prior inconsistent statement. *State v. Whitley*, 311 N.C. 656 (1984). But, under North Carolina law, "once a witness denies having made a prior statement, the State may not impeach that denial by introducing evidence of the prior statement." 135 N.C.App. at 507. The rationale for this rule is that "once the witness *denies* having made a prior inconsistent statement . . . the prior statement concerns only a *collateral matter,*

[6] In a recent decision, the court allowed impeachment with a statement on the witness' MySpace page which was inconsistent with the trial testimony. *In re K.W.*, 192 N.C. App. 646, 650-51 (2008).

i.e., whether the statement was ever made." *State v. Najewicz*, 112 N.C. App. 280, 289 (1993); *see also State v. Riccard*, 142 N.C. App. 298 (2001).

With regard to the inconsistency requirement, the rule is that so long as a reasonable inference may be drawn that the prior statement is inconsistent with the present testimony, the inconsistency is sufficient to allow the use of the statement to impeach. A direct contradiction is not required. The effect of the impeachment is for the jury to determine. Both the collateral matters and the extrinsic evidence rules apply so that extrinsic evidence of a prior inconsistent statement on a collateral matter is not admissible.[7]

c. Display of the Statement

Rule 613 applies to prior written statements, both consistent and inconsistent. It is a procedural rule, based on fairness that is written so as to nullify pre-rules requirements. It provides that **"[i]n examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel."**

d. Foundation, Contradiction, and Introduction of Extrinsic Evidence

There are few if any limits on counsel's ability to cross-examine a witness about a prior inconsistent statement, even if the prior statement is not relevant to the matters at trial. This is not because what the witness said is important or relevant but because the witness' inconsistency may affect the witness' credibility. Limitations do arise however, when the witness denies the statement and when the statement does not relate to the matters at trial. Procedural rules have developed to address when a cross-examiner is bound by the witness' answer and when the cross-examiner may introduce proof to contradict the witness.

Subject to the limitations discussed above, these rules turn on the content of the prior statement. If the prior statement concerns material facts[8] and is therefore, noncollateral, it may be proved on cross-examination of the witness or by others, without first calling it to the attention of the witness on cross-examination." Broun, at §161. Thus, noncollateral prior inconsistent statements may be proven by any method chosen by the examiner – be that cross-examination, documentary evidence, or the testimony of others. *See State v. Workman*, 344 N.C. 482 (1996).

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[7] See note 4 regarding the requirement that a witness be allowed to explain or deny a prior inconsistent statement on a collateral matter.

[8] Material facts "involve those matters which are pertinent and material to the pending inquiry." *State v. Riccard*, 142 N.C. App. 298 (2001).

When a prior inconsistent statement concerns collateral matters, the introduction of extrinsic evidence triggers concerns of trial efficiency and clarity. Thus, the procedural rules differ, depending on whether the prior statement, though collateral to the matter at issue, nonetheless suggests that the witness is biased or interested in the outcome of the case. If so, fairness concerns override those of efficiency and allow the introduction. While the prior statement must "first be called to the witness' attention, thus giving [the witness] an opportunity to admit, explain, or deny it, . . . if denied [the statement or conduct] may be proved by others." Broun, at § 161.

A different rule applies, however, if the statement or conduct does not relate to bias. As the North Carolina Supreme Court noted:

> A witness may be cross-examined by confronting him with prior statements inconsistent with any part of his testimony, but where such questions concern matters collateral to the issues, the witness's answers on cross-examination are conclusive, and the party who draws out such answers will not be permitted to contradict them by other testimony.

State v. Williams, 322 N.C. 452, 455 (1988)(quoting *State v. Green*, 296 N.C. 183, 192 (1978)). In *Williams*, a defense witness denied both that defendant had confessed to him and that he had revealed the confession to his probation officer. The state called the probation officer and a second rebuttal witness both of whom refuted the witness' denial and testified that the witness had relayed the confession to them. In finding error and reversing, the Supreme Court held that the evidence was

> not offered to prove that defendant had, in fact, made the alleged statements to [the witness]. Rather, the testimony was offered solely to contradict [the witness'] statement that he had not *told* [the probation officer] that defendant made these statements. While the substance of those statements and whether defendant made them would be material, whether [the witness] had *told* anyone about defendant's statement is clearly collateral.

322 N.C. at 456 (emphasis in original).

For summaries of cases in which impeachment by prior inconsistent statements has been discussed, *see* Judge Eagles, at 7 - 11.

5. Character for Untruthfulness

A witness may also be impeached by character evidence proving the witness' untruthfulness. This admission of character evidence is one of the few exceptions to the general rule prohibiting the circumstantial use of character evidence. Rule 608 specifically allows the introduction of reputation and opinion evidence, and in the court's discretion, cross-examination concerning specific instances of conduct to impeach a witness' character for truthfulness. Specific instances of conduct for the purpose of attacking or supporting a witness' credibility may not be proved by extrinsic evidence but may be inquired into on cross-examination, in the court's discretion. The rule specifically provides:

> **(a) 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 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.**

To prove truthfulness or untruthfulness by opinion evidence, a witness must be produced who has sufficient personal knowledge to give an opinion on the subject. While there is no standard for the length of relationship or familiarity, the opinion witness must have a sufficient basis to have formed the opinion about the witness' character for truthfulness or untruthfulness. Before a character witness may testify to another witness' reputation for truthfulness or untruthfulness, "a foundation must be laid showing that the character witness has sufficient contact with the community to enable [the character witness] to be

qualified as knowing the general reputation of the person." *State v. Morrison*, 84 N.C. App. 41, 47 (1987).

The North Carolina courts have distinguished between the two types of evidence.

> That opinion testimony does not require the foundation of reputation testimony follows from an analysis of the nature of the evidence involved. The reputation witness must have sufficient acquaintance with the principal witness and his community in order to ensure that the testimony adequately reflects the community's assessment. . . . In contrast, opinion testimony is a *personal assessment* of character. The opinion witness is not relating community feelings, the testimony is *solely the impeachment witness' own impression of an individual's character for truthfulness*. Hence, a foundation of long acquaintance is not required for opinion testimony. Of course, the opinion witness must testify from personal knowledge. . . . But once that basis is established the witness should be allowed to state his opinion, "cross-examination can be expected to expose defects. . . . The rule [for laying a foundation for laying a foundation for opinion evidence regarding a witness' character for untruthfulness] imposes no prerequisite conditioned upon long acquaintance or recent information about the witness; cross-examination can be expected to expose defects of lack of familiarity and to reveal reliance on isolated or irrelevant instances of misconduct or the existence of feelings of personal hostility towards the principal witness.

State v. Morrison, 84 N.C. App. 41, 48-49 (1987)(quoting *United States v. Watson*, 669 F.2d 1374 (11th Cir. 1982)) (internal citations omitted)(emphasis in original).

Courts are entitled to restrict the evidence to the witness' character for untruthfulness and not allow comment on other character traits. In *State v. Arrington*, 2010 WL 697339 (N.C.App. Mar. 2, 2010), for example, the witness was asked, "have you had the opportunity to form an opinion as to [the defendant's] reputation for honesty? The witness responded as follows: "It is in [sic] my opinion that [the defendant] is an honest person. He's a caring person. He's a kind person." The court, without objection, interjected, "[h]e didn't ask you any of that, ma'am. . . . He asked you about honesty. . . . [w]hich is not relevant to this case, by the way." 2010 WL 697339, *2. The appellate

court described the "better practice" as waiting for an objection, but concluded that the judge has discretion to control the trial.

> [T]he judge was concerned about the relevancy of the witness's unsolicited opinion regarding the "caring" and "kind" nature of defendant. It is difficult to see how defendant was prejudiced by remarks of the judge . . . . The prosecution never objected to these unsolicited remarks, nor did the court strike the remarks and give a limiting instruction. The evidence was received by the jury, and was favorable to defendant.

2010 WL 697339, *3.

For summaries of cases in which impeachment by character for untruthfulness has been discussed, *see* Judge Eagles, at 11.

6. Criminal Convictions

Witnesses who have been convicted of felonies or of misdemeanors that involve dishonesty may be impeached by their criminal convictions. Rule 609 sets forth the specific rules, including the applicable time limitations, the notice requirements, the effect of appeals and pardons, and the admissibility of juvenile adjudications. Although the rules are often expressed in absolute terms, their application may be impacted by concerns of fairness and due process. *See Davis v. Alaska*, 415 U.S. 308, 320 (1975)("The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness.").

For purposes of attacking a witness' credibility, Rule 609 provides for the admissibility of "**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.**" N.C. R. Evid. 609(a). The conviction

> **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.**

N.C. R. Evid. 609(b). The notice and balancing test requirement apply only to convictions that are more than ten years old. *State v. Gervin*, 2010 WL 10408 N.C. App., Jan. 5, 2010).

The rule also has specific provisions pertaining to pardoned convictions, N.C. R. Evid. 609(c)(stating not admissible); the use of juvenile adjudications, N.C. R. Evid. 609(d)(stating generally not admissible, *but see Davis v. Alaska*, supra); and convictions that are on appeal. N.C. R. Evid. 609(e)(stating that appeal status does not affect admissibility). *See State v. Weaver*, 160 N.C. App. 61 (2003)(allowing impeachment with district court conviction which was appealed for a trial de novo and was pending in the superior court).

Guilty pleas on cases in which a prayer for judgment has been continued for sentencing, *State v. Sidberry*, 337 N.C. 779 (1994), and a plea of no contest resulting in a conviction are impeachable convictions. *State v. Outlaw*, 326 N.C. 467 (1990), *but see State v. Lynch*, 337 N.C. 415 (1994)(allowing cross-examination of a witness with a PJC on payment of costs is not permitted). But inquiry into mere charges is not permissible. *State v. Abraham*, 338 N.C. 315 (1994). In a recent decision, *State v. Riley*, 688 S.E.2d 477 (N.C. App. 2010), the prosecution asked whether defendant, as a result of a plea bargain, was charged with an offense. After objection, the court clarified that the "charge" was the offense to which defendant plead guilty. Although the question was found to be improper, the appellate court found no prejudice based upon the court's limiting instruction. 688 S.E.2d at 480-81.

A party proves a prior conviction by introduction of a certified copy of the original record of conviction. Because the document is self-authenticating, there is no requirement that the custodian of the record be called to authenticate it. *See* G.S. 15A-924(d). Issues of discrepancy in name are addressed by the North Carolina statutes. G.S. 15A-924(d).

The North Carolina courts have indicated that for policy reasons, "the details of the crime by which the witness is being impeached" should not be introduced. [W]here a conviction has been established, a limited inquiry into the time and place of conviction and punishment imposed is proper." *State v. Finch*, 293 N.C. 132 (1977)(setting forth pre-rules case, but principle endorsed in *State v. Garner*, 330 N.C. 273 (1991); *see State v. Lynch*, 334 N.C. 402 (1993)(holding that inquiry into the kind of weapons defendant used in prior convictions was error).

While a defendant may testify to his or her own prior convictions on direct examination in order to reduce the impact of their introduction, if a defendant misstates the record, the court may find that the defendant has opened the door to additional inquiry. Thus, for example if a defendant misstates the facts of the crimes or downplays his or her involvement in order to create a misleading favorable impression, the court may allow cross-examination into the details of the crime. *State v. Braxton*, 352 N.C. 158 (2000).

E. Impeachment by Silence

The United States Supreme Court has held that a defendant's Fourteenth Amendment due-process rights are violated by the use of post-arrest and post-*Miranda* silence for impeachment purposes. *Doyle v. Ohio*, 426 U.S. 610 (1976); *State v. Hoyle*, 324 N.C. 232 (1989); *State v. Shores*, 155 N.C. App. 342 (2002). Similarly, a defendant's post-arrest silence cannot be used as substantive evidence of guilt. *State v. Ward*, 354 N.C. 231, 266 (2001). But a defendant's pre-arrest silence may be used for impeachment purposes. *Jenkins v. Anderson*, 447 U.S. 231, 240 (1980). If a defendant has been arrested, but has not been *Mirandized*, the state also may use silence to impeach. *Fletcher v. Weir*, 455 U.S. 603, 606-07 (1982)(per curiam). Before the prosecution may introduce silence to impeach a defendant's trial testimony, the prosecution must demonstrate that the prior silence amounts to a prior inconsistent statement. *State v. Bishop*, 346 N.C. 365, 386 (1997).

The United States Supreme Court has not addressed whether the prosecution may use pre-arrest silence for substantive, non-impeachment purposes, but most federal courts addressing the issue have held that such use would violate the defendant's Fifth Amendment rights. The North Carolina Court of Appeals agreed in *State v. Boston*, 191 N.C. App. 637, 651 (2008), holding that "a proper invocation of the privilege against self-incrimination is protected from prosecutorial comment or substantive use, no matter whether such invocation occurs before or after a defendant's arrest."

III. Rehabilitation

The universal rule of rehabilitation is that it cannot occur absent impeachment. A witness' testimony may not be accredited unless it has been discredited. The rules specifically provide that **"evidence of truthful character"** of a witness may be **"supported by evidence in the form of reputation or opinion after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise."** N. C. R. Evid. 608(a)(2).

Witnesses who have been impeached through contradiction, bias, interest, or motive, mental disability, or prior inconsistent statements may be rehabilitated by a denial or explanation of the impeachment evidence or, perhaps, by introduction of other supportive evidence. These rehabilitation

efforts are controlled by Rules 401, 403, and 611. Finally, if the impeachment has been by a suggestion that the witness has recently fabricated his or her testimony, the witness may be rehabilitated by use of a prior consistent statement. "One of the most widely used and well-recognized methods of strengthening the credibility of a witness is by the admission of prior consistent statements." *State v. Locklear*, 320 N.C. 754, 761-62 (1987)(citations omitted). *See generally* Broun, §164, nn. 489 - 90 (noting also that prior consistent statements are admissible "even when the witness has not been impeached").

Issues of improper vouching are often raised on appeal in child sexual abuse or molestation cases. Prosecutors may wish for witnesses, such as police officers or social services workers, who have conducted an investigation into the allegations, to comment on whether their investigation substantiated or confirmed the allegations. When this evidence is offered apart from any impeachment of the victim, it may constitute an impermissible expert opinion on the victim's credibility or violate the rule against improper vouching. *See e.g., State v. Couser*, 163 N.C. App. 727, 731 (2004)(disallowing medical expert's testimony that victim had probably been sexually abused); *State v. O'Hanlan*, 153 N.C. App. 546, 563 (2002)(allowing officer's testimony explaining why he did not conduct further scientific tests of physical evidence).

In *State v. Giddens*, 681 S.E.2d 504 (N.C. App. 2009), the North Carolina Court of Appeals found plain error and granted a new trial based upon a DSS investigator's testimony that her investigation had substantiated that defendant had abused the victim. The court reasoned that the DSS investigator's testimony vouched for the credibility of the witness and "amounted to a statement that a State agency had concluded [d]efendant was guilty." 681 S.E.2d at 508 (citing *State v. Freeland*, 316 N.C. 13, 16 (1986)). Without the offending testimony, the jury would have had only the children's testimony and the evidence corroborating their testimony. Thus, "the central issue to be decided by the jury was the credibility of the victims." 316 N.C. at 509. Because the jury likely gave the DSS investigator's testimony greater weight than a lay opinion, the admission of the testimony was prejudicial and entitled defendant to a new trial.

For summaries of cases discussing rehabilitation, *see* Judge Eagles at 20 – 21.