

## Chapter 6

### **OTHER EXCLUSIONS OF RELEVANT EVIDENCE: THE QUASI-PRIVILEGES**

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#### § 6.01 CHAPTER CHECKLIST

- 1a. Is evidence of “subsequent remedial measures” being offered, that is, of measures taken after an injury or harm occurs that make its reoccurrence less likely? *See* Rule 407.
- 1b. If yes, is the evidence offered to prove negligence, culpable conduct, a defect in a product’s design, or a need for a warning or instruction, in which case it is not admissible, or is it instead offered for some other purpose, such as proving ownership, control, or feasibility of precautionary measures, in which case it may be admissible? *See* Rule 407.
- 2a. Is evidence being offered of (1) furnishing or offering or promising to furnish, or (2) accepting or offering, or promising to accept a valuable consideration to compromise or attempt to compromise a claim that is disputed as to either validity or amount, or of (3) conduct or statements made in compromise negotiations? *See* Rule 408.
- 2b. If yes, is the evidence offered to prove liability for or invalidity of a claim or its amount, in which case it is — with one exception — inadmissible, or is it instead offered for some other purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation, in which case it may be admissible? *See* Rule 408.
- 2c. Even if the evidence is offered to prove liability for or invalidity of a claim or its amount, which would ordinarily make it inadmissible, does the evidence consist of conduct or statements made in compromise negotiations in a criminal case in which the negotiations related to the claim of a public office or agency in the exercise of regulatory, investigative, or enforcement authority? If yes, contrary to the usual rule, the evidence is admissible.
- 3a. Is evidence being offered of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury? *See* Rule 409.
- 3b. If yes, is it offered to prove liability for injury, in which case it is inadmissible? *See* Rule 409.
- 4a. Is evidence being offered in any civil or criminal proceeding of (see Rule 410):
  - (1) a plea of guilty later withdrawn?
  - (2) a plea of nolo contendere (that is, “no contest,” meaning that the defendant neither admits nor denies the crime but nevertheless agrees to be sentenced for it)?

- (3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas?
- (4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which does not result in a plea of guilty or which results in a plea of guilty later withdrawn?
- 4b. If yes, is the statement offered in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness to be considered contemporaneously with it, or in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel? *See* Rule 410.
- 4c. If yes to 4b, the evidence may be admissible, but, if no, is the evidence offered against the defendant who made the plea or was a participant in the plea discussions, in which case it is inadmissible? *See* Rule 410.
- 5a. Is evidence offered that a person was or was not insured against liability? *See* Rule 411.
- 5b. If yes, is it offered on the issue whether the person acted negligently or otherwise wrongfully, in which case it is not admissible, or is it instead offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness in which case it may be admissible? *See* Rule 411.

## § 6.02 RELEVANT FEDERAL RULES OF EVIDENCE

### Rule 407. Subsequent Remedial Measures

When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

### Rule 408. Compromise and Offers to Compromise

(a) **Prohibited Uses.** Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:

(1) furnishing or offering or promising to furnish, — or accepting or offering or promising to accept — a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related

to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.

(b) **Permitted Uses.** This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.

#### **Rule 409. Payment of Medical and Similar Expenses**

Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

#### **Rule 410. Inadmissibility of Pleas, Offers of Pleas, Plea Discussions, and Related Statements**

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

- (1) a plea of guilty which was later withdrawn;
- (2) a plea of nolo contendere;
- (3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or
- (4) any statements made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn. However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

#### **Rule 411. Liability Insurance**

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

### **§ 6.03 OVERVIEW**

Exclusionary evidence rules are most often justified in one of two ways:

1. The evidence, if admitted, will mislead the jury or otherwise impede an accurate and efficient search for the truth.

2. Exclusion of the evidence will promote some public policy that has little to do with the "truth" in a specific case. For example, excluding illegally seized but highly probative evidence (a matter beyond the scope of this course) is often thought to encourage police to respect individuals' Fourth Amendment right to be free from unreasonable searches and seizures.

Evidence rules seen as primarily serving the second of these two goals are often called "privileges." There is no common term for rules that primarily serve the first goal, but that category would include most evidence rules other than privileges. Thus, the hearsay rule, the exclusion of most forms of character evidence, and the court's power to exclude unfairly prejudicial evidence with low probative value are often justified as aiding the search for the truth at trial. "Quasi-privileges" are rules justified as serving *both* the determination of truth and external public policies. Recent scholarship suggests, however, that *all* evidence rules at least partly serve goals unconnected with "truth" and that "truth" itself may be a notion imbued with value judgments. But we avoid entering that debate here. *See, e.g.,* Robert P. Burns, *A Theory of the Trial* (1999); Andrew E. Taslitz, *What Feminism Has to Offer Evidence Law*, 28 S.W.U. L. Rev. 171 (1999). Moreover, while some scholars prefer alternative phraseology, we find the term "quasi-privileges" a useful shorthand.

The major quasi-privileges are: (1) Rule 407's exclusion of much evidence of subsequent remedial measures; (2) Rules 408 and 410, which exclude much evidence of compromise negotiations; (3) Rule 409's bar on admitting evidence of offers to furnish, or payment of, a person's medical expenses to prove the offeror's liability for the injury; and (4) Rule 411's bar on admitting much evidence that a person was insured against liability.

## § 6.04 SUBSEQUENT REMEDIAL MEASURES: RULE 407

After an incident that causes an injury, persons or organizations that are potentially responsible for the harm may take measures to prevent its recurrence. But if those persons or entities are later sued by the injured parties, those parties might offer evidence that the defendants took such "subsequent remedial measures." There are many reasons that evidence of subsequent remedial measures might be offered. Among the most problematic of such reasons is proving that the remediator was at fault for not fixing the problem sooner.

### *Example 1*

John Smith drove a Volvo truck whose rear end was at the height of the heads of the drivers of most ordinary cars. One day, Smith suddenly changed lanes without signaling and was hit from behind. He was hit by a GM car driven by Ronald Patterson, who was instantly decapitated. Volvo immediately recalled all its trucks of the model involved in the accident to install "safety bars" that effectively lowered the rear of the trucks in a way that should avoid future decapitations in accidents like Patterson's. Patterson's estate sued Volvo, both for negligence in designing its truck and for defectively

designing the truck, a theory of strict products liability. The estate sought at trial to offer evidence of the trucks' recall and of the installation of the safety bars (1) to prove Volvo's negligence in not earlier installing such bars on all trucks of this model and (2) to show that the model's design was defective. This evidence seemed to be relevant under Rule 401 to show both Volvo's negligence and the defective design of the truck. However, were the evidence to be admitted at trial, Volvo might be reluctant to take corrective measures after future accidents revealing other defects, because Volvo would fear that evidence of such measures would be used against it at trial.

Partly to encourage such remedial measures, Rule 407 requires the exclusion of evidence like that immediately above against Volvo:

**Rule 407.** When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

exclusion  
remedial  
measures

The Advisory Committee considered the "social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety" to be the "more impressive ground" for exclusion. Advisory Committee Note, Rule 407. The Committee noted that courts had applied this principle to exclude evidence of "subsequent repairs, installation of safety devices, changes in company rules, and discharge of employees" and that "the language of the present rule is broad enough to encompass all of them." While conceding that subsequent remedial measures might in a particular case have some relevance (*some probative value*) for each of the prohibited purposes, the Committee saw the probative value as minimal, thus further justifying the rule:

low probative  
value

The conduct is not in fact an admission, since the conduct is equally consistent with injury by mere accident or through contributory negligence. Or, as Baron Bramwell put it, the rule rejects the notion that "because the world gets wiser as it gets older therefore it was foolish before."

Some commentators describe Rule 407 as an "inclusionary rule," because the last sentence makes clear that subsequent remedial measures are admissible under Rule 407 (though they may be excluded by other rules) for any other purpose than the prohibited ones listed in the Rule's first sentence. The specific admissible purposes noted in the last sentence are, therefore, really just *non-exhaustive* examples of admissible purposes. Nevertheless, to avoid speculative claims that evidence is offered for an admissible purpose, given the dangers that jurors will use it for an inadmissible one, the last sentence requires that there be a real controversy about one of the listed issues to justify admissibility.

*Example 2*

Jana Fallahy, attending a party, slips on highly polished kitchen tile and severely injures her back. Reginald Melbourne, who gave the party, later replaces the tile with slip-resistant carpet. Jana sues Reginald for negligence in inviting partygoers into a home with slippery tile and offers evidence that the defendant replaced the tile with carpet. The defendant objects.

If the evidence is offered to prove Reginald's negligence in not earlier installing the carpet, the defense objection should be sustained. Suppose Jana's counsel argues that the evidence is really offered simply to show that Reginald owned the home in which the accident took place, which would render him responsible for its condition. For the evidence to be admissible for that purpose, the issue of ownership must be "controverted." If Reginald admitted ownership in his answer to the complaint, ownership is conceded, and the objection should be sustained. If, on the other hand, Reginald's answer denied ownership (perhaps claiming that he was just house-sitting and is at least not solely responsible for the injuries), then ownership is in dispute, and the objection should probably be overruled.

A careful lawyer must also be sensitive to this timing issue: to what event must the remedial measure be "subsequent"? Again, the 1997 Advisory Committee Note answers this question:

[Under] the [1997] amendment to Rule 407 . . . , the words "an injury or harm allegedly caused by" were added to clarify that the rule applies only to changes made after the occurrence that produced the damages giving rise to the action. Evidence of measures taken by the defendant prior to the "event" do not fall within the exclusionary scope of Rule 407 even if they occurred after the manufacture or design of the product.

*Example 3*

Assume that in the first example in this chapter, Volvo realized that its trucks created a decapitation danger because numerous Volvo trucks had been involved in similar accidents before Ronald Patterson's accident. All but one of the trucks — the one that killed Patterson — had the new "safety bars" added by the time Patterson was killed. Patterson offered, over defense objection, evidence of the recall and safety bar installation concerning all the other trucks to prove Volvo's negligence in the Patterson case. The objection should be overruled because the remedial measures, while "subsequent" to the "manufacture or design of the product," were not "subsequent" to the "occurrence that produced the damages giving rise to the action."

*Problem 6-1: The Ruptured Bulldozer*

John Faro was injured while operating a Ford F4 bulldozer. The injury occurred when a hydraulic hose ruptured; it sprayed him and the engine with a flammable liquid, which ignited on contact. Forty-eight percent of Faro's body was burned. Faro, who had been injured in New York State, sued Ford,

issue must  
be  
controverted

timing

a Michigan corporation, in federal court, on theories of negligent design and strict products liability. Specifically, Faro argued that a protective shield should have enclosed the driver, protecting him from being sprayed if any hose ruptured. Faro sought to call a witness who would testify that Ford in fact installed such shields on its F5 earth-moving scraper, three weeks after Faro's injury. But, upon Ford's objection, the trial court excluded this evidence.

At the motion in limine on whether to exclude this evidence, Faro's expert had testified that the F5 moving scraper's design was not different from the F4 bulldozer's design in any significant way that would prevent installing such deflection shields on the bulldozer too. Prior to this motion in limine, however, Faro had succeeded in admitting all of the following evidence to support the proposition that deflecting shields could have been installed on the F4 bulldozer: an instructional aid on mechanical engineering, an engineering code of ethics, an alleged shielding standard published by the International Standards Organization, internal Ford memoranda, magazine articles, and service letters regarding the effects of possible ruptures in the F4 hoses.

1. Did the trial judge rule correctly? Would any additional information help you to answer this question? Should the trial judge's ruling be reversed on appeal?

2. Would your answer to "1" change if Ford had offered an expert at the motion in limine who testified that F5 wheeled-earth moving scrapers, which scrape rocky roads flat, are of a radically different design from, and serve different functions than, the F4 bulldozer, which moves large amounts of earth and dirt? What if he further testified that installing a shield on the F4 bulldozer would have raised its cost by \$10,000? That it was not yet scientifically feasible to install an effective deflecting shield on bulldozers?

3. Assume that, after excluding the evidence about the F5, and after plaintiff Faro rested, defendant Ford called an expert to the stand. Would your answer to "1" above change if the expert testified:

- a. That it is not scientifically feasible yet to install deflecting shields on bulldozers? ~~no~~ *yes*
- b. That it is feasible but is prohibitively expensive? ~~no~~ *yes*
- c. That it is not feasible on any construction equipment? ~~no~~ *yes*
- d. That it is prohibitively expensive on any construction equipment?

### *Problem 6-2: The Painful Beach Party*

John Patrick rented a beach house from Maurice Applebaum. One day, when Patrick threw a beach party at the house, a guest slipped in the outdoor shower and sustained serious back and neck injuries. Applebaum, hearing about the incident, came by one day and installed non-slip rubber stickpads on the shower floor. The guest sued both Patrick and Applebaum for the injuries suffered as a result of the slip in the shower. At trial, the plaintiff seeks to offer evidence of Applebaum's installing the non-slip stickpads. *Will this evidence be admissible against one or both of the defendants?*

*Problem 6-3: Rotund University*

A Rotund University School of Law student was recently raped while studying late at night in one of the study carrels in the stacks. The University hired an outside consulting firm to prepare a report on what steps, if any, the school could take to avoid future such incidents. The consultant recommended that the library be locked during night hours; that only students, faculty, and staff have keys; that locks be changed each semester; and that video cameras and emergency alarm buttons be installed on every floor. However, none of these changes has yet been implemented. The rape victim sues the University for damages and seeks to offer the report into evidence. *Ignoring hearsay issues, should the University's objection be sustained or overruled?*

**§ 6.05 OFFERS TO COMPROMISE: RULES 408  
AND 410**

**[A] Importance of Compromise in Civil and Criminal  
Cases**

High percentages of both civil and criminal cases are resolved by compromise, generally by settlement agreements (civil cases) or plea bargains (criminal cases). Our legal system generally seeks to encourage compromises as fair and efficient ways to settle disputes, thus reducing the otherwise unmanageable burden on trial courts. At the same time, some claims are settled to avoid the costs and risk of a trial, rather than as an admission of responsibility or guilt, thus suggesting that compromises are of limited probative value in proving fault or guilt at trial. The Rules, in recognizing these policy concerns, often exclude evidence of compromises reached or statements made during compromise negotiations, though negotiations arising in the civil versus the criminal context are treated somewhat differently.

**[B] Evidence of Civil Settlement Agreements and  
Negotiations: Rule 408**

Rule 408 addresses use of evidence of civil settlement agreements and negotiations in trials arising in the same or other cases than the one in which the negotiations took place:

**Rule 408. (a) Prohibited Uses.** Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:

- (1) furnishing or offering or promising to furnish — or accepting or offering or promising to accept — a valuable consideration in compromising or attempting to compromise the claim; and
- (2) conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations

related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.

**(b) Permitted Uses.** This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution."

The Advisory Committee explained that it based Rule 408 (compromises and offers to compromise) on essentially the same two grounds as support Rule 407 (subsequent remedial measures):<sup>1</sup>

As with evidence of subsequent remedial measures, dealt with in Rule 407, exclusion [under Rule 408] may be based on two grounds: (1) The evidence is irrelevant, since the offer may be motivated by a desire for peace rather than from any concession of weakness of position. The validity of this position will vary as the amount of the offer varies in relation to the size of the claims and may also be influenced by other circumstances. (2) A more consistently impressive ground is promotion of the public policy favoring the compromise and settlement of disputes.

The Advisory Committee worried, however, that these purposes were not well served by the traditional approach, which excluded only the compromise itself, but admitted evidence of both negotiations leading up to a compromise and offers to compromise:<sup>2</sup>

The practical value of the common law rule has been greatly diminished by its inapplicability to admissions of fact, even though made in the course of compromise negotiations, unless hypothetical, stated to be "without" prejudice, or so connected with the offer as to be inseparable from it. McCormick § 251, pp. 540-541. An inevitable effect is to inhibit freedom of communication with respect to compromise, even among lawyers. Another effect is the generation of controversy over whether a given statement falls within or without the protected area. These considerations account for the expansion of the rule herewith to include evidence of conduct or statements made in compromise negotiations, as well as the offer or completed compromise itself.

### *Example 1*

Matt Wrightley is dying from lung cancer, allegedly caused by his 50 years of chain-smoking Winston-Salem cigarettes. He sues Winston, the manufacturer of the cigarettes, for failing to warn consumers adequately of the dangers of smoking, since these dangers were known to the cigarette manufacturers long before they were known to the federal government. During the course

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<sup>1</sup> Advisory Committee Note, Rule 408.

<sup>2</sup> *Id.*

of settlement negotiations, the attorney for Winston-Salem concedes that a single study conducted by the company itself 40 years ago concluded that cigarettes could cause lung cancer but denies that this lone study constituted "knowledge" of a cancer danger. Winston-Salem did not at any point in the litigation produce such a report during discovery despite the plaintiff's requests. The company's attorney offered \$1,000,000 to settle the suit. The plaintiff, declaring the offer obscenely low, walked out of the settlement negotiations, and the case proceeded to trial. Rule 408 prohibits introduction of either the \$1,000,000 offer or the Winston-Salem lawyer's admission about the company's report concerning cancer danger if offered to prove either: (1) that Winston-Salem is liable for failing to convey early adequate warnings of cancer dangers to its customers, or (2) that Winston-Salem caused the plaintiff to suffer at least \$1,000,000 in damages.

### *Example 2*

Same example as above, but the case was indeed settled for \$1,000,000. A new plaintiff sues Winston-Salem on the same theory as did Matt Wrightley, seeking at trial to offer evidence of the Wrightley settlement as an admission of liability generally for negligently failing to make early and adequate warnings of the cancer dangers of its product. Winston-Salem's objection to this evidence will be sustained.

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Rule 408 bars admitting evidence of accepting a compromise to settle a claim disputed as to validity or amount *at any future civil or criminal trial* to prove liability for the claim. An earlier version of the Rule declared that the Rule "does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations." This language was deleted by a 2006 amendment but, according to the Advisory Committee, this deletion was not done to effect any change in meaning but because the language was "superfluous." Although the "intent of the sentence was to prevent a party from immunizing admissible information, such as a pre-existing document, through the pretense of disclosing it during compromise negotiations," explained the Advisory Committee, "even without the sentence, the Rule cannot be read to protect pre-existing information simply because it was presented to the adversary in compromise negotiations."

### *Example 3*

In the first Winston-Salem hypothetical above, assume that Winston-Salem does indeed admit in response to interrogatories that it has copies of its damaging internal cancer report in its possession. It refuses to produce the report, however, and later moves in limine to bar its introduction at trial, because the report was discussed during the failed settlement negotiations. While the *mention* of the report during settlement negotiations is inadmissible to prove liability or damages at trial, Rule 408 does not bar admission of the

report itself for the same purposes. The Rule was never intended as a shield for otherwise discoverable documents.

Furthermore, because the report is likely admissible at trial, under rules consistent with the Federal Rules of Civil Procedure, Winston-Salem cannot withhold the report during discovery on the ground that the report is either inadmissible or unlikely to lead to admissible evidence.

RULE NOT  
A SHIELD  
FOR  
ADMISSIBLE  
DOCUMENTS

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Importantly, the Rule applies only to compromise offers concerning a claim that is "disputed as to either validity or amount." Rule 408. The Advisory Committee explains: "The policy considerations which underlie the rule do not come into play when the effort is to induce a creditor to settle an admittedly due amount for a lesser sum."

#### Example 4

The Classic Books Club sends one of its customers, Martha Evans, a letter threatening to sue her for \$5,000 she owes them for books ordered and received at her request. She calls Classic Books, admits that she owes them the full \$5,000, but says that it will cost her little to contest that fact and represent herself in any law suit. She therefore offers to pay \$3,000, but not one penny more, arguing that it is in the company's interest to accept the settlement rather than face the litigation costs of suit. The company rejects her offer, files a complaint, and seeks to use her \$3,000 settlement offer and admission of \$5,000 liability against her at trial. Her objection under Rule 408 will be overruled because the negotiation statements concerned a matter not seriously disputed as to either "validity or amount."

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Like Rule 407, Rule 408 is arguably an inclusionary rule because civil settlements, offers, and statements during compromise negotiations are not excluded by Rule 408 if offered for *any purpose other than* proving the validity or liability of the claim then in dispute. In particular, the Rule expressly declares that the use of compromise evidence for "proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution" does "not require exclusion." To say that Rule 408 does not require exclusion does not mean, however, that some other rule might nevertheless exclude the evidence if a proper objection under another rule is made.

#### Example 5

Carter, Guttman, Inc., has been civilly sued for wrongful termination by its former employee, Harold Carswell. Carswell is also the star witness against Carter, Guttman, Inc., executives in a criminal bribery prosecution. The Chief Executive Officer of Carter, Guttman, Inc., offers to pay Carswell \$2,000,000

to settle his civil suit for wrongful termination (\$1,000,000 more than he asked for in that suit) if Carswell will leave the country before he can be subpoenaed in the criminal case and not return until the criminal case is resolved. Carswell refuses and reports the Carter, Guttman, Inc., proposal to the local prosecutor. The company's CEO is indicted for attempted obstruction of justice. In the criminal prosecution, the CEO objects under Rule 408 to evidence of his offer to settle the civil wrongful termination suit and of his related statements during settlement negotiations. This objection will be overruled. The evidence is not offered to prove that the company is liable for the civil claim but rather to prove the CEO's effort, in an unrelated case, "to obstruct a criminal investigation or prosecution."

### Example 6

The Federal Railroad Administration ("FRA") has assessed a substantial civil fine against the Kay-Cee Railroad Company for violation of federal railroad safety regulations. Kay-Cee disputes both whether it has engaged in any violations in the first place and the size of the fines. The attorney for the FRA enters into negotiations over this matter with Kay-Cee. During those negotiations, Kay-Cee's President admits to knowing that certain safety violations had caused a railroad engineer's death yet ordered that the violations not be corrected because it would be cheaper just to pay the fine. As a result, as the company President further admits, a second engineer died, so the President finally ordered those violations corrected. The company and the FRA do ultimately agree to settle their fine dispute for approximately half the amount that FRA originally sought.

Subsequently, the U.S. Attorney files negligent homicide charges against Kay-Cee. At trial, the government seeks to offer testimony about the above statements made by Kay-Cee's President during the civil dispute. Kay-Cee objects under Rule 408 on the grounds that these were statements made during compromise negotiations. Although ordinarily such statements would be barred by the rule, the objection should be overruled because the statements fit within the exception for statements made during compromise negotiations relating to a civil claim "by a public office or agency in the exercise of regulatory, investigative, or enforcement authority." Note that this exception applies only to the statements made during the civil negotiations, not to the furnishing or offering or accepting of consideration. As the Advisory Committee Note to the 2006 amendment that created this exception explains:

The amendment distinguishes statements and conduct (such as a direct admission of fault) made in compromise negotiations of a civil claim by a government agency from an offer or acceptance of a compromise of such a claim. An offer or acceptance of a compromise of any civil claim is excluded under the Rule if offered against the defendant as an admission of fault. In that case, the predicate for the evidence would be that the defendant, by compromising with the government agency, has admitted the validity and amount of the civil claim, and that this admission has sufficient probative value to be considered as evidence of [criminal] guilt. But unlike a direct statement of fault, an offer or acceptance of a compromise is not very

to establish  
civil claim  
by public  
officer  
→ 2006

probative of the defendant's guilt. Moreover, admitting such an offer or acceptance could deter a defendant from settling a civil regulatory action, for fear of evidentiary use in a subsequent criminal action.

Remember too that the exception is only to Rule 408, not to other rules. Thus the statements by Kay-Cee's President still might be excluded under Rule 403 under appropriate circumstances. As the Advisory Committee Note again explains:

Statements made in compromise negotiations of a claim by a government agency may be excluded in criminal cases where the circumstances so warrant under Rule 403. For example, if an individual was unrepresented at the time the statement was made in a civil enforcement proceeding, its probative value in a subsequent criminal case may be minimal. But there is no absolute exclusion imposed by Rule 408.

### *Example 7*

Assume instead that the family of the second engineer killed as a result of the Kay-Cee Railroad Company's safety violations mentioned in Example 6 has brought a civil suit for wrongful death against the railroad. The FRA has not yet assessed civil penalties or begun any negotiations with the company. However, during negotiations between the company and the engineer's family in the wrongful death suit, Kay-Cee's President admits that he knew that these violations had already caused one other death, that he did not order them corrected because of the expense of doing so, and that his failure contributed to this second engineer's death. No settlement agreement can be reached, however, so the case is scheduled for trial. Meanwhile, the local prosecutor's office brings criminal charges against Kay-Cee for negligent homicide. At the criminal trial, Kay-Cee objects under Rule 408 when the engineer's family member present at the civil negotiations is called to testify to the President's statements made during those negotiations. This objection will be sustained. Rule 408 generally bars admission of offers to settle, settlements, or statements made during civil settlement negotiations to prove fault or guilt respectively at *any* later civil or criminal trial *other than where the later criminal trial involves offering statements made during civil negotiations with a government regulatory, investigative or enforcement agency.*

Why does the Rule prohibit offering civil compromise negotiation statements made in negotiations *between private parties* to prove guilt at a criminal trial but *not* prohibit them if the civil negotiations were with a government regulatory, investigative, or enforcement agency? Here is the Advisory Committee's justification for the general prohibition on using civil settlement negotiation statements at later criminal trials to prove guilt:

[S]tatements made during compromise negotiations of other disputed claims [that is, *other than* those claims involving the government] are not admissible in subsequent criminal litigation, when offered to prove liability for, invalidity of, or amount of those claims. When private

parties enter into compromise negotiations they cannot protect against the subsequent use of statements in criminal cases by way of private ordering. The inability to guarantee protection against subsequent use could lead to parties refusing to admit fault, even if by doing so they could favorably settle the private matter. Such a chill on settlement negotiations would be contrary to the policy of Rule 408.

By contrast, the Advisory Committee believed that it was fair to admit such statements where negotiations were with the government rather than with private parties. There were two reasons for this conclusion: first, the parties should expect that statements made to one governmental entity might be reported to another one; and, second, governmental negotiators may be able to gain concessions from, or at times bind, other governmental actors (specifically prosecutors) where that is necessary to obtaining a civil settlement. In other words, the civil parties can by contract negotiate prohibitions against use of civil compromise negotiations in a later criminal trial — prohibitions not created by Rule 408. The underlying theory seems to be that the default position should be admissibility because that empowers governmental negotiators. However, those negotiators can move away from that default where it is in the public interest to do so. It will be in the public interest to do so where the state sees it as worthwhile to forego using the civil settlement negotiation statements as evidence in a criminal case where that is the only way to get the other side to agree to settle the civil matter. The other side, correspondingly, sees it as not worth settling the civil case if it risks criminal conviction on a serious matter. In the Advisory Committee's words:

[T]he [2006] amendment provides that Rule 408 does not prohibit the introduction in a criminal case of statements or conduct during compromise negotiations regarding a civil dispute by a government regulatory, investigative, or enforcement agency. *See, e.g., United States v. Prewitt*, 34 F.3d 436, 439 (7th Cir. 1994) (admissions of fault made in compromise of a civil securities enforcement action were admissible against the accused in a subsequent criminal action for mail fraud). Where an individual makes a statement in the presence of government agents, its subsequent admission in a criminal case should not be unexpected. The individual can seek to protect against subsequent disclosure through negotiation and agreement with the civil regulator or an attorney for the government.

### Example 8

Jason Dunkin is involved in a car crash in which he hits another car at high speed, seriously injuring the other car's driver. That driver has sued Jason for damages caused by Jason's negligent driving. The whole suit turns on whether Jason ran a red light. During settlement negotiations, Jason admits that he ran the red light. But no settlement is reached because the two parties cannot agree on damages. The case goes to trial, and Jason takes the stand, this time testifying that the light facing him was green, not red, when he entered the intersection. Plaintiff's counsel seeks to cross-examine Jason

with his admission during settlement negotiations that the light facing him was in fact red, not green, at the time of the accident. Plaintiff's counsel's theory for admission is that the statement is simply being offered to impeach by a prior inconsistent statement, not to prove validity or invalidity of the claim or amount. Jason's lawyer objects. His objection should be sustained, for Rule 408, as amended in 2006, expressly states that when the requirements set forth in parts (1) or (2) of the rule are otherwise met, the rule bars using settlement offers or statements made during them to impeach if the impeachment method is by contradiction or use of a prior inconsistent statement. Here is the 2006 Advisory Committee Note's justification for this position:

contradiction

The amendment prohibits the use of statements made during settlement negotiations when offered to impeach by prior inconsistent statement or through contradiction. Such broad impeachment would tend to swallow the exclusionary rule and would impair the public policy of promoting settlements. See McCormick on Evidence at 186 (5th ed. 1999) ("Use of statements made in compromise negotiations to impeach the testimony of a party, which is not specifically treated in [original] Rule 408, is fraught with danger of misuse of the statements to prove liability, threatens frank interchange of information during negotiations, and generally should not be permitted."). See also *EEOC v. Gear Petroleum, Inc.*, 948 F.2d 1542 (10th Cir. 1991) (letter sent as part of settlement negotiation cannot be used to impeach defense witness by way of contradiction or prior inconsistent statement; such broad impeachment would undermine the policy of encouraging uninhibited settlement negotiations).

### Example 9

Assume that during the negotiations in the immediately preceding example, Jason Dunkin had also said, "I never went one mile past the speed limit" and that the plaintiff alleged that Jason was negligent both in running a red light and in speeding. No settlement is reached, and the case goes to trial. At trial, Jason seeks to offer his own statement made during the negotiations denying speeding as substantive evidence that he in fact was not speeding at the time. The plaintiff objects. The objection will be sustained. According to the Advisory Committee, again in its 2006 Note:

The amendment makes clear that Rule 408 excludes compromise evidence even when a party seeks to admit its own settlement offer or statements made in settlement negotiations. If a party were to reveal its own statement or offer, this could reveal the fact that the adversary entered into settlement negotiations. The protections of Rule 408 cannot be waived unilaterally because the Rule, by definition, protects both parties from having the fact of negotiation disclosed to the jury. Moreover, proof of statements and offers made in settlement would often have to be made through the testimony of attorneys, leading to the risks and costs of disqualification. See generally *Pierce v. Tripler & Co.*, 955 F.2d 820, 828 (2nd Cir. 1992) (settlement offers are

CANNOT BE WAIVED UNILATERALLY

excluded under Rule 408 even if it is the offeror who seeks to admit them; noting that the “widespread admissibility of the substance of settlement offers could bring with it a rash of motions for disqualification of a party’s chosen counsel who would likely become a witness at trial.”).

#### *Problem 6-4: The Car Crash*

Two cars collide. One driver, Harry Marsden, said to the other driver, Julian Cort, “Look, let’s not hassle this; will you take \$1,000, and let’s forget the whole thing?” Cort subsequently files a civil complaint against Marsden, seeking damages caused by Marsden’s negligence. *Will any or all of Marsden’s statements be admissible at the subsequent trial on this complaint? Why or why not?*

What if, instead, Marsden said, “I screwed up; I wasn’t paying attention. How about taking \$1,000 to forget the whole thing?” *Will any or all of these statements be admissible? Why or why not?*

#### *Problem 6-5: The Non-Settling Defendant*

Plaintiff Robert Belton filed a diversity action against Pittsburgh Corning and 15 other defendants, alleging that exposure to their asbestos-containing products caused him to develop various diseases. Immediately before trial, the 15 defendants other than Corning settled with plaintiff Belton. Corning, in its opening statement to the jury, stated that it would prove that plaintiff had been exposed to asbestos-containing products manufactured by 15 other companies, identifying them by name. Those companies were the settling defendants, though the jury did not yet know this. Thus, Corning argued, plaintiff could not prove that any of his injuries were caused by Corning’s products. Over Corning’s objection, however, plaintiff presented evidence in the liability phase of the trial that each of the 15 other defendants had settled immediately before trial, though the amounts of the settlements were not revealed. The jury entered a verdict in favor of the plaintiff, and the case proceeded to the damages phase.

At the damages phase, again over defense objection, the plaintiff presented evidence of the precise amount of the settlement agreements. The jury returned a massive verdict against Corning. *Were either or both of the trial judge’s rulings in error? Why?*

#### *Problem 6-6: The Recalcitrant Health Insurer*

Dallas Park’s health insurer was Aetna Life Insurance Company. Park obtained “immuno-augmentative” anti-cancer treatment at the Immunology Center (IC) in Freeport, Bahamas, when more traditional treatments had failed. Aetna refused to reimburse Park for the cost of these treatments on the ground that the treatments were not broadly accepted in the medical profession and were not necessary to treat her cancer.

1. At trial, Park offers evidence that another Aetna insured who had been treated with the same sort of anti-cancer therapy at the IC was reimbursed

in full by Aetna without any dispute. Aetna objects. If you were the trial judge, how would you rule and why?

2. Assume the same facts, but with one variation: Aetna had, by letter, expressed a concern to the earlier insured about the efficacy and necessity of these treatments. That insured asked to have an Aetna representative meet with the insured and her physician. Mid-way during that meeting, the Aetna representative said, "Well, you've convinced me. These really are effective treatments in cases like yours, and we will be happy to cover them." Again, if you were the trial judge in *Park v. Aetna*, how would you rule, and why?

3. Now assume that, in the present case of *Park v. Aetna*, the parties met to try to negotiate a settlement. This time, the Aetna representative says, during the negotiations, "This really is an effective, promising treatment in many cases, but the amount you are requesting to settle the claim is ridiculously large." At trial, another Aetna representative much higher in the company hierarchy testified, "We long ago concluded that these treatments are worthless in fighting Mr. Park's sort of cancer, and all our representatives are trained to understand this conclusion." Plaintiffs counsel asks this latter Aetna representative, "Didn't Mr. McAuliffe [the first Aetna representative] meet with my client and admit that this treatment is effective? Didn't he contest only the amount of the claim?" Aetna objects. How should the trial judge rule?

4. Returning to the facts of Problem 6-5, assume that plaintiff Belton calls each of the settling co-defendants to the stand to testify during the liability phase that each of them manufactured a type of asbestos different from the unique type made only by Corning. They so testify to lay the groundwork for plaintiff's experts to testify that the asbestos particles found in plaintiff's lungs were of the unique type made by Corning. Assume further in this variation that the trial judge has not told the jury of Belton's settlements with the 15 co-defendants and has no intention of doing so. Corning's counsel on cross-examination asks each co-defendant, "Isn't it true that you were originally named as a co-defendant in this lawsuit and that you settled with the plaintiff immediately before this trial? And isn't it further true that a condition of this settlement was that you would testify as you now have at his trial?" Objections to both questions were sustained as to each witness. Did the trial judge rule correctly?

5. What if, in part 2 above, Aetna offered to settle the claim for \$50,000? At trial, an Aetna representative testifies that the medical treatment is worthless in fighting cancer. Can plaintiffs counsel impeach the representative with the \$50,000 settlement offer, arguing that it shows that Aetna did, contrary to the representative's testimony, recognize that the treatment indeed had value?

6. Assume the facts of part 2 above. At trial, Park seeks to have his physician testify about the same medical research presented during the part 3 settlement negotiations that enabled Park to get Aetna tentatively to concede the value of the treatment. Aetna objects on the ground that the jury would be exposed to "evidence of conduct or statements made in compromise negotiations." How should the trial judge rule?

*Problem 6-7*

Marc Wayne is the CEO of Megatech, Inc, a corporation involved in Agribusiness. Megatech has allegedly failed to obey Environmental Protection Agency ("EPA") regulations governing the disposal of animal waste on its farms. Small family-run corn farmers on adjacent land maintain that the run-off of animal waste from Megatech farms is killing nearby corn crops. The small farmers jointly bring a class action suit against Megatech for damages for negligence and for an injunction in abatement of a nuisance. The farmers also report the matter to the EPA, which begins an investigation. As a result of that investigation, the EPA concludes that there have been serious violations of its regulations, and they seek civil penalties as well as strict future compliance with the law, threatening to sue Megatech if their demands are not promptly met. Megatech meets with the farmers to discuss settlement of their suit. During that meeting, CEO Wayne says, "I've known for years that our run-off was draining into your farms, but I had no idea that animal waste run-off could be dangerous to corn crops, I don't see how I could have known, and we just aren't responsible for any damages." After much haggling, the suit is settled for \$1,000,000. The EPA thereafter meets with Megatech, insisting that the settlement is a paltry sum and does not prevent future harms. The EPA still seeks civil penalties and wants an agreement to changes in farming practices that will minimize future run-off. During this negotiation with EPA, CEO Wayne says, "Look, my employees have been telling me for at least two years that animal waste run-off could harm the adjacent corn crops, but they never showed me any scientific evidence to support it, and I wasn't going to kill our profits by putting big bucks into alleviating the problem if it didn't really hurt anyone." EPA refuses to settle and files a civil action against Megatech. Simultaneously, the United States Attorney files federal criminal charges against Megatech for violating federal criminal environmental law statutes.

1. At the criminal trial, the prosecution seeks to offer into evidence CEO Wayne's statement from Megatech's negotiation with the small farmers, "I've known for years that our run-off was draining into your farms." Megatech objects. Sustained or overruled?

2. Suppose that the objection in question 1 is sustained. Now Megatech, in its case in chief, seeks to offer into evidence the statement of its CEO made during settlement negotiations with the small farmers that he "had no idea that animal waste run-off could be dangerous to corn crops, I don't see how I could have known, and we just aren't responsible for any damages." The CEO has not taken the stand, but other Megatech employees present at the negotiation are available to testify to CEO Wayne's statements. The prosecution objects. How should the judge rule?

3. Assume now that CEO Wayne takes the stand at Megatech's criminal trial and denies ever having been aware, until the farmers complained to him, that any Megatech animal waste was running onto adjacent farmers' land. On cross-examination, the prosecution seeks to have Wayne admit to his statement during his civil negotiation with the small farmers that he had "known for years that our run-off was draining onto your farms." Megatech objects to the question. Sustained or overruled?

4. The prosecution seeks to offer into evidence the fact that Megatech settled with the farmers for \$1,000,000, arguing that that settlement constituted an admission of guilt. Megatech objects. How should the trial judge rule?

5. The prosecution next seeks to offer in its case in chief at the criminal trial the statement that CEO Wayne made to the EPA: "Look, my employees have been telling me for at least two years that animal waste run-off could harm adjacent corn crops." Megatech objects. How should the trial judge rule?

6. Assume that the objection in question 5 is sustained. CEO Wayne later takes the stand in Megatech's case in chief, testifying that no one had ever warned him before he met with the farmers that animal waste run-off could kill corn crops. The prosecution seeks on cross to have Wayne admit to his statement to the EPA that "my employees have been telling me for at least two years that animal waste run-off could harm adjacent corn crops." Megatech objects. Sustained or overruled?

7. Wayne is still on the stand. Prosecutors seek on cross to have him admit to his statement to the EPA that he "wasn't going to kill our profits by putting big bucks into alleviating the problem [of run-off harming corn crops]." Megatech objects. Sustained or overruled? Does your answer depend upon whether the objection to question number 6 was sustained or overruled?

8. Megatech seeks in its case in chief to offer evidence of Wayne's statement during Megatech's negotiations with the small farmers that he had "no idea that animal waste run-off could be dangerous to corn crops" and he "didn't see how [he] could have known," and Megatech just is not "responsible for any damages. The prosecution objects. How should the trial judge rule?

9. Could Megatech's attorney have reduced the risk of evidence of Wayne's statements made during civil negotiations with the EPA being admitted in evidence against Megatech at a potential later criminal trial? How?

10. Would your answers to any of the above questions change if CEO Wayne himself, and not Megatech, was being criminally tried?

11. Would your answers to any of the above questions change if, instead of CEO Wayne making the statements noted above, Megatech's lawyer had made the statements, that is, for example, the lawyer admitted that Wayne knew about the run-off for years? (Assume that Wayne was not even present at the negotiations).

12. Would your answers to any of the above questions change if the evidence noted were sought to be offered at the trial of the civil suit brought by the EPA rather than at a criminal trial?

### **[C] Plea Bargains and Related Statements in Criminal Cases: Rule 410**

Rule 410 addresses the use of evidence in any proceeding, civil or criminal, of guilty plea negotiations arising from a criminal case. Rule 410's general prohibition on using such evidence reads as follows:

**Rule 410.** Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against

the defendant who made the plea or was a participant in the plea discussions:

- (1) a plea of guilty which was later withdrawn;
- (2) a plea of *nolo contendere*;
- (3) any statement made in the course of any proceeding under Rule 11 of the Federal Rules of Criminal Procedures or comparable state procedure regarding either of the foregoing pleas; or
- (4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty later withdrawn.

The purpose of this rule is to encourage plea negotiations between the prosecution and the defense, by assuring defendants that, if the negotiations fail, the defendants' statements will not be used against them at trial. If the prosecution and defense reach a plea agreement, that agreement must be approved by the trial judge. The trial judge conducts a "colloquy" in open court in which the defendant is questioned under oath to ensure that his or her decision to plead guilty was knowingly, intelligently, and voluntarily made. The defendants will thus be informed of the content and implications of the rights being waived by entering the guilty plea (such as the right to a jury trial); of the potential penalties that may result from pleading guilty; and of the limited grounds for appealing or withdrawing a guilty plea. Additionally, the prosecutor usually reads a summary of the facts to which the defendant admits.

Once a plea is entered, it may be withdrawn only for a very few, narrow reasons such as that the plea was involuntary or that defense counsel was ineffective in advising the defendant to plead guilty. Even then, proving these grounds can be hard, since the plea would not have been accepted until after a detailed colloquy in which the defendant, for example, denied that he or she was pressured in any way to enter into the plea. Nevertheless, if the court does permit the plea to be withdrawn and the case proceeds to trial, subsection (1) prohibits using the fact of the plea against the defendant at that trial or in any other civil or criminal proceeding. Subsection (2) extends similar protection to statements made during the colloquy, which is the procedure described in subsection (3) as a "proceeding under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure . . ." The prohibition against using colloquy statements applies in any future civil or criminal proceeding, even if the resulting guilty plea is not withdrawn.

A "*nolo contendere*" or "no contest" plea is, in common sense terms, a statement by the defendant that, "I will neither admit nor deny that I am guilty, but I will not contest the charge, and I therefore agree to allow the state to sentence me as if I were guilty." A defendant entering a no contest plea faces the same criminal penalties as one entering a guilty plea. However, there is one huge advantage in entering a *nolo* plea: the plea may not usually (there are some exceptions beyond the scope of this course) be used against a defendant as an admission of guilt in a subsequent civil case. A colloquy is also required, though a defendant may be asked only to concede that the

state can prove an agreed-upon summary of facts rather than admitting (as he would with a guilty plea) that those facts actually happened.

Subsections (2) and (3) of Rule 410 extend the same evidentiary protections to a no contest plea as they extend to a guilty plea later withdrawn, including protection of statements made during the colloquy. Subsection (4) further extends protection to any statements made between the defendant or defense counsel and the prosecutor while attempting to negotiate a guilty plea, even if no plea ever results or a plea does result but is later withdrawn. In this respect, Rule 410 differs from the analogous Rule 408 for civil settlement negotiations. Under Rule 408, statements made during negotiations with any person involved in the case are protected (for example, with an insurance company agent trying to settle a civil claim before suit is brought). Under Rule 410, however, negotiations are protected only if they are made *with the prosecutor*. Statements to the police are outside Rule 410's scope. Thus, statements made during purported negotiations between a defendant and interrogating police officers are not barred by this rule (unless, of course, the officers are acting as agents for the prosecutor for these purposes — in which case the statements made to the police would be protected by Rule 410 because they would in effect really be statements to the prosecutor). Although statements made to police officers during purported settlement negotiations where the officers are not acting on behalf of the prosecutors are not protected by Rule 410, they may under certain circumstances be barred by other rules, such as the constitutional prohibition against involuntary confessions.

only protect negotiations with prosecutor

Rule 410 provides broader protection than Rule 408 in at least one respect, however: evidence of a guilty plea later withdrawn or a nolo plea may not be admitted to show bias or for any other purpose unconnected to criminal liability for the offense charged. Unlike Rule 408, under which civil settlement offers or agreements are excluded from trial only if offered for the purpose of proving liability for or invalidity of the claim or its amount, Rule 410 excludes withdrawn pleas or offers to plead for *any purpose whatsoever*, other than two narrow exceptions discussed below. The same is true for statements made in the course of plea discussions with the prosecuting authority. These discussions must, however, involve an attempted *quid pro quo*, thus involving a "plea" and not simply an admission. Compare *United States v. Leon Guerrero*, 847 F. 2d 1363, 1367 (9th Cir. 1988) (making this determination by inquiring whether the offender had an actual and reasonable expectation that he was negotiating a plea) with *State v. Fox*, 760 P. 2d 670, 674-675 (Haw. 1988) (Rule's language requires only a subjective inquiry into the offender's state of mind).

excludes withdrawn pleas for any purpose

Importantly, however, Rule 410 does not extend protection against using a guilty plea against the declarant in another civil or criminal case if the plea is never withdrawn and becomes the basis for a conviction. A guilty plea in a criminal case is therefore often admissible as a party admission in a civil case. See Chapter 13.

not protect case if not withdrawn and becomes basis for conviction

Rule 410 continues with the following provisions creating exceptions to the general rules outlined above:

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea

discussion has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

The rationale for the first exception (concerning statements that ought in fairness be considered together) has been explained by the Rules of Criminal Procedure Advisory Committee Note to Rule 11(e)(6) of the Federal Rules of Criminal Procedure, which Rule corresponds to Rule 410, thus:

This change is necessary so that, when evidence of statements made in the course of or as a consequence of a certain plea or plea discussion are introduced under circumstances not prohibited by this rule (e.g., not "against" the person who made the plea), other statements relating to the same plea or plea discussions may also be admitted when relevant to the matter at issue. For example, if a defendant upon a motion to dismiss a prosecution on some ground were able to admit certain statements made in aborted plea discussions in his favor, then other relevant statements made in the same plea discussions should be admissible against the defendant in the interest of determining the truth of the matter at issue.

The second exception permits, for example, a perjury prosecution based on the defendant's lies under oath in a guilty plea colloquy. The colloquy statements may be used against the defendant at a perjury trial.

The United States Supreme Court has read a third exception into the Rule as implied by its nature and the nature of the adversary system: a defendant may waive the right to the rule's protection if the prosecutor insists on such a waiver as a precondition to the plea negotiations.

The Court recognized this waiver rule in *United States v. Mezzanatto*, 513 U.S. 196, 115 S. Ct. 797, 130 L. Ed. 2d 697 (1995). (See Case Library). There, a defendant charged with possessing methamphetamine with intent to distribute it sought to negotiate a plea with the prosecutor. The prosecutor agreed to do so only if the defendant first agreed — which he did — that any statements made during the negotiation could be used to impeach him should the case go to trial. During the negotiations, however, the defendant sought to shift primary responsibility to another individual, a Mr. Shuster. The prosecutor thus cut short the negotiations, believing that the defendant had lied. At trial, the prosecutor, over defense objection, impeached the defendant with prior inconsistent statements that he had made during the plea bargaining. The jury convicted him, and he appealed, arguing that he had been impeached in violation of Rule 410 of the Federal Rules of Evidence. The Ninth Circuit reversed the defendant's conviction, holding that, because neither Rule 410 nor its two narrowly drafted exceptions said anything about waiver, Congress must have meant to preclude it.

The United States Supreme Court, however, reversed the Ninth Circuit, reinstating the conviction. First, the Court was unconvinced that the Rule's silence about waiver mattered, given the routine trial practice of granting

waivers for tactical purposes. Second, the Court believed that the waiver agreements before it would enhance truth-seeking by discouraging lies. Third, said the Court, the Rule's reference to making certain statements inadmissible "against" the defendant, and its exception where a defendant has first offered such statements in his favor, contemplates the tactical freedom of a defendant to agree to the use of such statements where he believes that the result may work in his favor. Fourth, and most importantly, the Court rejected the argument that permitting waivers would defeat the Rule's purpose of encouraging plea bargains.<sup>3</sup>

To use the Ninth Circuit's metaphor, if the prosecutor is interested in "buying" the reliability assurance that accompanies a waiver agreement, then precluding waiver can only stifle the market for plea bargains. A defendant can "maximize" what he has to "sell" only if he is permitted to offer what the prosecutor is most interested in buying. And while it is certainly true that prosecutors often need help from the small fish in a conspiracy in order to catch the big ones, that is no reason to preclude waiver altogether. If prosecutors decide that certain crucial information will be gained only by preserving the inadmissibility of plea statements, they will agree to leave intact the exclusionary provisions of the plea-statement rules.

Justice Souter dissented on a number of grounds, most importantly rejecting the conclusion that Congress meant to leave waiver to the mercy of market forces. Souter believed that waivers would diminish the "zone of unrestrained candor" because a defendant must pause to think whether the guilty plea negotiations are worth the risk, thus undermining the Rule's pro-plea-negotiation purpose.<sup>4</sup>

#### *Problem 6-7: Rodney Ransom*

Rodney Ransom is the driver of a car that was involved in an accident with a car driven by Myron Cohen. A police officer who arrived on the scene gave Ransom a ticket for reckless driving. Cohen civilly sues Ransom on a negligence theory. When Ransom meets with his newly-retained defense lawyer, Lola Brandon, Ransom says, "I'll just go down to traffic court and plead guilty, so at least that will be over with, and we can concentrate on the silly civil suit. O.K.?" *What advice should Ransom's lawyer give him in response to this question? Why?*

#### *Problem 6-8: Turning on Mr. Big*

Morris Mumford is arrested on a charge of distributing cocaine. Detective Jacob Marlee tells Mumford, "Look, I know you're just a little guy. If you turn in Mr. Big, the prosecutor has promised me you'll get probation." Mumford then recounted the complete details of his involvement in the cocaine distribution scheme, and this confession was admitted against him at trial, over

<sup>3</sup> 513 U.S. at 208.

<sup>4</sup> *Id.* at 214-215.

Mumford's objection. *Did the trial judge rule correctly? Does it matter, in reaching this decision, whether Marlee told Mumford the truth?*

*Problem 6-9: Waiving Rule 410*

Assume that in Problem 6-8 above, the prosecutor joins Marlee's discussions with Mumford. But the prosecutor agrees to discuss a plea with Mumford only if he first waives his right to exclude his statements from trial under Rule 410. At first, Mumford refuses, saying he does not understand what Rule 410 is and does not want to give up something without knowing its importance. The prosecutor leaves the room to make a phone call. While he is gone, Marlee tells Mumford, "Trust me, if you don't agree to this waiver thing, you're going away for at least 20 years." When the prosecutor returns, Mumford agrees to the waiver and confesses everything. The prosecutor believes that Mumford is lying about some details and refuses to agree to a plea. At Mumford's trial, the prosecutor calls Marlee to the stand to recount Mumford's confession. The defense objects. *How should the trial judge rule? Are there any additional facts that would help you in answering this question? What facts?*

1. What if, on this same set of facts, Mumford and the prosecutor do reach an agreement. Mumford recounts the details of the crime during the plea colloquy, and a plea is entered. Subsequently, the prosecutor obtains evidence that some of what Mumford said during the colloquy was false. May the colloquy statements be admitted against Mumford at his later perjury trial?

2. Suppose in a civil case against Mumford for the wrongful death of a teenager who died from an overdose of drugs sold to him by Mumford, Mumford takes the stand and denies any involvement in a drug distribution scheme.

a. Under the original set of facts here, in which no plea agreement is reached, may Mumford's statements made during plea negotiations be used to impeach him at his civil trial?

b. Under variation 1, may the fact of his plea be used to impeach him at the civil trial?

c. Under variation 1, assume that Mumford successfully withdraws his guilty plea. Before that criminal case proceeds to trial, he testifies in the civil case, denying involvement in the drug scheme. May his colloquy statements he used to impeach him at the civil trial?

## § 6.06 PAYMENT OF MEDICAL AND SIMILAR EXPENSES

Rule 409 reads as follows:

**Rule 409.** Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

### *Example 1*

Layla DePaul rear-ends a car driven by Lindsey Lee. Lindsey exits the car, able to speak but complaining of back pain. Layla says, "Don't worry. We'll

get you immediate medical care, and if your insurance company won't pay for it, I will." Layla's statement will be excluded from evidence, upon Layla's objection, at any trial in which Lindsey or someone acting on her behalf seeks to recover damages from Layla.

The Advisory Committee Note explains the rationale for the rule:<sup>5</sup>

"[G]enerally, evidence of payment of medical, hospital, or similar expenses of an injured party by the opposing party, is not admissible, the reason often given being that such payment or offer is usually made from humane impulses and not from an admission of liability, and that to hold otherwise would tend to discourage assistance to the injured person."

Rule 409 differs from Rules 408 and 410 in that Rule 409 does not extend to "conduct or statements not a part of the act of furnishing or offering or promising to pay." Advisory Committee Note. The Advisory Committee explains that this difference arises "from a fundamental difference in nature. Communication is essential if compromises are to be effected, and consequently broad protection of statements is needed. This is not so in cases of payments or offers or promises to pay medical expenses, where factual statements may be expected to be incidental in nature."

only offers to pay

### Example 2

In Layla's accident with Lindsey above, assume that Layla really said, "Don't worry. I'm so sorry. It's all my fault. I shouldn't have tailgated you. We'll get you immediate medical attention, and if your insurance company won't pay for it, I will." In a subsequent suit by Lindsey against Layla, Rule 409 will result in the exclusion of the offer to pay medical expenses. But Rule 409 will not apply to exclude the statements clearly admitting fault, such as, "It's all my fault. I shouldn't have tailgated you." It also would not exclude the apology ("I'm so sorry"), which could be viewed as an admission of fault on the theory that people do not apologize unless they have done some wrong calling for an apology. Of course, a judge has discretion to exclude an apology like "I'm sorry" under Rule 403.

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No dispute is necessary for Rule 409 to apply. Moreover, the offer need not have been made directly to the injured party; it can be made to anyone who can accept payment. Importantly, the Rule's prohibition is only against using the evidence to "prove liability for the injury." But furnishing, offering, or promising to pay medical expenses can be used for any other purpose, such as showing control or identity.

NO DISPUTE NECESSARY

<sup>5</sup> Advisory Committee Note, quoting Annot. 20 A.L.R.2d 291, 293.

### Example 3

In Layla's accident with Lindsey above, assume that Layla and Linda were in the car that hit Lindsey. Layla said to Lindsey, "We'll get you to a hospital. Don't worry about the money. If your insurance company won't pay the cost, I will." Lindsey did not, however, see who drove the car that hit her, and there were no eyewitnesses outside the cars. Moreover, Linda died before her deposition could be taken. Lindsey offers into evidence Layla's offer to pay Lindsey's medical expenses. This offer is made not to prove Layla's fault but merely to show that Layla had control over the car, that is, that Layla was the driver.

The argument would be that the driver is the one most likely to feel responsible enough (in the sense of having some active involvement in the events, even if not "at fault") to offer to pay medical expenses. Of course, other inferences are possible (maybe Layla was the passenger but just a nice person), but Layla's being the driver is at least a relevant plausible inference. Rule 409 would not bar this evidence. However, a trial court might nevertheless fear that a jury would make the prohibited fault inference and that a limiting instruction would not cure the problem. Accordingly, the trial judge still might exclude the evidence under Rule 403.

### Problem 6-10: Med X

After a frustrating business meeting, Jan hurried away, lost in thought. Jan crashed her car into Arsenio, knocking him over. As Arsenio writhed in pain on the ground, Jan stated, "I'm really sorry; I was preoccupied, and this mess was all my fault. If you don't bring suit, I'll be more than happy to pay for all of your medical expenses. Hey, I'll even pay for your ripped pants and for any embarrassment this incident may have caused you. What do you say?" Arsenio said, "No," and filed suit. *Are any of Jan's statements admissible at trial?*

### Problem 6-11: Kommander Condominium Club

One crisp fall day at the Kommander Condominium Club, Rob Arbuckle was late for his 10:30 a.m. tennis appointment. He left the elevator while looking at his watch and bowled over 86-year-old Alfred Macumber. A distraught Rob exclaimed, "Oh Mac! I hope you're okay. Why don't you go to the Mellon Hospital, and I'll pay for the check-up?" Later that night, Mac's attorney called Rob and told him that Mac was thinking of bringing suit because of his fairly severe injuries. Rob responded, "Look, I don't want any trouble. I admit I was not looking when I ran into Mac; I was in a hurry. If I gave Mac \$1,000, would this whole thing go away?" The attorney refused Rob's proposal. Prior to the civil trial, Rob was prosecuted for battery on Mr. Macumber. He sought a plea bargain in which he would admit guilt if he received a suspended sentence. The prosecutor rejected Rob's offer. *Which, if any, of Rob's statements are admissible against him in the civil trial?*



Plaintiff's attorney Jed Ward (Gene Hackman) and defense co-counsel Michael Grazier (Colin Friels) and Maggie Ward (Mary Elizabeth Mastrantonio) battle over the admissibility of a safety report in *Class Action*. \*

### § 6.07 LIABILITY INSURANCE: Rule 411

Rule 411 reads as follows:

**Rule 411.** Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

#### *Example 1*

Assume the facts, set forth in § 6.06, about Lindsey's suit against Layla, which arises out of an automobile accident. At trial, Lindsey offers evidence that Layla was insured to prove Layla's own awareness of her poor driving skills and thus her effort, by obtaining insurance, to protect herself against the consequences of her own carelessness. Layla's objection will be sustained.

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The Advisory Committee Note sets forth two justifications for the rule: (1) "(at best the inference of fault from the fact of insurance coverage is a tenuous

one, as is its converse"); and (2) "the feeling that knowledge of the presence or absence of liability insurance would induce juries to decide cases on improper grounds." Commentators have also described the rule as encouraging people (and companies) to obtain insurance by limiting the risk that the insurance contract will create an inference of their carelessness.

def. or  
plaintiff

The rule is not limited to evidence that the *defendant* was insured against liability; it was broadly drafted "so as to include contributory negligence or other fault of a plaintiff as well as fault of a defendant."

Note that the Rule does not prohibit using the evidence for purposes other than proving negligence or wrongful conduct.

### Example 2

Layla, in varying our continuing example above, had been driving a truck with the phrase, "Acme Trucking Company," emblazoned on its side. Part of Lindsey's claim is that the truck's owner was negligent for not maintaining its brakes in tip-top shape. Lindsey's suit is only against Layla. Layla, in her answer to the complaint, denies owning the truck. She denies being responsible for its maintenance, and alleges that the maintenance responsibility belongs to the Acme Trucking Company. Lindsey introduces evidence at trial that the truck was insured in Layla's name, to prove that Layla was the truck's true owner and therefore was obligated to keep it well-maintained. Layla's objection under Rule 411 will probably be overruled, because the evidence is offered to prove ownership, not to prove Layla's negligence or otherwise wrongful conduct. However, the evidence may be excluded if the trial judge is not convinced that jurors will comply with a limiting instruction directing them to use the evidence of insurance only for the permitted purpose.

### Problem 6-12: "I Forgot"

Defendant is sued for injuries resulting from an automobile accident. The defendant did not have automobile liability insurance; he "forgot to buy some." At trial, the defendant testified on direct examination.

DEFENDANT'S ATTORNEY: How careful a driver are you?

PLAINTIFF'S ATTORNEY: Objection. This evidence is irrelevant and unfairly prejudicial.

JUDGE: (*How should the judge rule? Why?*)

DEFENDANT'S ATTORNEY: What is your motive to be careful while driving?

PLAINTIFF'S ATTORNEY: Objection.

DEFENDANT'S ATTORNEY: (at the bench) I will proffer, Your Honor, that the defendant will say that "I'm a careful driver in large part because I forgot to take out car insurance; I knew that I could be held personally liable if I was in an automobile accident."

PLAINTIFF'S ATTORNEY: Objection.

JUDGE: (*How should the judge rule? Why?*)

Is this evidence admissible if it is offered to rebut the implicit assumption that, because many people have automobile insurance, the defendant likely has automobile insurance as well?

*Problem 6-13: Go Ahead and Jump*

Plaintiff, Laurie, brought suit against a bungee jumping facility in Michigan. Plaintiff jumped and was injured when the rope broke. Plaintiff offered evidence at trial that the defendant was insured, to corroborate her claim that the defendant operated the business with a lackadaisical attitude. The facility's unofficial motto was: "Why worry? Be happy." *Is this evidence admissible?*

*Problem 6-14: Columbo*

Defense witness, Samantha, testified about the position of two cars involved in an automobile accident at a busy intersection. On cross-examination, she was asked by an apparently bumbling attorney named Columbo whether she was employed by the defendant's insurer. The defendant objected to the question and the court sustained the objection. *Should the lower court's ruling be affirmed on appeal?*

*Problem 6-15: Statutory Interpretation Exercise*

Read *United States v. Mezzanatto*, 115 S. Ct. 797 (1995) (see Case Library), and answer the following questions:

1. *Text and Silence*: What role did text play in the majority's analysis? The dissent's? How much weight did each opinion give to text? What audience was assumed to assign the text meaning? What was the relative weight given to text versus silence, that is, what the text failed to say? Why?

2. *Truth*: What respective weight did the majority and dissenting opinions give to truth-finding as a value? Why did each opinion give truth its respective weight?

3. *The Free Market*: What significance did each opinion give to the importance of a free versus a regulated market in plea bargains? Why? What was the source of each opinion's view of the relevance meaning, an importance of this market? What narrative did each opinion craft, and what was the role of the free market in that narrative?

4. *Congressional Intent Versus Congressional Purpose and Its Alternatives*: Did any of the opinions rely on "actual" congressional intent on "actual" congressional purpose? What intent or purpose would Congress have had had it thought specifically about the matter before the Court? What sources did each opinion rely on for these real or imagined designations of legislative intent? What was the relative role of the Advisory Committee and the Supreme Court in determining legislative intent or purpose, real or imagined? What weight did intent or purpose receive relative to other data sources on which each opinion relied?

5. *Candor*: Is there a difference between what each opinion claims to be doing in its approach to statutory interpretation and what it is in fact doing?

## § 6.08 REVIEW PROBLEMS: SYNTHESIZING THE QUASI-PRIVILEGES

### *Problem 6-16: Let's Make a Deal*

Barbara owed Alice \$500. When Barbara saw Alice hanging out in front of the local convenience store, Barbara asked Alice, "If I give you \$350 and a ticket to the Harry Connick Jr. concert, would that be an adequate settlement? I don't have the full \$500 I owe you, and I just won't have it by the agreed date. I'm very short on cash at the moment." *If Alice does not accept Barbara's offer, can Alice introduce Barbara's statements in a later trial for payment of the \$500?*

### *Problem 6-17: Engulf and Devour*

Johann is sued by a business partner, Domino. Domino claimed that Johann understated profits by \$1 million over a period of five years and clandestinely siphoned off partnership money for personal use. During negotiations with Domino, Johann admitted to taking some money because he needed to pay off gambling losses. Johann claimed, however, that he did not owe Domino anything because Domino had swindled him at the time they had formed the partnership, and, therefore, the money he took was rightfully his.

*Can Domino offer Johann's statements at trial?*

*If Johann, hoping to get a more favorable settlement by showing his meager current assets, had produced during the negotiations all of the tax forms relating to the years in question and the betting slips verifying his losses, could these documents still be offered at trial?*

*If Johann had agreed that he owed Domino the \$1 million as Domino claimed, but offered during negotiations to pay "500 grand" to have the lawsuit dropped, are any factual admissions made in conjunction with Johann's offer to pay admissible?*

*If subsequent criminal proceedings are initiated against Johann for his failure to pay income taxes on the monies in question, would the statements he made during the previous settlement negotiations be admissible in the subsequent criminal case?*

### *Problem 6-18. Battery*

Jessel is sued by Cohan for damages resulting from an alleged battery outside of a local nightclub, Crickett Place. Cohan and Jessel engaged in series of discussions about settling the suit before trial. During one discussion, Cohan stated, "The only reason I hit you from behind was because you were doing a song and dance with my girlfriend inside the club." Negotiations were unsuccessful. At trial, Cohan takes the stand and states, "I was in the club until after Jessel left; I didn't learn about him getting hurt until I heard the sirens and ran outside to see what had happened."

*Jessel seeks to impeach Cohan with the admissions he made during settlement negotiations. Is this permissible?*

*Problem 6-19: Gorkey Park*

McGillicuddy is charged with two counts of breaking and entering the kitchen of a local restaurant, Sim's Place. A day after the charges were filed, McGillicuddy visited a local police officer, Officer Gorkey. McGillicuddy and Gorkey were social acquaintances. McGillicuddy proposed to Gorkey that "if you ditch these charges against me, I can help you catch some big-time crooks. I admit I broke into Sim's, but I was hungry and wanted some food; you can understand that, right?"

*At McGillicuddy's trial for breaking and entering, can the prosecution offer McGillicuddy's statements to Officer Gorkey?*

Assume that McGillicuddy's friend, Bobby, also is charged with breaking and entering as an aider and abetter. But the real mastermind of the operation, says Bobby, was McGillicuddy, who planned everything. Bobby agrees to testify against McGillicuddy, provided that the prosecution drops the charges against Bobby. *Can statements made by Bobby while entering a plea of guilty be used by McGillicuddy to impeach Bobby on cross-examination (e.g., a statement in which Bobby describes his own planning activity in a way suggesting that he, not McGillicuddy, was the mastermind, so McGillicuddy could show that he was just Bobby's innocent dupe)?*

McGillicuddy unsuccessfully attempted to negotiate a plea directly with the prosecutor. At trial, McGillicuddy introduces some of his own statements made during plea discussions with the prosecutor. These are statements suggesting that McGillicuddy thought he had permission to enter the kitchen. *What can the prosecutor do in response to McGillicuddy's evidence, if anything?*

After reading Rule 410 of the Federal Rules of Evidence, McGillicuddy concluded that the Rule is designed to protect the accused during plea bargaining. Consequently, McGillicuddy offered the statements made by the prosecutor during their unsuccessful plea negotiations. *Are the prosecutor's statements admissible?*

*Problem 6-20: Did I Say That?*

Leslie is sued by her neighbor, Murray, for breaking a very expensive mirror in Murray's house. During settlement negotiations, Leslie admitted she had been smoking marijuana at Murray's at the time the mirror broke. She denied, however, actually breaking the heirloom. The following month, Leslie is prosecuted for the possession of marijuana at her neighbor's house.

*Can the prosecution offer the admission about marijuana use that Leslie made during the earlier settlement negotiations?*

*If Leslie had pled guilty to using marijuana at her neighbor's house, and then was sued in a civil action by her neighbor for breaking the mirror, could the guilty plea be used against her in the later civil trial?*

*Problem 6-21: The Singing Sparrow*

The defendant, Sparrow, is charged with murdering Goodot. During a plea negotiation with the prosecutor, the defendant blurts out, "You guys don't

know who you're up against! You think I killed Goodot, but you really should ask me about the unsolved murder of Blaine in the next county. I have personal knowledge about that one, and you coppers are way off base in your investigation!"

Sparrow is subsequently charged with Blaine's murder. *At that trial, can the prosecutor offer Sparrow's inculpatory statements made during the Goodot plea negotiations?*

*Problem 6-22: Rosetta's Orwellian Plight*

Rosetta sues Maxwell civilly for injuries growing out of Maxwell's alleged sexual assault. Rosetta seeks to testify to the following: "I called an ambulance right after the rape and was rushed to the Center City Hospital Emergency Room. Maxwell was waiting there and said to me: "I'm sorry that I hurt you. I just couldn't control myself. I promise to pay all your medical expenses if you promise not to tell the cops what happened, even if they ask you, and not to sue me." *This testimony, in the face of a proper objection, should be:*

(a) Admissible if there is a limiting instruction prohibiting the jurors from using the words, "I promise to pay all your medical expenses" as showing Maxwell's consciousness of guilt for in fact raping Rosetta.

(b) Inadmissible under Rule 408.

(c) Inadmissible under Rule 409.

(d) Inadmissible under both Rule 408 and 409.

*Problem 6-23: Maxwell's Comeuppance*

Just before the criminal trial arising from the situation mentioned in the immediately preceding multiple-choice question, defense counsel approaches the prosecutor to begin plea discussions. The prosecutor refuses to negotiate unless the defendant responds personally to the prosecutor's question during the negotiation and further waives his right to raise any Rule 410 objections at any future trial. Additionally, the prosecutor promises to seek the highest possible sentence if the defendant is convicted of the rape charge if the defendant does not immediately agree to the Rule 410 waiver. Reluctantly, the defendant and his counsel agree to the prosecutor's terms. During the negotiation, defendant Maxwell admits that he raped Rosetta, and the prosecutor immediately cuts off negotiations and proceeds to trial. Defendant Maxwell testifies at his rape trial that he did not rape Rosetta but, rather, that she consented. The prosecutor seeks to cross-examine Maxwell with this statement made during the plea negotiations and later files perjury charges against Maxwell for lying under oath at his rape trial. *Select the best answer:*

(a) Maxwell's statement made during the plea negotiations is admissible at both the rape trial and the perjury trial.

(c) Maxwell's statement made during the plea negotiations is inadmissible at the rape trial but admissible at the perjury trial, so long as the trial court concludes by a preponderance of the evidence that the waiver was not voluntary.

(b) Maxwell's statement made during the plea negotiations is not admissible at either the rape trial or the perjury trial.

(d) Maxwell's statement made during the plea negotiations is admissible at the rape trial but not the perjury trial.

## § 6.09 CASE LIBRARY: UNITED STATES v. MEZZANATTO

### UNITED STATES v. MEZZANATTO

*Supreme Court of the United States*  
513 U.S. 196, 130 L. Ed. 2d 697, 115 S. Ct. 797

Argued Nov. 2, 1994.  
Decided Jan. 18, 1995.

JUSTICE THOMAS delivered the opinion of the Court.

Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(e)(6) provide that statements made in the course of plea discussions between a criminal defendant and a prosecutor are inadmissible against the defendant. The court below held that these exclusionary provisions may not be waived by the defendant. We granted certiorari to resolve a conflict among the Courts of Appeals, and we now reverse.

#### I

On August 1, 1991, San Diego Narcotics Task Force agents arrested Gordon Shuster after discovering a methamphetamine laboratory at his residence in Rainbow, California. Shuster agreed to cooperate with the agents, and a few hours after his arrest he placed a call to respondent's pager. When respondent returned the call, Shuster told him that a friend wanted to purchase a pound of methamphetamine for \$13,000. Shuster arranged to meet respondent later that day.

At their meeting, Shuster introduced an undercover officer as his "friend." The officer asked respondent if he had "brought the stuff with him," and respondent told the officer it was in his car. The two proceeded to the car, where respondent produced a brown paper package containing approximately one pound of methamphetamine. Respondent then presented a glass pipe (later found to contain methamphetamine residue) and asked the officer if he wanted to take a "hit." The officer indicated that he would first get respondent the money; as the officer left the car, he gave a prearranged arrest signal. Respondent was arrested and charged with possession of methamphetamine with intent to distribute, in violation of 84 Stat. 1260, as amended, 21 U.S.C. § 841(a)(1).

On October 17, 1991, respondent and his attorney asked to meet with the prosecutor to discuss the possibility of cooperating with the Government. The prosecutor agreed to meet later that day. At the beginning of the meeting, the prosecutor informed respondent that he had no obligation to talk, but that

if he wanted to cooperate he would have to be completely truthful. As a condition to proceeding with the discussion, the prosecutor indicated that respondent would have to agree that any statements he made during the meeting could be used to impeach any contradictory testimony he might give at trial if the case proceeded that far. Respondent conferred with his counsel and agreed to proceed under the prosecutor's terms.

Respondent then admitted knowing that the package he had attempted to sell to the undercover police officer contained methamphetamine, but insisted that he had dealt only in "ounce" quantities of methamphetamine prior to his arrest. Initially, respondent also claimed that he was acting merely as a broker for Shuster and did not know that Shuster was manufacturing methamphetamine at his residence, but he later conceded that he knew about Shuster's laboratory. Respondent attempted to minimize his role in Shuster's operation by claiming that he had not visited Shuster's residence for at least a week before his arrest. At this point, the Government confronted respondent with surveillance evidence showing that his car was on Shuster's property the day before the arrest, and terminated the meeting on the basis of respondent's failure to provide completely truthful information.

Respondent eventually was tried on the methamphetamine charge and took the stand in his own defense. He maintained that he was not involved in methamphetamine trafficking and that he had thought Shuster used his home laboratory to manufacture plastic explosives for the CIA. He also denied knowing that the package he delivered to the undercover officer contained methamphetamine. Over defense counsel's objection, the prosecutor cross-examined respondent about the inconsistent statements he had made during the October 17 meeting. Respondent denied having made certain statements, and the prosecutor called one of the agents who had attended the meeting to recount the prior statements. The jury found respondent guilty, and the District Court sentenced him to 170 months in prison.

A panel of the Ninth Circuit reversed, over the dissent of Chief Judge Wallace. The Ninth Circuit held that respondent's agreement to allow admission of his plea statements for purposes of impeachment was unenforceable and that the District Court therefore erred in admitting the statements for that purpose. We granted certiorari because the Ninth Circuit's decision conflicts with the Seventh Circuit's decision in *United States v. Dortch*, 5 F.3d 1056, 1067-1068 (1993).

## II

Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(e)(6) (Rules or plea-statement Rules) are substantively identical. Rule 410 provides:

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who . . . was a participant in the plea discussions: . . . (4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty. . .

The Ninth Circuit noted that these Rules are subject to only two express exceptions,<sup>6</sup> neither of which says anything about waiver, and thus concluded that Congress must have meant to preclude waiver agreements such as respondent's. 998 F.2d, at 1454-1456. In light of the "precision with which these rules are generally phrased," the Ninth Circuit declined to "write in a waiver in a waiverless rule." *Id.*, at 1456.<sup>7</sup>

The Ninth Circuit's analysis is directly contrary to the approach we have taken in the context of a broad array of constitutional and statutory provisions. Rather than deeming waiver presumptively unavailable absent some sort of express enabling clause, we instead have adhered to the opposite presumption. See *Shutte v. Thompson*, 15 Wall. 151, 159, 21 L. Ed. 123 (1873) ("A party may waive any provision, either of a contract or of a statute, intended for his benefit"); *Peretz v. United States*, 501 U.S. 923, 936, 111 S. Ct. 2661, 2669, 115 L. Ed. 2d 808 (1991) ("The most basic rights of criminal defendants are . . . subject to waiver"). A criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution. See, e.g., *Ricketts v. Adamson*, 483 U.S. 1, 10, 107 S. Ct. 2680, 2685-2686, 97 L. Ed. 2d 1 (1987) (double jeopardy defense waivable by pretrial agreement); *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S. Ct. 1709, 1712, 23 L. Ed. 2d 274 (1969) (knowing and voluntary guilty plea waives privilege against compulsory self-incrimination, right to jury trial, and right to confront one's accusers); *Johnson v. Zerbst*, 304 U.S. 458, 465, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461 (1938) (Sixth Amendment right to counsel may be waived). Likewise, absent some affirmative indication of Congress' intent to preclude waiver, we have presumed that statutory provisions are subject to waiver by voluntary agreement of the parties. See, e.g., *Evans v. Jeff D.*, 475 U.S. 717, 730-732, 106 S. Ct. 1531, 1538-1540, 89 L. Ed. 2d 747 (1986) (prevailing party in civil-rights action may waive its statutory eligibility for attorney's fees).

Our cases interpreting the Federal Rules of Criminal Procedure are consistent with this approach. The provisions of those Rules are presumptively waivable, though an express waiver clause may suggest that Congress intended to occupy the field and to preclude waiver under other, unstated circumstances. See *Crosby v. United States*, 506 U.S. 255, 113 S. Ct. 748, 122 L. Ed. 2d 25 (1993); *Smith v. United States* 360 U.S. 1, 79 S. Ct. 991, 3 L. Ed. 2d 1041 (1959). In *Crosby*, for example, we held that a defendant's failure to appear for any part of his trial did not constitute a valid waiver of his right to be present under Federal Rule of Criminal Procedure 43. We noted that the specific right codified in Rule 43 "was considered unwaivable in felony cases" at common law, and that Rule 43 expressly recognized only one

<sup>6</sup> A statement made by a criminal defendant in the course of plea discussions is "admissible (i) in any proceeding wherein another statement made in the course of the same . . . plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel." Fed. Rule Evid. 410. Accord, Fed. Rule Crim. Proc. 11(e)(6).

<sup>7</sup> Respondent also goes to great lengths to establish a proposition that is not at issue in this case: that the plea-statement Rules do not contain a blanket "impeachment" exception. We certainly agree that the Rules give a defendant the right not to be impeached by statements made during plea discussions, but that conclusion says nothing about whether the defendant may relinquish that right by voluntary agreement.

exception to the common-law rule. 506 U.S., at 259, 113 S. Ct. at 751. In light of the specific common-law history behind Rule 43 and the express waiver provision in the Rule, we declined to conclude that “the drafters intended the Rule to go further.” *Id.*, at 260, 113 S. Ct. at 752). Our decision in *Smith* followed a similar line of reasoning. It held that waiver of the indictment requirement embodied in Federal Rule of Criminal Procedure 7(a) is confined to the specific circumstances outlined in the Rule’s text: “Rule 7(a) recognizes that this safeguard may be waived, but only in those proceedings which are noncapital.” 360 U.S., at 9, 79 S. Ct. at 997. Unlike Rules 43 and 7(a), however, the plea-statement Rules make no mention of waiver, and so *Crosby* and *Smith* provide no basis for setting aside the usual presumption.

The presumption of waivability has found specific application in the context of evidentiary rules. Absent some “overriding procedural consideration that prevents enforcement of the contract,” courts have held that agreements to waive evidentiary rules are generally enforceable even over a party’s subsequent objections. 21 C. Wright & K. Graham, *Federal Practice and Procedure* § 5039, pp. 207–208 (1977) (hereinafter *Wright & Graham*). Courts have “liberally enforced” agreements to waive various exclusionary rules of evidence. Note, *Contracts to Alter the Rules of Evidence*, 46 *Harv. L.Rev.* 138, 139–140 (1933). Thus, at the time of the adoption of the Federal Rules of Evidence, agreements as to the admissibility of documentary evidence were routinely enforced and held to preclude subsequent objections as to authenticity. *See, e.g., Tupman Thurlow Co. v. S.S. Cap Castillo*, 490 F.2d 302, 309 (CA2 1974); *United States v. Wing*, 450 F.2d 806, 811 (CA9 1971). And although hearsay is inadmissible except under certain specific exceptions, we have held that agreements to waive hearsay objections are enforceable. *See Sac and Fox Indians of Miss. in Iowa v. Sac and Fox Indians of Miss. in Ohl.*, 220 U.S. 481, 488–489, 31 S. Ct. 473, 476–477, 55 L. Ed. 552 (1911); *see also United States v. Bonnett*, 877 F.2d 1450, 1458–1459 (CA10 1989) (*party’s stipulation to admissibility of document precluded hearsay objection at trial*).

Indeed, evidentiary stipulations are a valuable and integral part of everyday trial practice. Prior to trial, parties often agree in writing to the admission of otherwise objectionable evidence, either in exchange for stipulations from opposing counsel or for other strategic purposes. Both the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure appear to contemplate that the parties will enter into evidentiary agreements during a pretrial conference. *See* Fed. Rule Civ. Proc. 16(c)(3); Fed. Rule Crim. Proc. 17.1. During the course of trial, parties frequently decide to waive evidentiary objections, and such tactics are routinely honored by trial judges. *See* 21 *Wright & Graham* § 5032, at 161 (“It is left to the parties, in the first instance, to decide whether or not the rules are to be enforced . . . It is only in rare cases that the trial judge will . . . exclude evidence they are content to see admitted”); *see also United States v. Coonan*, 938 F.2d 1553, 1561 (CA2 1991) (criminal defendant not entitled “to evade the consequences of an unsuccessful tactical decision” made in welcoming admission of otherwise inadmissible evidence).<sup>8</sup>

<sup>8</sup> Respondent contends that a pretrial agreement to waive the exclusionary provisions of the plea-statement Rules is unlike a typical stipulation, which is entered into while the case is in

## III

Because the plea-statement Rules were enacted against a background presumption that legal rights generally, and evidentiary provisions specifically, are subject to waiver by voluntary agreement of the parties, we will not interpret Congress' silence as an implicit rejection of waivability. Respondent bears the responsibility of identifying some affirmative basis for concluding that the plea-statement Rules depart from the presumption of waivability.

Respondent offers three potential bases for concluding that the Rules should be placed beyond the control of the parties. We find none of them persuasive.

## A

Respondent first suggests that the plea-statement Rules establish a "guarantee [to] fair procedure" that cannot be waived. Brief for Respondent 12. We agree with respondent's basic premise: There may be some evidentiary provisions that are so fundamental to the reliability of the factfinding process that they may never be waived without irreparably "discredit[ing] the federal courts." See 21 Wright & Graham § 5039, at 207-208; see also *Wheat v. United States*, 486 U.S. 153, 162, 108 S. Ct. 1692, 1698-1699, 100 L. Ed. 2d 140 (1988) (court may decline a defendant's waiver of his right to conflict-free counsel); *United States v. Josefik*, 753 F.2d 585, 588 (CA7 1985) ("No doubt there are limits to waiver; if the parties stipulated to trial by 12 orangutans the defendant's conviction would be invalid notwithstanding his consent, because some minimum of civilized procedure is required by community feeling regardless of what the defendant wants or is willing to accept"). But enforcement of agreements like respondent's plainly will not have that effect. The admission of plea statements for impeachment purposes enhances the truth-seeking function of trials and will result in more accurate verdicts. Cf. *Jenkins v. Anderson*, 447 U.S. 231, 238, 100 S. Ct. 2124, 2129, 65 L. Ed. 2d 86 (1980) (once a defendant decides to testify, he may be required to face impeachment on cross-examination, which furthers the "function of the courts of justice to ascertain the truth") (quoting *Brown v. United States*, 356 U.S. 148, 156, 78 S. Ct. 622, 627, 2 L. Ed. 2d 589 (1958)); Note, 46 Harv. L. Rev., at 142-143 ("[A] contract to deprive the court of relevant testimony . . . stands on a different ground than one admitting evidence that would otherwise have been barred by an exclusionary rule. One contract is an impediment to ascertaining the facts, the other aids in the final determination of the true situation") (footnote omitted). Under any view of the evidence, the defendant has made a false statement, either to the prosecutor during the plea discussion or to the jury at trial; making the jury aware of the inconsistency will tend to increase the reliability of the verdict without risking institutional harm to the federal courts.

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progress, and is more like an extrajudicial agreement made outside the context of litigation. Brief for Respondent 39. While it may be true that extrajudicial contracts made prior to litigation trigger closer judicial scrutiny than stipulations made within the context of litigation, see 21 Wright & Graham § 5039, at 206, there is nothing extrajudicial about the waiver agreement at issue here. The agreement was made in the course of a plea discussion aimed at resolving the specific criminal case that was "in progress" against respondent.

Respondent nevertheless urges that the plea-statement Rules are analogous to Federal Rule of Criminal Procedure 24(c), which provides that “[a]n alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict.” Justice Kennedy’s concurrence in *United States v. Olano*, 507 U.S. 725, 741, 113 S. Ct. 1770, 1781, 123 L. Ed. 2d 508 (1993), suggested that the guarantees of Rule 24(c) may never be waived by an agreement to permit alternate jurors to sit in on jury deliberations, and respondent asks us to extend that logic to the plea-statement Rules. But even if we assume that the requirements of Rule 24(c) are “the product of a judgment that our jury system should be given a stable and constant structure, one that cannot be varied by a court with or without the consent of the parties,” *id.*, at 742, 113 S. Ct. at 1782, the plea-statement Rules plainly do not satisfy this standard. Rules 410 and 11(e)(6) “creat[e], in effect, a privilege of the defendant,” 2 J. Weinstein & M. Berger, *Weinstein’s Evidence* ¶ 410[05], p. 410–43 (1994), and, like other evidentiary privileges, this one may be waived or varied at the defendant’s request. The Rules provide that statements made in the course of plea discussions are inadmissible “against” the defendant, and thus leave open the possibility that a defendant may offer such statements into evidence for his own tactical advantage. Indeed, the Rules contemplate this result in permitting admission of statements made “in any proceeding wherein another statement made in the course of the same . . . plea discussions *has been introduced* and the statement ought in fairness be considered contemporaneously with it.” Fed. Rule Evid. 410(i) (emphasis added); accord, Fed. Rule Crim. Proc. 11(e)(6)(i). Thus, the plea-statement Rules expressly contemplate a degree of party control that is consonant with the background presumption of waivability.<sup>9</sup>

## B

Respondent also contends that waiver is fundamentally inconsistent with the Rules’ goal of encouraging voluntary settlement. See Advisory Committee’s Notes on Fed. Rule Evid. 410 (purpose of Rule is “promotion of disposition of criminal cases by compromise”). Because the prospect of waiver may make defendants “think twice” before entering into any plea negotiation, respondent suggests that enforcement of waiver agreements acts “as a brake, not as a facilitator, to the plea-bargain process.” Brief for Respondent 23, n. 17. The Ninth Circuit expressed similar concerns, noting that Rules 410 and 11(e)(6) “aid in obtaining th[e] cooperation” that is often necessary to identify and prosecute the leaders of a criminal conspiracy and that waiver of the protections of the Rules “could easily have a chilling effect on the entire plea bargaining process.” 998 F.2d, at 1455. According to the Ninth Circuit, the plea-statement Rules “permit the plea bargainer to maximize what he has ‘to

<sup>9</sup> The Ninth Circuit relied on *Brooklyn Savings Bank v. O’Neil*, 324 U.S. 697, 65 S.Ct. 895, 89 L.Ed. 1296 (1945), but that case is easily distinguishable in this regard. *Brooklyn Savings Bank* held that certain statutory entitlements guaranteed to employees by the Fair Labor Standards Act of 1938 were unwaivable because the structure and legislative history of the Act evinced a specific “legislative policy” of “prevent[ing] private contracts” on such matters. *Id.*, at 706, 65 S. Ct. at 902. Respondent has identified nothing in the structure or history of the plea-statement Rules that suggests that they were aimed at preventing private bargaining; in fact, the above discussion suggests that the Rules adopt a contrary view.

sell” by preserving “the ability to withdraw from the bargain proposed by the prosecutor without being harmed by any of his statements made in the course of an aborted plea bargaining session.” *Ibid.*

We need not decide whether and under what circumstances substantial “public policy” interests may permit the inference that Congress intended to override the presumption of waivability, for in this case there is no basis for concluding that waiver will interfere with the Rules’ goal of encouraging plea bargaining. The court below focused entirely on the *defendant’s* incentives and completely ignored the other essential party to the transaction: the prosecutor. Thus, although the availability of waiver may discourage some defendants from negotiating, it is also true that prosecutors may be unwilling to proceed without it.

Prosecutors may be especially reluctant to negotiate without a waiver agreement during the early stages of a criminal investigation, when prosecutors are searching for leads and suspects may be willing to offer information in exchange for some form of immunity or leniency in sentencing. In this “cooperation” context, prosecutors face “painfully delicate” choices as to “whether to proceed and prosecute those suspects against whom the already produced evidence makes a case or whether to extend leniency or full immunity to some suspects in order to procure testimony against other, more dangerous suspects against whom existing evidence is flimsy or nonexistent.” Hughes, *Agreements for Cooperation in Criminal Cases*, 45 Vand. L. Rev. 1, 15 (1992). Because prosecutors have limited resources and must be able to answer “sensitive questions about the credibility of the testimony” they receive before entering into any sort of cooperation agreement, *id.*, at 10, prosecutors may condition cooperation discussions on an agreement that the testimony provided may be used for impeachment purposes. See Thompson & Sumner, *Structuring Informal Immunity*, 8 Crim. Just. 16, 19 (spring 1993). If prosecutors were precluded from securing such agreements, they might well decline to enter into cooperation discussions in the first place and might never take this potential first step toward a plea bargain.<sup>10</sup>

Indeed, as a logical matter, it simply makes no sense to conclude that mutual settlement will be encouraged by precluding negotiation over an issue that may be particularly important to one of the parties to the transaction. A sounder way to encourage settlement is to permit the interested parties to enter into knowing and voluntary negotiations without any arbitrary limits on their bargaining chips. To use the Ninth Circuit’s metaphor, if the prosecutor is interested in “buying” the reliability assurance that accompanies

<sup>10</sup> We cannot agree with the dissent’s conclusion that the policies expressed in the Advisory Committee’s Notes to the plea-statement Rules indicate congressional animosity toward waivability. The Advisory Committee’s Notes *always* provide some policy justification for the exclusionary provisions in the Rules, yet those policies merely justify the default rule of exclusion; they do not mean that the parties can never waive the default rule. Indeed, the dissent is unwilling to accept the logical result of its approach, which would require a wholesale rejection of the background presumption of party control over evidentiary provisions. Hearsay, for example, is generally excluded because it tends to lack “trustworthiness,” see Advisory Committee’s Notes on Article VIII of the Fed. Rules of Evid., 28 U.S.C.App., p. 770, yet even the dissent concedes that the hearsay rules are “waivable beyond any question,” *post*, at 807. Thus, the mere existence of a policy justification for the plea-statement Rules cannot provide a sound basis for rejecting the background presumption of waivability.

a waiver agreement, then precluding waiver can only stifle the market for plea bargains. A defendant can "maximize" what he has to "sell" only if he is permitted to offer what the prosecutor is most interested in buying. And while it is certainly true that prosecutors often need help from the small fish in a conspiracy in order to catch the big ones, that is no reason to preclude waiver altogether. If prosecutors decide that certain crucial information will be gained only by preserving the inadmissibility of plea statements, they will agree to leave intact the exclusionary provisions of the plea-statement Rules.

In sum, there is no reason to believe that allowing negotiation as to waiver of the plea-statement Rules will bring plea bargaining to a grinding halt; it may well have the opposite effect.<sup>11</sup> Respondent's unfounded policy argument thus provides no basis for concluding that Congress intended to prevent criminal defendants from offering to waive the plea-statement Rules during plea negotiation.

### C

Finally, respondent contends that waiver agreements should be forbidden because they invite prosecutorial overreaching and abuse. Respondent asserts that there is a "gross disparity" in the relative bargaining power of the parties to a plea agreement and suggests that a waiver agreement is "inherently unfair and coercive." Brief for Respondent 26. Because the prosecutor retains the discretion to "reward defendants for their substantial assistance" under the Sentencing Guidelines, respondent argues that defendants face an "incredible dilemma" when they are asked to accept waiver as the price of entering plea discussions. *Ibid.* (quoting *Green v. United States*, 355 U.S. 184, 193, 78 S. Ct. 221, 226, 2 L. Ed. 2d 199 (1957)).

The dilemma flagged by respondent is indistinguishable from any of a number of difficult choices that criminal defendants face every day. The plea bargaining process necessarily exerts pressure on defendants to plead guilty and to abandon a series of fundamental rights, but we have repeatedly held that the government "may encourage a guilty plea by offering substantial benefits in return for the plea." *Corbitt v. New Jersey*, 439 U.S. 212, 219, 99 S. Ct. 492, 497-498, 58 L. Ed. 2d 466 (1978). "While confronting a defendant with the risk of more severe punishment clearly may have a 'discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable' — and permissible — 'attribute of any legitimate system which tolerates and encourages the negotiation of pleas.'" *Bordenkircher v. Hayes*, 434 U.S. 357, 364, 98 S. Ct. 663, 668-669, 54 L. Ed. 2d 604 (1978) (quoting *Chaffin v. Stynchcombe*, 412 U.S. 17, 31, 93 S. Ct. 1977, 1985, 36 L. Ed. 2d 714 (1973)).

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<sup>11</sup> Respondent has failed to offer any empirical support for his apocalyptic predictions, and data compiled by the Administrative Office of the United States Courts appear to contradict them. Prior to the Ninth Circuit's decision in this case (when, according to the Solicitor General, federal prosecutors in that Circuit used waiver agreements like the one invalidated by the court below, see Pet. for Cert. 10-11), approximately 92.2% of the convictions in the Ninth Circuit were secured through pleas of guilty or *nolo contendere*. Annual Report of the Director, Administrative Office of the United States Courts, Judicial Business of the United States Courts 278 (1992) (Table D-7). During that same period, about 88.8% of the convictions in all federal courts were secured by voluntary pleas. *Id.*, at 276.

The mere potential for abuse of prosecutorial bargaining power is an insufficient basis for foreclosing negotiation altogether. "Rather, tradition and experience justify our belief that the great majority of prosecutors will be faithful to their duty." *Newton v. Rumery*, 480 U.S. 386, 397, 107 S. Ct. 1187, 1194, 94 L. Ed. 2d 405 (1987) (plurality opinion); see also *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15, 47 S. Ct. 1, 6, 71 L. Ed. 131 (1926) ("[I]n the absence of clear evidence to the contrary, courts presume that [public officers] have properly discharged their official duties"). Thus, although some waiver agreements "may not be the product of an informed and voluntary decision," this possibility "does not justify invalidating *all* such agreements." *Newton, supra*, 480 U.S. at 393, 107 S. Ct. at 1192 (majority opinion). Instead, the appropriate response to respondent's predictions of abuse is to permit case-by-case inquiries into whether waiver agreements are the product of fraud or coercion. We hold that absent some affirmative indication that the agreement was entered into unknowingly or involuntarily, an agreement to waive the exclusionary provisions of the plea-statement Rules is valid and enforceable.

#### IV

Respondent conferred with his lawyer after the prosecutor proposed waiver as a condition of proceeding with the plea discussion, and he has never complained that he entered into the waiver agreement at issue unknowingly or involuntarily. The Ninth Circuit's decision was based on its *per se* rejection of waiver of the plea-statement Rules. Accordingly, the judgment of the Court of Appeals is reversed.

*It is so ordered.*

JUSTICE GINSBURG, with whom JUSTICE O'CONNOR and JUSTICE BREYER join, concurring.

The Court holds that a waiver allowing the Government to impeach with statements made during plea negotiations is compatible with Congress' intent to promote plea bargaining. It may be, however, that a waiver to use such statements in the case in chief would more severely undermine a defendant's incentive to negotiate, and thereby inhibit plea bargaining. As the Government has not sought such a waiver, we do not here explore this question.

JUSTICE SOUTER, with whom JUSTICE STEVENS joins, dissenting.

This case poses only one question: did Congress intend to create a personal right subject to waiver by its individual beneficiaries when it adopted Rule 410 of the Federal Rules of Evidence and Rule 11(e)(6) of the Federal Rules of Criminal Procedure, each Rule providing that statements made during plea discussions are inadmissible against the defendant except in two carefully described circumstances? The case raises no issue of policy to be settled by the courts, and if the generally applicable (and generally sound) judicial policy of respecting waivers of rights and privileges should conflict with a reading of the Rules as reasonably construed to accord with the intent of Congress, there is no doubt that congressional intent should prevail. Because the majority ruling is at odds with the intent of Congress and will render the Rules largely dead letters, I respectfully dissent.

At first glance, the question of waivability may seem short on substance, given the unconditional language of the two virtually identical Rules, unsoftened by any provision for waiver or allusion to that possibility:

Except as otherwise provided in this rule, evidence . . . is not . . . admissible against the defendant who . . . was a participant in . . . plea discussions [of]

. . . .

any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty . . . [subject to two stated exceptions]. Fed. Rule Evid. 410.

Believers in plain meaning might be excused for thinking that the text answers the question. But history may have something to say about what is plain, and here history is not silent. If the Rules are assumed to create only a personal right of a defendant, the right arguably finds itself in the company of other personal rights, including constitutional ones, that have been accepted time out of mind as being freely waivable. *See, e.g., Johnson v. Zerbst*, 304 U.S. 458, 465, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461 (1938) (Sixth Amendment right to counsel may be waived). The possibility that the Rules in question here do create such a personal right must, indeed, be taken seriously if for no other reason than that the Rules of Evidence contain other bars to admissibility equally uncompromising on their face but nonetheless waivable beyond any question. *See* Fed. Rule Evid. 802 (hearsay); Fed. Rule Evid. 1002 (best evidence).

The majority comes down on the side of waivability through reliance on the general presumption in favor of recognizing waivers of rights, including evidentiary rights. To be sure, the majority recognizes that the presumption does not necessarily resolve the issue before us, and the majority opinion describes some counterexamples of rights that are insulated against waiver, at least when waiver is expressly prohibited or limited in terms that speak of waiver expressly. *See Crosby v. United States*, 506 U.S. 255, 113 S. Ct. 748, 122 L. Ed. 2d 25 (1993); *Smith v. United States*, 360 U.S. 1, 79 S. Ct. 991, 3 L. Ed. 2d 1041 (1959). Still, the majority seems to assume that the express-waiver cases describe the only circumstances in which the recognition of waiver is foreclosed, and since the Rules in question here say nothing about "waiver" as such, the majority finds that fact really to be the end of the matter.

If there were nothing more to go on here, I, too, would join the majority in relying on the fallback rule of permissible waiver. But there is more to go on. There is, indeed, good reason to believe that Congress rejected the general rule of waivability when it passed the Rules in issue here, and once the evidence of such congressional intent is squarely faced, we have no business but to respect it (or deflect it by applying some constitutionally mandated requirement of clear statement). There is, of course, no claim in this case that Congress should be hobbled by any clear statement rule, and the result is that we are bound to respect the intent that the Advisory Committee's Notes to the congressionally enacted Rules reveal. *See Williamson v. United States*, 512

U.S. 594, 614-615, 114 S. Ct. 2431, 2442, 129 L. Ed. 2d 476 (1994) (Kennedy, J., concurring in judgment) (citing cases in which Advisory Committee's Notes are taken as authoritative evidence of intent).

The fact underlying those Notes, and the fact of which all congressional and judicial action must take account in dealing with the possible evidentiary significance of plea discussions, is that the federal judicial system could not possibly litigate every civil and criminal case filed in the courts. The consequence of this is that plea bargaining is an accepted feature of the criminal justice system, and, "[p]roperly administered, it is to be encouraged." *Santobello v. New York*, 404 U.S. 257, 260, 92 S. Ct. 495, 498, 30 L. Ed. 2d 427 (1971). Thus the Advisory Committee's Notes on Rule 410 explained that "[e]xclusion of offers to plead guilty or *nolo* has as its purpose the promotion of disposition of criminal cases by compromise." 28 U.S.C. App., p. 750. "As with compromise offers generally, . . . free communication is needed, and security against having an offer of compromise or related statement admitted in evidence effectively encourages it." *Ibid.* The Advisory Committee's Notes on Rule 11(e)(6) drew the same conclusion about the purpose of that Rule and summed up the object of both Rules as being "to permit the unrestrained candor which produces effective plea discussions between the attorney for the government and the attorney for the defendant or the defendant when acting pro se." 18 U.S.C. App., p. 745 (1979 Amendment) (internal quotation marks omitted).

These explanations show with reasonable clarity that Congress probably made two assumptions when it adopted the Rules: pleas and plea discussions are to be encouraged, and conditions of unrestrained candor are the most effective means of encouragement. The provisions protecting a defendant against use of statements made in his plea bargaining are thus meant to create something more than a personal right shielding an individual from his imprudence. Rather, the Rules are meant to serve the interest of the federal judicial system (whose resources are controlled by Congress), by creating the conditions understood by Congress to be effective in promoting reasonable plea agreements. Whether Congress was right or wrong that unrestrained candor is necessary to promote a reasonable number of plea agreements, Congress assumed that there was such a need and meant to satisfy it by these Rules. Since the zone of unrestrained candor is diminished whenever a defendant has to stop to think about the amount of trouble his openness may cause him if the plea negotiations fall through, Congress must have understood that the judicial system's interest in candid plea discussions would be threatened by recognizing waivers under Rules 410 and 11(e)(6). See ABA Standards for Criminal Justice 14-3.4, commentary (2d ed. 1980) (a rule contrary to the one adopted by Congress "would discourage plea negotiations and agreements, for defendants would have to be constantly concerned whether, in light of their plea negotiation activities, they could successfully defend on the merits if a plea ultimately was not entered"). There is, indeed, no indication that Congress intended merely a regime of such limited openness as might happen to survive market forces sufficient to supplant a default rule of inadmissibility. Nor may Congress be presumed to have intended to permit waivers that would undermine the stated policy of its own Rules. *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 704, 65 S. Ct. 895, 900, 89 L. Ed. 1296 (1945) ("Where a private

right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate").

It bears emphasizing that I would not suggest that there is only one reasonable balance possible between society's interest in encouraging compromise (which Congress thought to be served most effectively by refusing to recognize waivers of rights under these Rules) and society's interest in providing a vigorous adversary system when cases are tried (which may be served by recognizing waivers). The majority may be right that a better balance could have been struck than the one Congress intended. The majority may also be correct as a matter of policy that enough pleas will result even if parties are allowed to make their own rule of admissibility by agreement, with prosecutors refusing to talk without a defendant's waiver (unless such refusal overloads the system beyond its capacity for trials) and defendants refusing to waive (unless they are desperate enough to forgo their option to be tried without fear of compromising statements if the plea negotiations fail). But whether the majority is right or wrong on either score is beside the point; the policy it endorses is not the policy that Congress intended when it enacted the Rules. See *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578, 99 S. Ct. 2479, 2490, 61 L. Ed. 2d 82 (1979) ("The ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law").

The unlikelihood that Congress intended the modest default rule that the majority sees in Rules 11(e)(6) and 410 looms all the larger when the consequences of the majority position are pursued. The first consequence is that the Rules will probably not even function as default rules, for there is little chance that they will be applied at all. Already, standard forms indicate that many federal prosecutors routinely require waiver of Rules 410 and 11(e)(6) rights before a prosecutor is willing to enter into plea discussions. Pet. for Cert. 10-11. See also *United States v. Stevens*, 935 F.2d 1380, 1396 (CA3 1991) ("Plea agreements . . . commonly contain a provision stating that proffer information that is disclosed during the course of plea negotiations is . . . admissible for purposes of impeachment"). As the Government conceded during oral argument, defendants are generally in no position to challenge demands for these waivers, and the use of waiver provisions as contracts of adhesion has become accepted practice.<sup>12</sup> Today's decision can only speed the heretofore illegitimate process by which the exception has been swallowing the Rules. See, e.g., *Guidry v. Sheet Metal Workers Nat. Pension Fund*, 493 U.S. 365, 377, 110 S. Ct. 680, 687-688, 107 L. Ed. 2d 782 (1990) (no exception should be made by Court because it would be too difficult to "carve out an

<sup>12</sup> The argument that the plea-bargaining system still works even though waiver has become the accepted practice does not answer the question whether Congress intended to permit a waiver rule. The Court's obligation is to interpret criminal procedure and evidentiary rules according to congressional intent. If the Government believes that the better rule is different from what is currently the law, the Government can petition Congress to change it. See *TVA v. Hill*, 437 U.S. 153, 194, 98 S. Ct. 2279, 2301-2302, 57 L. Ed. 2d 117 (1978) ("Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute").

exception that would not swallow the rule"); *United States v. Powell*, 469 U.S. 57, 68, 105 S. Ct. 471, 478-479, 83 L. Ed. 2d 461 (1984) (respondent's suggested exception to the *Dunn* rule "threatens to swallow the rule"). See also 23 C. Wright & K. Graham, *Federal Practice and Procedure* 121-122, n. 7.3 (1994 Supp.) ("It would seem strange if the prosecutor could undermine the judicial policy, now endorsed by Congress, of encouraging plea bargaining by announcing a policy that his office will only plea bargain with defendants who 'waive' the benefits of Rule 410"). Accordingly, it is probably only a matter of time until the Rules are dead letters.

The second consequence likely to emerge from today's decision is the practical certainty that the waiver demanded will in time come to function as a waiver of trial itself. It is true that many (if not all) of the waiver forms now employed go only to admissibility for impeachment.<sup>13</sup> But although the erosion of the Rules has begun with this trickle, the majority's reasoning will provide no principled limit to it. The Rules draw no distinction between use of a statement for impeachment and use in the Government's case in chief. If objection can be waived for impeachment use, it can be waived for use as affirmative evidence, and if the Government can effectively demand waiver in the former instance, there is no reason to believe it will not do so just as successfully in the latter. When it does, there is nothing this Court will legitimately be able to do about it. The Court is construing a congressional Rule on the theory that Congress meant to permit its waiver. Once that point is passed, as it is today, there is no legitimate limit on admissibility of a defendant's plea negotiation statements beyond what the Constitution may independently impose or the traffic may bear. Just what the traffic may bear is an open question, but what cannot be denied is that the majority opinion sanctions a demand for waiver of such scope that a defendant who gives it will be unable even to acknowledge his desire to negotiate a guilty plea without furnishing admissible evidence against himself then and there. In such cases, the possibility of trial if no agreement is reached will be reduced to fantasy. The only defendant who will not damage himself by even the most restrained candor will be the one so desperate that he might as well walk into court and enter a naked guilty plea. It defies reason to think that Congress intended to invite such a result, when it adopted a Rule said to promote candid discussion in the interest of encouraging compromise.

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<sup>13</sup> Waiver for impeachment use, however, has been applied broadly. For example, plea statements have been used to impeach a defendant's witnesses even where the defendant has chosen not to testify. See *United States v. Dortch*, 5 F.3d 1056, 1069 (CA7 1993) ("[J]ust as the defendant must choose whether to protect the proffer statements by not taking the stand, the defendant must choose whether to protect the proffer by carefully determining which lines of questioning to pursue with different witnesses"), cert. pending *sub nom. Suess v. United States*, No. 93-7218.



## **Chapter 7**

# **THE EXAMINATION AND IMPEACHMENT OF WITNESSES**

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### **§ 7.01 CHAPTER CHECKLIST**

1. Is there a witness testifying at a hearing or proceeding before, during, or after the trial?
2. Is the witness under oath and subject to cross-examination?
3. Is the witness offering evidence going to the background of the case, an element of a claim, defense, or cause of action, or the impeachment of another witness?
4. Is the witness on direct, cross, redirect, or recross examination?
5. If this is the proponent's witness, what objections to the witness' testimony can be anticipated?
6. If the witness is being impeached, is the impeachment intrinsic (from the witness' mouth) or extrinsic (by offering other evidence or another witness)?
7. If the impeachment is intrinsic, is it in a permissible form?
8. If the impeachment is extrinsic, does it satisfy the collateral issue rule?

### **§ 7.02 RELEVANT FEDERAL RULES OF EVIDENCE**

#### **Rule 601. General Rule of Competency**

Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.

#### **Rule 602. Lack of Personal Knowledge**

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.

#### **Rule 603. Oath or Affirmation**

Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated

to awaken the witness' conscience and impress the witness' mind with the duty to do so.

### **Rule 604. 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 to make a true translation.

### **Rule 605. Competency of Judge as Witness**

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

### **Rule 606. Competency of Juror as Witness**

(a) **At the trial.** A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) **Inquiry into validity of verdict or indictment.** Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror. . . .

### **Rule 607. Who May Impeach**

The credibility of a witness may be attacked by any party, including the party calling the witness.

### **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 opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness . . . .

(b) **Specific instances of conduct.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, 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 the witness' 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 the accused's or the witness' privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness.

### **Rule 609. Impeachment by Evidence of Conviction of Crime**

(a) **General rule.** For the purpose of attacking the character for truthfulness of a witness, (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and (2) evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.

. . . .

### **Rule 610. Religious Beliefs or Opinions**

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.

### **Rule 611. Mode and Order of Interrogation and Presentation**

(a) **Control by court.** The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence . . . .

(b) **Scope of cross-examination.** Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. . . .

(c) **Leading questions.** Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. . . .

### **Rule 612. Writing Used to Refresh Memory**

Except as otherwise provided in criminal proceedings by section 3500 of Title 18, United States Code, if a witness uses a writing to refresh memory for the purpose of testifying, either

(1) while testifying, or

(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,

an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. . . .

### Rule 613. Prior Statements of Witnesses

(a) **Examining witness concerning prior statement.** In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

....

### Rule 614. Calling and Interrogation of Witnesses by Court

(a) **Calling by court.** The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

(b) **Interrogation by court.** The court may interrogate witnesses, whether called by itself or by a party.

(c) **Objections.** Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

### Rule 615. Exclusion of Witnesses.

At the request of a party the court shall order witnesses excluded so that they cannot hear the 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 which 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 the party's cause, or (4) a person authorized by statute to be present.

## § 7.03 EXAMINATION OF WITNESSES

### [A] Overview

Witness testimony, sometimes referred to as "viva voce," or "by voice," is one of the most common types of evidence at trial. Witnesses produce potentially powerful evidence, and witness examination sometimes becomes a "trial within a trial," much like the individual battles within a war. Because of the significance of witness testimony, special rules have been adopted to govern it. Many trials are won or lost on the nature and impact of witness testimony and how the attorneys negotiate the rules governing the admissibility of that testimony.

The Rules place the examination of witnesses squarely within the control of the judge. Under Rule 611, the judge has the discretion to decide whether to allow witness testimony and if so, in what form and at what time. For example, the judge has the authority to govern the use of leading questions on direct examination, to restrict the length of time for cross-examination and to limit the scope of cross-examination. See Rule 611. Of course, the Federal

*judge's discretion*

Rules of Evidence provide the judge with guidance and impose a variety of prohibitions, including the subject matter of the questions. For example, questions must concern a relevant matter under Rules 401 and 402 and not elicit privileged information under Rule 501.

*RULES of EVIDENCE*

The Federal Rules of Evidence impose several different types of limits on witness testimony. These limits range from who may testify (i.e., witness competency), to the substance of the testimony, to the form of the questions asked. Competency restrictions, such as those imposed on judge and jurors as provided in Rules 605 and 606, help to maintain the fundamental fairness of the trial process. Substantive limits are utilized to deter suspect evidence, such as hearsay, propensity character evidence, and settlement offers. Form limits also are intended to foster fairness and efficiency in the stylized "dance" that constitutes a trial.

*limits from RULES*

**[B] Competency: Who May Testify**

The competency of witnesses to testify in federal court is generally determined by Federal Rule of Evidence 601. While it may seem obvious that federal law should govern in federal courts, there exists one glaring exception in the area of witness competency. Rule 601 directs that state competency law governs in a federal civil action or proceeding when the state law provides the rule of decision. In this manner, Rule 601 becomes a choice-of-law rule. The use of state law in federal court is not restricted solely to competency matters. State law sometimes may be used in federal court when determining whether evidence is privileged. See Rule 501. Privileges are discussed in Chapter 17. See also presumptions, Rule 302.

*state governs when it provides rule of decision*

Under the Federal Rules of Evidence, all witnesses are presumptively competent to testify. Rule 601 reverses the common law, which for many years excluded from the witness stand various categories of persons, such as those convicted of certain crimes, persons having an interest in the action (such as a party or a party's spouse), and persons without religious beliefs. These incompetencies have largely disappeared from both federal and state courts, with the one remaining vestige in some state courts often called "Dead Man's Statutes." These statutes essentially prohibit interested parties from testifying about an oral transaction or communication against a deceased or incompetent person essentially because such a person would not be able to rebut that testimony. Under the federal rules, at least, all of the aforementioned persons are permitted to testify, although some prior conduct, such as convictions of crime, may be the subject of impeachment. An example of a "Dead Man's Statute" follows.

**Idaho Code § 9-202. Who may not testify**

The following persons cannot be witnesses:

....

- 3. Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted against an executor or administrator, upon a claim or demand against the estate

of a deceased person, as to any communication or agreement, not in writing, occurring before the death of such deceased person.

*competency is not a free pass to testify*

The presumption of competency under Rule 601 is not a free pass to testify. The presumptive witness must meet the foundational requirement of understanding what it means to tell the truth, must possess some relevant information, and must bypass several carefully delineated prohibitions involving testimony by the judge and jurors.

*child*

The primary foundational requirement for witness competency is that the witness must be able to understand what it means to be truthful. This prerequisite has no bright-line litmus test, perhaps because imposing a bright-line standard would be difficult, if not impossible. As the Advisory Committee Note to Rule 601 aptly stated, "No mental or moral qualifications for testifying as a witness are specified. Standards of mental capacity have proved elusive in actual application." Consequently, it is assumed in the Rules that the overwhelming majority of witnesses understand their obligation to testify truthfully. This assumption extends even to convicted perjurers (who will be given an opportunity to incur yet another perjury conviction). There is one category of witness where the truthfulness requirement is regularly tested, however, and that is the child witness. An attorney must carefully lay a foundation with child witnesses to establish their understanding of the difference between truth and falsehood.

#### Example

ATTORNEY: Hi, Rebecca. How are you?

A: Fine.

ATTORNEY: Good. I am going to ask you a few questions, Okay?

A: Okay.

ATTORNEY: May I call you Becca?

A: My Mommy and Daddy do.

ATTORNEY: Becca, how old are you?

A: Four. Last week!

ATTORNEY: Did you have a party on your birthday?

A: Yes. With cake.

ATTORNEY: With whom do you live, Becca?

A: My Mommy and Daddy and Emma.

ATTORNEY: Who is Emma?

A: My sister.

ATTORNEY: Becca, do you know what it means to tell the truth?

A: Yes.

ATTORNEY: What happens when you don't tell the truth?

A: Mommy sends me to time-out.

ATTORNEY: What is that?

A: It is when I am in trouble.

ATTORNEY: What happens during time-out?

A: I stand in a corner. I'm not allowed to talk.

ATTORNEY: Is it fun?

A: Noooo.

ATTORNEY: What happens if you tell the truth?

A: Nothing.

ATTORNEY: No time-out?

A: No.

ATTORNEY: Are you going to tell the truth here today?

A: Yes. (nodding her head up and down)

ATTORNEY: If I told you that I was wearing a green tie, would that be the truth or a lie?

A: That's silly. That would be a lie.

ATTORNEY: And if I told you that Santa Claus and the Easter Bunny were phony merchandising creations of a capitalist economy ... please don't cry Becca, I withdraw the question.

ATTORNEY: Now, remember when there was a fire at your house?

A: Yes.

ATTORNEY: Who was home at the time?

### *Problem 7-1: The Habitual Drug Addict*

Paul observed an armed robbery in Pacific Heights one foggy Sunday morning. When Paul was called to testify for the prosecution, the defense objected. In an earlier deposition, Paul admitted that he was a heroin addict, and had been one for more than a decade. *Should Paul's testimony be permitted?*

### *Problem 7-2: Say What?*

Archie Oakley, age 102, was on his front porch when he observed a purse snatching approximately 20 yards away. While Archie could not positively identify the assailant, he was called to testify by the prosecution to provide other relevant information. Archie concedes that he is deaf in one ear, needs a hearing aid in the other, and has very poor vision. The defendant objects to Archie's testimony, claiming it is extremely unreliable. *Is Archie competent to testify?*

### *Problem 7-3: Dead Again and Again*

Josie agreed in writing to sell Bernard her boat, pending an inspection. The inspection occurred and it was a complete success. Before the completion of

the sale, however, Josie died. Bernard then brought suit against Josie's estate based on diversity of citizenship. Bernard sought specific performance of the contract. At trial, Bernard took the witness stand to testify about the terms of the contract. *Will he be allowed to testify about the agreement if a "Dead Man's Statute" applies? Explain.*

#### *Problem 7-4: Hypnotized*

Lil, the victim of an armed robbery at gunpoint, could not remember what happened during the robbery, no matter how hard she tried to recall the events, with the exception of the general time and place. After she made numerous unsuccessful attempts to recall the crime, a certified police neuropsychologist hypnotized her. After the hypnosis, Lil was able to recall what had occurred during the robbery and even remembered the identity of the perpetrator. *Will Lil be allowed to testify at trial?*

### **[C] Requirement of Personal Knowledge**

Federal Rule of Evidence 602 requires lay witnesses to possess personal knowledge in order to testify. Without personal knowledge, a lay person likely violates the Rules in at least two ways: (1) the testimony is probably based on hearsay, in which case the original declarants would be the preferable witnesses; and (2) the testimony is probably speculation, which would distract the jury from drawing its own inferences from the admitted evidence.

Rule 602 permits some witnesses to testify without personal knowledge. The most significant example of testimony without personal knowledge involves expert witnesses, who routinely testify based on facts supplied to them either before or during their testimony. *See* Rule 703. Similarly, out-of-court admissions of party opponents (generally offered through the testimony of in-court witnesses) are admissible in evidence, even if they were not based on the party's personal knowledge. *See* Rule 801(d)(2). These exceptions are discussed at length in Chapters 9 and 13, respectively.

Rule 602 can be viewed in conjunction with Federal Rule of Evidence 701, which describes when lay persons may offer opinions. As Rule 701 explains, a lay witness may offer opinions or inferences if the opinions "are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Thus, the personal knowledge requirement leaves some room for lay witnesses to offer opinions and inferences, but only within narrow guidelines.

#### *Example*

Peter brings suit against his neighbor, Stanley, for civil assault, trespass, and conversion. At trial, Peter calls another neighbor, Howard, to testify. The following exchange occurs on direct examination:

PLAINTIFF'S ATTORNEY: Now, Howard, what happened at 6:45 p.m. on January 4th?

A: Stanley walked across the path between his and Peter's house. He was carrying a disgusting dead animal and —

DEFENDANT'S ATTORNEY: Objection. Lack of personal knowledge, Your Honor.

JUDGE: To the bench, counsel.

PLAINTIFF'S ATTORNEY: Your Honor, Howard had seen Peter walk across that path innumerable times on prior occasions, if not this one, and was told by Elma, who always is a reliable source of information for what happens in that part of the neighborhood, that Peter walked across the path on this occasion with the dead animal.

JUDGE: I am going to sustain the objection. Even if Howard had observed Peter traverse the path many times before, he cannot opine that Peter did so on this occasion. If anyone should testify about Peter's alleged trip with the dead animal, it ought to be Elma. Instead, Howard's testimony is hearsay when he offers Elma's statement as his own. There is a preference for putting Elma on the witness stand to hear about her observations directly. Please continue with the examination. Again, the objection is sustained.

### *Problem 7-5: Robbin the Hood*

Robbin the Hood is prosecuted for bank robbery. At trial, Robbin's wife, Gayle, testifies for the defense. She states that before Robbin robbed the bank to give to the poor, he was despondent about the state of affairs in this country. The prosecution objects to this testimony, claiming that Gayle lacks personal knowledge about Robbin's state of mind. *What ruling and why?*

## **[D] Competency of Judges and Attorneys As Witnesses (Rule 605)**

Rule 605 sensibly disqualifies judges from testifying in trials over which they preside. Serious doubts about objectivity would arise if a judge were called to testify at the behest of a party. In practice, a situation in which a party seeks to have a judge testify to case-related information is unlikely to arise. If judges have personal knowledge about events giving rise to litigation they are supposed to preserve both the reality and the appearance of impartiality by recusing themselves, regardless of whether they are likely to be called as witnesses.<sup>1</sup> In the unlikely event a party does call a judge to testify, Rule 605 provides that the adversary need not object to preserve the impropriety for appeal. The automatic objection protects a party from having to directly challenge a judge's competency in open court.

The Federal Rules of Evidence do not have a rule barring attorneys from testifying in cases in which they appear as counsel. Again, the situation rarely arises because ethical rules generally bar lawyers from appearing as counsel in trial if they are likely to be called as witnesses.<sup>2</sup> However, the lack of a

<sup>1</sup> For an analysis of whether judges must disqualify themselves from presiding over cases in which they have personal knowledge of case-related regardless of whether any party intends to call the judge as a witness, see Glen Weissenberger and James Duane, *Federal Rules of Evidence: Rules, Legislative History, Commentary and Authority* 253-256 (LexisNexis Pub. Co. 2005).

<sup>2</sup> See, e.g., Rule 3.7(a) of the Model Rules of Professional Conduct. If the need for an attorney's testimony arises only after the attorney-client relationship is underway, the attorney should withdraw as counsel unless doing so would cause "substantial hardship." See *id.*

rule flatly rendering attorneys incompetent as witnesses means that judges sometimes do allow attorneys to testify to uncontested and formalistic matters. For example, a judge may allow an attorney of record to testify to efforts to locate an unavailable witness for the purposes of establishing a hearsay declarant's unavailability under Rule 804(a).

### *Problem 7-6: Anyone But You*

Judge Liz Wilber lived in a suburban neighborhood outside of Chicago. One cold Saturday morning, while she was walking her dog, Pudge, the Judge witnessed two of her neighbors engaged in a fistfight. The fight ended when one neighbor took out a knife and stabbed the other, causing a serious wound. Judge Wilber coincidentally drew the case and presided over the trial.

The defense calls Judge Wilber as a "necessary" witness.

1. Can she testify if she states from the bench that testifying will not impede her impartiality?
2. If no objection is lodged by the opposing counsel, can Judge Wilber then testify?
3. Can the bailiff, who also lives in the neighborhood, testify?
4. Can the court reporter, who is a friend of the defendant, testify as a character witness?
5. Can the defendant's best friend, who was convicted of murder twice and perjury once, testify for the defendant on a minor question of fact?
6. Suppose Judge Wilber had recessed the case for the day and was heading to her car. As she did so, she overheard a witness who had just testified say, "My testimony today really pulled the wool over their eyes; I can't believe they bought that garbage!" What should the Judge do?
7. Suppose that instead of Judge Wilber overhearing the witness, it was the opposing counsel. What should the opposing counsel do?

### *Problem 7-7: The Deal*

Enos, Nasty, and Usta are members of a radical environmental group that allegedly fire-bombed the office of the Sierra Club, killing two people. Only Nasty and Usta are charged with the bombing. Enos is called to testify for the prosecution. The defense counsel believes that Enos had been offered a deal by the prosecution in exchange for his testimony, but that he would refuse to acknowledge such a deal at trial. The defense counsel wants to call in rebuttal the assistant prosecutor who negotiated with Enos. *Can the assistant prosecutor be asked to testify? See United States v. Newman, 476 F.2d 733 (3d Cir. 1973).*

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*Practice Tip: Competency to testify — why attorneys use investigators:* Often, lawyers interview the witnesses in a case either formally, in depositions, or informally. When lawyers cross-examine the opposing witnesses after such interviews, they are "locked in" to their stories based on the interviews.

Sometimes, the witnesses deny having made the prior statements, especially those made during the informal interviews. This situation could create a significant dilemma. Counsel is not about to testify in order to extrinsically impeach the witness, but still does not want to let the witness' credibility remain whole. The answer lies in the use of investigators. If an investigator had been employed, the investigator could be called to testify about what was said, consequently impeaching the witness and letting the attorney play the sole role at trial for which she prepared — lawyer, not witness.

### **[E] Competency of Jurors As Witnesses (Rule 606)**

Rule 606(a) closely resembles Rule 605, in that it bans jurors from testifying in cases where they are sitting as jurors. The primary difference, should the unlikely scenario of a juror being called as a witness occur, is that an adversary has to object to preserve the point for appeal. The rule allows the adverse party to object out of the jury's presence, reducing the risk that the objection will prejudice the remaining jurors. A mistrial likely would result should a party seek to call a juror to testify. Removing the juror from the jury and continuing with the trial in front of the remaining jurors (perhaps with the addition of an alternate) is unlikely to be a satisfactory solution, since the ability of the remaining jurors to evaluate the credibility of their ex-colleague's impartially would be in question.

It might be unimaginable that judges and jurors would testify in actions in which they are professionally involved. However, Rules 605 and 606(a) are at the polar extreme from trial procedures as they initially evolved in England. Hundreds of years ago, judges and jurors had first hand knowledge of the parties and their disputes. Rather than listening to evidence, they reviewed what they knew and rendered judgments accordingly. Implicit in Rules 605 and 606(a), by contrast, is the policy that judges and jurors should not be personally acquainted with parties or their disputes.

Unlike Rules 605 and 606(a), Rule 606(b) applies to scenarios that arise often. After a verdict is rendered and a jury is discharged, the losing party may talk to jurors and uncover deliberative improprieties the party thinks justifies setting aside the verdict. There are numerous possible improprieties. A party may find out that, despite an out of court statement being admitted only for a limited, non-hearsay purpose, the jurors in fact violated the hearsay rule by using it for its truth. Similarly, jurors might have used evidence admitted for a non-character use as evidence that a defendant was a bad person and therefore deserved to be convicted despite doubts over whether the defendant committed the charged crime. Perhaps the jurors speculated about inadmissible evidence or agreed they had no idea what the phrase "malice aforethought" meant, but were too embarrassed to ask the judge for clarification. Also, some jurors might have changed their votes because they wanted to conclude the deliberations quickly.

Rule 606(b)'s response to such problems is consistent with the aphorism widely attributed to Otto Von Bismarck, "If you like laws and sausages, you should never watch either one being made." That is, while such happenings hardly symbolize the jury system's finest moments, the rule keeps the

deliberations largely hidden from view by forbidding jurors from testifying about them: "Upon an inquiry into the validity of a verdict . . . a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict. . . or concerning the juror's mental processes in connection therewith . . . ." Rule 606(b) rests in part on a judgment that perfection in the trial process is impossible to achieve and the need for finality means that improprieties in the jury process generally must be tolerated. In addition, underlying Rule 606(b) is a fear that a general policy admitting evidence about jury deliberations would chill jurors' abilities to speak openly and would encourage losing parties to hound jurors who suffered from "buyer's remorse" into describing improprieties that might not have occurred.

### *Example 1*

Tanner was convicted of mail fraud. Following his conviction, in an effort to obtain a new trial, Tanner submitted affidavits from two of the jurors describing events that had taken place during the trial and the deliberations. The affidavits claimed that a number of the jurors smoked marijuana regularly during the trial and others had snorted cocaine. In addition, one juror sold marijuana to another during the trial and a number of jurors fell asleep. Further, jurors consumed beer and wine during lunch breaks and at recesses. Despite these apparent events, the United States Supreme Court still upheld the verdict, concluding that Rule 606(b) barred the use of the affidavits. See *Tanner v. United States*, 483 U.S. 107 (1987).

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Rule 606(b) does not turn a completely blind eye to jury improprieties. The rule's exceptions permit jurors to "testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." Even if a judge considers such evidence, jurors are nevertheless not allowed to testify to the impact of the improper influence on their reasoning processes. Rather, a judge decides what the impact would have been on a "reasonable juror," and either upholds a verdict or sets it aside accordingly.

### *Example 2*

Assume that a juror in *Tanner* had submitted an affidavit stating that while the bailiff was escorting the jurors to lunch, the bailiff had told the juror, "This wasn't allowed in evidence, but you all should know that Tanner is a really bad guy. He has a string of convictions for mail fraud a mile long." The juror's affidavit also states that "I never would have voted to convict Tanner if the bailiff hadn't said that." The judge can consider the juror's affidavit when deciding whether the bailiff's statement was sufficiently prejudicial to justify setting aside the guilty verdict. However, the juror's assertion as to the effect of the impropriety on the juror's vote is inadmissible.

Rule 606(b) governs inquiries “into the validity of a verdict.” Often, serious problems in the jury process become evident prior to the time a jury arrives at a verdict. Rule 606(b) does not bar jurors from testifying to improprieties that arise prior to the time of verdict.

### *Problem 7-8: At the Movies*

In the film *12 Angry Men*,<sup>3</sup> jurors debate whether a young Puerto Rican defendant is guilty of stabbing his father to death with a knife. During the deliberations, the following incidents take place:

1. The prosecution claims that the knife found lying next to the victim and owned by the defendant was an extremely unusual one. During the deliberations, Juror # 8 counters the prosecutor’s claim by producing an almost exact replica of the knife. Juror # 8 tells the other jurors that he bought it the night before in a shop while walking in the defendant’s neighborhood.

2. An elderly prosecution witness who walks with a limp testified that he lives directly underneath the victim’s apartment. On the night of the victim’s death, the witness heard a violent argument coming from the victim’s apartment and heard the door slam and someone run out of the apartment. The witness walked from his bedroom to his front door, in time to see the defendant run past. In the jury room in front of all the jurors, Juror # 8 conducts an experiment in which he walks with a limp over the distance from the witness’ apartment to his front door. The experiment suggests that the witness could not have gotten to his front door in time to see the defendant run past.

3. Juror # 10 argues that the defendant is guilty because “we all know that these kind of people are violent and that human life doesn’t mean the same to them as it does to us,” the jurors.

*Following the verdict, which, if any, of these incidents would jurors be competent to testify to under Rule 606(b)?*

### *Problem 7-9: Stop the Reading!*

1. Maryann Twonnette is on trial for murder. While the jury is deliberating, a group of jurors seeks to inform the judge that one of the jurors refuses to deliberate. Instead, the juror continuously sits in a corner and reads a book, and tells the other jurors to “tell me when you’re done deliberating, then I’ll vote not guilty and we can get out of here.”

*Can the judge consider this information? If so, how, if at all, might the judge be able to respond?*

2. The jury convicts Maryann Twonnette of first degree murder. One of the jurors later informs Twonnette’s attorney that during the deliberations, another juror had violated the judge’s order to ignore media reports about the case by bringing into the jury room a newspaper article detailing Twonnette’s

<sup>3</sup> United Artists (1957).

lengthy prior criminal history. Some, but not all, of the information in the article had been introduced into evidence at trial. The juror also tells the defense attorney that a few of the jurors changed their votes from "not guilty" to "guilty" after reading the article. The defense attorney submits a motion for a new trial, attaching as exhibits the newspaper article and an affidavit from the juror swearing to the above information.

*What if any of this information can the judge consider in ruling on the motion for a new trial?*

### **[F] Order of Witness Testimony and Common Objections**

Witness examination usually unfolds in a ritualistic ordering. The proponent of the witness first calls the witness to testify on direct examination. After direct examination, the opposing party has the opportunity to conduct cross-examination. Rule 611(b) provides that cross-examination "should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness." Following the cross-examination, the proponent may conduct a redirect examination. As its name implies, a "redirect" examination is a variant of direct and is governed by rules similar to the initial direct examination, particularly with respect to the rule prohibiting leading questions. Redirect examination allows a rebuttal or exploration of points raised on cross-examination.

A wide variety of objections can be raised concerning a witness' testimony, particularly objections to the form of the examiners' questions. Some of the more common objections, and brief definitions of those objections, are offered below:

1. **Leading questions:** questions that suggest an answer. Questions calling for a yes or no response are often leading. Primary examples of leading questions are questions beginning with words such as Was, Were, Did, Does, Have, or Had.
2. **Asked and answered questions:** questions that have already been asked of the witness and answered.
3. **Compound questions:** questions that actually incorporate two or more questions in a single sentence.
4. **Questions assuming facts not in evidence:** questions that assume the existence of facts not yet testified to by a witness or otherwise introduced into evidence.
5. **Argumentative questions:** questions that are phrased in such a way they merely engage the witness in improper argument.
6. **Questions calling for speculation:** questions asking for information beyond the witness' personal knowledge or questions asking the witness to provide an inadmissible opinion. See Rule 701 and Chapter 8. In such cases, the witness has either no knowledge or insufficient information about the subject matter of the testimony.
7. **Non-responsive answers:** answers by witnesses that do not respond to the examiner's question.

8. Narrative answers: answers by witnesses that exceed the scope of the questions put to them. A party may object to a question that would result in an objectionable answer; in that case, the objection would be phrased as "Calls for a Narrative Answer."

## [G] Witness Strategy

### [1] General Principles

An attorney may follow various strategies with witness testimony, particularly when it is recognized that effective testimony "paints a picture," or "tells a story," and that there are many ways to paint a single picture or tell a story. Trial practice strategies include the tone of voice attorneys adopt with witnesses, where attorneys stand when examining witnesses, in which direction attorneys face or how they frame particular questions. Much of what a jury receives from testimony lies in the nonverbal subtext and not in the words themselves. Some attorneys hire jury consultants, who assist with jury selection or suggest how to approach the witnesses at trial in the most persuasive manner.

One strategy commonly followed by trial lawyers is embodied in Rule 615. This rule permits attorneys (or the judge, *sua sponte*) to request that prospective witnesses be excluded from the courtroom when other witnesses are testifying. This rule is commonly known among trial attorneys as "the rule on witnesses." Attorneys sometimes use verbal shorthand, asking the judge "to invoke the rule." Despite invocation of the rule, certain witnesses must be permitted to remain in the courtroom: the parties; certain experts; and persons whose presence might be authorized by statute, such as the victims of crimes.

### [2] Direct Examination

The function of direct examination is to elicit information that is relevant to the cause of action, claim, or defense. The testimony of a witness on direct examination can be viewed as consisting of three parts: background; scene; and action. The "background" component establishes the witness as a three-dimensional person and not merely as a blank conduit of information. Juries and judges can identify more with a whole person than with an empty name with nothing behind it. The background also helps lay a foundation of authenticity (a showing that this witness is who she says she is) and of credibility (that this witness is believable). Common background questions address the witness' age, employment, education, and family status.

The "scene" component of testimony is usually the locus or place in which the action occurs. If the case is a prosecution for bank robbery, the scene is the bank. If the case is a domestic family dispute, the scene is the family house. The scene component, while very important, often is given short shrift. Many attorneys jump right into the action part of the testimony instead.

The "action" component is usually the focal point of the testimony and is readily identifiable. In a bank robbery, the action is the robbery itself. In a family dispute, the action is the actual dispute.

The prohibition against leading questions on direct examination has several rationales. One reason for the rule is to allow the jury to hear the testimony directly from the witness and not from the attorney. If leading questions were permitted, an attorney could present the entire factual story through leading questions, with the witness serving as nothing more than a stage prop. A second reason is that witnesses are considered to be aligned with the party who called them to the witness stand, and, consequently, there is no need for the attorney to lead the witness through the testimony.

The assumption about witness alignment, however, is not always accurate. Sometimes a party must call a hostile witness, i.e., a person who is biased in favor of the opposing side or is otherwise aligned with an opposing party. For example, an eyewitness with important information may be a family member or neighbor of the opposing party. If the witness is considered to be hostile to the examiner, the examiner may seek the judge's permission to ask leading questions on direct examination or, simply, "to lead the witness."

The rule prohibiting the use of leading questions on direct examination is subject to several exceptions in addition to the one for hostile witnesses. The usual non-leading questions may be inappropriate with a witness who is aged, infirm, or a child. Thus, Rule 611(c) provides that leading questions are allowed on direct if the court decides they are necessary to develop the witness' testimony.

### *Example*

PROSECUTOR: (on direct examination) Wally, where do you live?

DEFENSE COUNSEL: Objection! Leading.

JUDGE: Objection overruled.

[The judge most likely ruled in this manner because the question was not leading. Like most "where," "why," "when," or "how" questions, this question does not suggest an answer. Further, the question properly elicits background information.]

A: I live on the corner of 4th and Overland Street.

PROSECUTOR: What happened on July 10th, at 7:00 p.m.?

A: I saw Johnny B. Badd shoot and kill Louie Ratatooie.

PROSECUTOR: Did Johnny shoot Louie with a revolver?

DEFENSE COUNSEL: Objection. Leading.

JUDGE: Objection sustained.

[The judge concluded that the question suggests an answer — that Johnny shot Louie with a revolver. There is no reason to lead the witness during this portion of the direct examination pursuant to Federal Rules of Evidence 611.]

PROSECUTOR: So Johnny shot Louie dead? And after the shooting, in which direction did Johnny drive away and where did he hide the gun?

DEFENSE COUNSEL: Objection on three grounds, Your Honor, asked and answered, compound question, and assuming facts not in evidence.

[If the judge permits an explanation, probably at a sidebar, the defense counsel might elaborate as follows. "First, the question of whether Johnny shot Louie dead has been asked and answered. Second, the question asked by the prosecutor about the events after the shooting is objectionable because it is really two separate questions posed in compound form. The witness was asked where did Johnny drive and where did Johnny hide the gun. Finally, the question is objectionable because it assumes facts not in evidence — that Johnny drove away (he may have walked, taken a boat, or even remained at the scene) and that he hid the gun (he may not have hidden it at all)."]

*Problem 7-10: Returning to Form Objections*

Plaintiff sues Defendant for breach of contract. Plaintiff is questioned at trial on direct examination.

PLAINTIFF'S ATTORNEY: Would you state your name for the record?

A: Alfreida Cohen.

PLAINTIFF'S ATTORNEY: You live in San Francisco, right?

DEFENDANT'S ATTORNEY: Objection! (*On what grounds?*)

JUDGE: (*How should the judge rule? Why?*)

LEAVE BY — P A QUE

PLAINTIFF'S ATTORNEY: Do you live in San Francisco, or somewhere else?

DEFENDANT'S ATTORNEY: Objection! (*On what grounds?*)

COME IN  
JUDGE

JUDGE: (*How should the judge rule? Why?*)

PLAINTIFF'S ATTORNEY: Where were you on the night of June 1st, at 9:00 p.m.?

DEFENDANT'S ATTORNEY: Objection! (*On what grounds?*)

JUDGE: (*How should the judge rule? Why?*)

A: I was at the Burger King, having a candlelight dinner.

PLAINTIFF'S ATTORNEY: What did you see and hear at that time?

DEFENDANT'S ATTORNEY: Objection! (*On what grounds?*)

JUDGE: (*How should the judge rule? Why?*)

A: I saw the defendant selling goods to my competitor.

PLAINTIFF'S ATTORNEY: So you saw the defendant selling goods to someone else?

DEFENDANT'S ATTORNEY: Objection! (*On what grounds?*)

JUDGE: (*How should the judge rule? Why?*)

PLAINTIFF'S ATTORNEY: After you saw the defendant with your competitor, what happened next?

A: They left and I went to my office. Later that week I saw the defendant's sister. Now she's in business with the defendant and —

DEFENDANT'S ATTORNEY: Objection! (*On what grounds?*)

JUDGE: (*How should the judge rule? Why?*)

*Problem 7-11: More Form*

At a trial in a civil conversion case, the plaintiff testifies on direct examination as follows:

PLAINTIFF'S ATTORNEY: When you saw the defendant walk by your house at 3:30 p.m., on July 5th, what did you do? — D

DEFENDANT'S ATTORNEY: Objection! (*On what grounds?*)

JUDGE: (*How should the judge rule? Why?*)

PLAINTIFF'S ATTORNEY: What happened at 3:30 p.m. on July 5th? — D

DEFENDANT'S ATTORNEY: Objection! (*On what grounds?*)

JUDGE: (*How should the judge rule? Why?*)

PLAINTIFF'S ATTORNEY: Did the defendant have anything in his hands when, as you say, he walked by your house at 3:30 p.m.?

DEFENDANT'S ATTORNEY: Objection! (*On what grounds?*)

JUDGE: (*How should the judge rule? Why?*)

A: Yes, he held what appeared to be a glass statue.

PLAINTIFF'S ATTORNEY: Do you think the defendant looked suspicious or shifty?

DEFENDANT'S ATTORNEY: Objection! (*On what grounds?*)

JUDGE: (*How should the judge rule? Why?*)

A: (if objection overruled) Yes, definitely.

PLAINTIFF'S ATTORNEY: So where were you when you saw the defendant?

A: At first, I was still in front of my house. Then I went inside to telephone the police. I was steaming! By 4:00 p.m., the police came and I had calmed down some. It took until 5:00 p.m. before I was fully relaxed. I did drink a beer at 4:50 p.m., but then I was itching to —

DEFENDANT'S ATTORNEY: Objection! (*On what grounds?*)

JUDGE: (*How should the judge rule? Why?*)

**[3] Cross-Examination**

Cross-examination is the part of the trial approached by some attorneys with unrestrained exuberance. Novices, in particular, often labor under the mistaken belief that a good cross-examination always crushes a witness into tiny pieces. Nothing could be further from the truth. Cross-examination of a witness should depend on what can be achieved in the context of the case. The witness might have helpful information as well as hurtful evidence, and even the hurtful information may not hurt that much. Belligerent cross-examination of an unimportant witness, especially one who happens to be 90 elderly, can be much more harmful to the case than not cross-examining the witness at all.

Leading questions are permitted on cross-examination, and most cross-examinations are filled almost entirely with them. In fact, leading questions are the preferred type. When a cross-examiner uses a series of well-framed

leading questions, it almost seems as if the attorney is testifying, and not the witness.

It is an oft-stated maxim that examiners should not ask a question to which they do not know the answer. A question such as, "Why did you do that?" invites a new and possibly harmful response by the witness, one that could surprise the examiner and greatly damage the case. For example, the question, "So if you did not observe the defendant stab the victim, how can you testify he did it?" could result in the extremely unfortunate answer, "I saw the videotape of the knifing" or "I saw everything up to the point of impact." In addition, a non-leading question permits the witness to explain, bolster, or augment the testimony previously given on direct examination.

Arguing with witnesses about major points of the witness' testimony is usually a vain attempt to get the witness to recant what the witness stated on direct examination. Instead, it is more useful to make smaller points, especially those about which the attorney already knows the answer. The attorney can argue the salient central questions (such as guilt or liability), using inferences and logic in the closing argument to the jury. It is the rare case, indeed, where a witness collapses on the stand with bowed head, saying "Yes, you're right. I will finally, after all of these years, admit I did it. I am the culprit who committed the evil deed!"

### Example

An eyewitness to an automobile accident, Lucy Lubner, has testified on direct examination about how the accident occurred. She is now on cross-examination. This cross-examination suggests inferences that can be argued and aggregated for the jury during closing argument.

DEFENDANT'S ATTORNEY: Now, Lucy, you say the accident occurred at approximately 5:00 p.m.?

A: Yes, about that time.

DEFENDANT'S ATTORNEY: You were on your way home after working a six-hour shift in the town mill?

A: Yes, I work from 10:00 a.m. to 5:00 p.m. on Fridays.

DEFENDANT'S ATTORNEY: Is it fair to say that your work requires you to stand over a moving machine for most of the day?

A: Yes, that's right.

DEFENDANT'S ATTORNEY: While you are standing over that machine, you are also operating it, right?

A: Yes.

DEFENDANT'S ATTORNEY: Now this accident occurred on December 18th, true?

A: Yes.

DEFENDANT'S ATTORNEY: The sun was setting at that time, right?

A: Yes.

DEFENDANT'S ATTORNEY: Some of the cars around you had their headlights on.

A: Yes.

*Problem 7-12: Scope*

Bam was employed as a truck-driver for a mouthwash company. After detouring from his usual delivery route to visit his friend, Barney, Bam was involved in an accident with a pedestrian, Fred. Fred sued Bam and Bam's employer. The only issue at trial was whether Bam was acting outside of the scope of his employment at the time of the accident. At trial, Bam was called to testify by the plaintiff, Fred. Bam was asked only four questions that elicited whether he was working at the time of the accident. On cross-examination, Bam was asked several additional questions:

DEFENDANT'S ATTORNEY: Bam, were you distracted at the time of the crash by your friend, Pebbles, yelling at you from the sidewalk?

PLAINTIFF'S ATTORNEY: Objection! (*On what grounds?*)

JUDGE: (*How should the judge rule? Why?*)

DEFENDANT'S ATTORNEY: Had you been drinking any alcoholic beverages immediately prior to the crash?

PLAINTIFF'S ATTORNEY: Objection! (*On what grounds?*)

JUDGE: (*How should the judge rule? Why?*)

DEFENDANT'S ATTORNEY: Describe what you saw immediately after the crash occurred.

PLAINTIFF'S ATTORNEY: Objection! (*On what grounds?*)

JUDGE: (*How should the judge rule? Why?*)

*Problem 7-13: Succa Mucca Rucca . . .*

Arsenic, a prominent local banker, sues Lacey, the mayor of the town, for slander. Lacey called Arsenic a "succa mucca rucca cheat whose business deals are all criminal in nature." At trial, plaintiff Arsenic calls his business partner, Sharon, to testify. Sharon testifies that Arsenic is an honest businessman whose truthfulness, in her opinion, is beyond reproach. Sharon is asked the following questions on cross-examination:

DEFENDANT'S ATTORNEY: Sharon, didn't Arsenic take 20 legal pads owned by the bank for his own personal use two years ago?

PLAINTIFF'S ATTORNEY: Objection! The question is irrelevant.

JUDGE: (*How should the judge rule? Why?*)

DEFENDANT'S ATTORNEY: Sharon, is it true that you cheated on your civil service examination last year?

PLAINTIFF'S ATTORNEY: Objection! The question is beyond the scope of the direct examination, your honor.

JUDGE: (*How should the judge rule? Why?*)

## § 7.04 IMPEACHMENT OF WITNESSES

### [A] Introduction

“To impeach a witness” means to attack the witness’ credibility or believability. A witness’ credibility may be undermined by showing that the testimony is either untrue or inaccurate. Even a well-intentioned witness may have low credibility, if only because the person needs eyeglasses or has a poor memory. Thus, impeachment is not simply about whether a witness is lying or deceitful. An examiner generally impeaches a witness to undermine the weight that will be accorded the witness’ testimony by the trier of fact. It bears emphasizing that the impeachment of a witness can be viewed almost as a trial within a trial, since it is distinct from the admissibility of the witness’ initial evidence.

The modern trend is to allow the impeachment of a witness either on direct or cross-examination. *See* Rule 607. Under the common-law “voucher rule,” parties were presumed to vouch for the credibility of their own witnesses. Consequently, parties were forbidden to impeach their own witnesses unless the witnesses were shown to be hostile or adverse.

The Federal Rules of Evidence and the evidence codes of many states have abandoned the voucher limitation. The modern rules recognize that parties often do not have a real choice in selecting their own witnesses. Consequently, parties should be able to impeach those witnesses when appropriate. Further, parties may seek to impeach their own witness for strategic purposes. The proponent of the witness may wish to “lessen the sting” or “soften the blow” of harmful impeachment evidence by offering the evidence on direct examination. The disclosure makes it appear that the party has not attempted to hide damaging testimony.

Two of the primary considerations in understanding the impeachment rules are the type of impeachment, e.g., proof of bias or prior convictions, and whether the impeaching evidence is considered *intrinsic* or *extrinsic*. The significance of the intrinsic-extrinsic distinction is discussed in [C] below.

### [B] Types of Impeachment

#### [1] Common Types of Impeachment

Most types of impeachment are implicitly accepted by tradition and case law, rather than expressly described in the Federal Rules of Evidence. Types of impeachment commonly employed at trial include the following:

- Contradiction (*see* [2], *below*).
- Bias (*see* [3], *below*).
- Criminal convictions (*see* [4], *below*).
- Prior untruthful (bad) acts (*see* [5], *below*).
- Testimonial capacities (*see* [6], *below*).
- Prior inconsistent statements (*see* [7], *below*).
- Poor character for truthfulness (*see* [C], *below*).

*Example*

The witness, Amy Sue, testified on direct examination that she observed the defendant rob the Charley's Chicken restaurant on 9th Street and escape through the side door. The following occurred on cross-examination of Amy Sue.

*This is an example of impeachment by contradiction:*

DEFENSE COUNSEL: Now, Amy Sue, the Charley's Chicken restaurant that was robbed is actually located at 3200 S.W. 9th Street, not 3400 S.W. 9th Street, as you just testified, right?

A: Actually, you're correct, come to think of it.

*This is an example of impeachment by showing bias:*

DEFENSE COUNSEL: Amy Sue, you hate people who are charged with violent crime, isn't that right?

A: Well, that's true, but this defendant is the person who I saw rob Charley's.

*This is an example of impeachment by prior, untruthful acts:*

DEFENSE COUNSEL: Please just answer the question asked. Last March, you committed mail fraud against the United States Postal Service, did you not?

A: So? What about it?

*This is an example of impeachment by prior felony conviction:*

DEFENSE COUNSEL: You were convicted nine years ago of attempted murder, right?

A: Yes, but that so-called conviction was a colossal mistake. I was framed!

*This is an example of impeachment by showing defects in the witness' testimonial capacities:*

DEFENSE COUNSEL: You were not wearing your prescription eyeglasses at the time you say you observed the alleged robber, were you?

A: No, I was not wearing my glasses.

*This is an example of impeachment by prior inconsistent statement:*

DEFENSE COUNSEL: So it is your testimony here in court that the robber was about 5 feet, 10 inches tall and had brown hair?

A: Yes.

DEFENSE COUNSEL: Didn't you say to your mother after the incident that "the robber was about six feet two and had blonde hair"?

A: Yes, I did say that to my mother.

[Note: Most attorneys probably would not be able to squeeze in all six forms of intrinsic impeachment with a single witness unless the witness is Atilla the Hun or otherwise thoroughly discreditable.]

*Problem 7-14: Cross My Heart: An Overview*

Jim Stone is sued by his neighbor for the conversion of his neighbor's very expensive Cannondale bicycle, which disappeared at around 11:45 a.m. At

trial, Jim testifies on his own behalf, claiming misidentification. Jim offered an alibi. He asserted that he was at work several miles away from 9:00 a.m. to noon, including the time when the alleged theft occurred. On direct examination, Jim stated, "If someone took that fancy bicycle of yours, I'm really sorry. But I can tell you this, I was at work several miles away from 9:00 a.m. until noon on that day." On cross-examination, Jim is questioned as follows:

PLAINTIFF'S ATTORNEY: Isn't it true that on the day in question, you worked in the morning from 8:00 a.m. to 11:25 a.m., and not to 11:45 a.m. as you just testified?

DEFENDANT'S ATTORNEY: Objection! Irrelevant!

JUDGE: (How should the judge rule? Why?) *CONTRADICTION*

PLAINTIFF'S ATTORNEY: Are you going to lose your job if you are found liable in this case?

DEFENDANT'S ATTORNEY: Objection! On what grounds? What type of impeachment is occurring? Explain.

JUDGE: (How should the judge rule? Why?) *BIAS; SELF-INTEREST*

PLAINTIFF'S ATTORNEY: Weren't you convicted of a felony, the distribution of marijuana, three years ago?

DEFENDANT'S ATTORNEY: Objection! On what grounds? What type of impeachment is occurring? Explain.

JUDGE: (How should the judge rule? Why?) *CRIMINAL CONVICTION*

PLAINTIFF'S ATTORNEY: You cheated on your Law School Admission Test last year, didn't you?

DEFENDANT'S ATTORNEY: Objection! On what grounds? What type of impeachment is occurring? Explain.

JUDGE: (How should the judge rule? Why?) *PERJURY UNTRUTHFUL  
BAD ACTS*

PLAINTIFF'S ATTORNEY: You have intermittent amnesia, Mr. Stone, don't you?

DEFENDANT'S ATTORNEY: Objection! On what grounds? What type of impeachment is occurring? Explain.

JUDGE: (How should the judge rule? Why?)

PLAINTIFF'S ATTORNEY: Didn't you say in your deposition of June 5th that you drove to work via the Parkway, not U.S. 1, as you just testified?

DEFENDANT'S ATTORNEY: Objection! On what grounds? What type of impeachment is occurring? Explain.

JUDGE: (How should the judge rule? Why?)

## [2] Contradiction

Contradiction occurs when the examining attorney disputes the witness' testimony about a fact (e.g., "Ms. Witness, you said on direct examination that the house at Greentree Place has no garage, when in fact it has a two-car garage, isn't that right?"). On cross-examination, a witness may be impeached

*FIRST  
FOUL  
RESPONSE*

by contradiction concerning facts that need not be dispositive or even important to the outcome of the case. The theory of impeachment by contradiction is that if a witness is inaccurate about one fact, she is more likely to be inaccurate about other facts as well. If the witness denies the asserted contradicting facts, however, the cross-examiner may not be allowed to prove them by extrinsic evidence (see [C], *below*).

### *Problem 7-15: Cross.com*

Carolyn testified in a commercial litigation action. *Which of the following questions are permissible during the cross-examination of Carolyn? Explain.*

1. "You used your personal computer to make notes of the meeting with the opposing party only two days after the meeting occurred, not immediately thereafter as you testified on direct examination, isn't that right?"
2. "You have a Macintosh computer, not a Dell as you just testified on direct, isn't that correct?"
3. "You left your office last Wednesday at 5:30 p.m., not 7:30 p.m. as you testified on direct examination, right?"
4. "Your boss, Ms. Sanders, was wrong when she testified that she deposited the March proceeds on March 4th, wasn't she?"
5. "Isn't it true that you are one big liar?"

### [3] Bias

Bias is a form of impeachment in which a witness is shown (usually on cross-examination or through extrinsic evidence) to be influenced, prejudiced, or predisposed toward or against a party. Bias may exist because the witness is hostile, interested in the outcome, or otherwise non-neutral (e.g., "Mr. Witness, is it true that you owe the plaintiff money; that you hate the plaintiff because he's now married to your ex-wife; and that you were promised a job by the plaintiff's brother if the plaintiff wins this case?").

### *Problem 7-16: The Right Direct-ION*

Shawn is prosecuted for allegedly battering Bobbi on a Colorado ski slope. The only eyewitness is Shawn's sister, Tya. The prosecutor calls Tya as a witness. On direct examination, the prosecutor questions Tya.

PROSECUTOR: Tya, you are the sister of the defendant, Shawn, correct?

DEFENSE COUNSEL: Objection. The question is leading and therefore improper.

JUDGE: (*How should the judge rule? Why?*) *If this is proper impeachment, can it occur on direct examination? Why?*

PROSECUTOR: Tya, are you currently facing a criminal charge of attempted murder?

DEFENSE COUNSEL: Objection. This question is improper impeachment on several grounds. *What are the grounds for this objection?*

JUDGE: (*How should the judge rule? Why?*)

PROSECUTOR: Have any deals been made in return for your testimony?

DEFENSE COUNSEL: Objection! *What are the grounds for this objection?*

JUDGE: (*How should the judge rule? Why?*)

### *Problem 7-17: Just Friends*

The defendant, Alexander, is charged with the unlawful possession of a firearm by a felon. At trial, the defendant's friend, Preston, testifies for the defense. Preston states that the gun in question, found on the ground near Alexander, was really Preston's. On cross-examination, the prosecutor asks Preston whether he and Alexander are both members of the same gang, "Red 'N Blue Violins."

*Admissible? Explain.*

### *Problem 7-18: Losing Religion*

Shawana is prosecuted for the distribution of cocaine. Father O'Malley testifies for the prosecution as an eyewitness to the crime. On cross-examination he is asked by defense counsel, "Father, isn't it true that Shawana was at one time a member of the church where you are the priest, but she quit the church after having an argument with you?"

*Admissible? Explain.*

## **[4] Convictions of Crime**

The underlying theory of impeachment by conviction is that a witness who has been convicted of certain types of crime is less believable. According to Federal Rule of Evidence 609, two types of crimes affect a witness' credibility and can be used to impeach: (1) crimes of dishonesty or false statement (i.e., those involving deception or fraud), regardless of the potential length of incarceration; and (2) felonies, those crimes punishable by more than one year in prison. Other crimes, such as misdemeanor crimes of violence or drug possession, are not permitted to impeach. Likewise, Rule 609 generally excludes juvenile adjudications and "stale" convictions. Convictions are stale if more than 10 years have elapsed since the date of the conviction or of the witness' release from incarceration, whichever is later. Under Rule 609, for example, a witness could not be impeached with an 11-year-old felony conviction for which the sentence was probation and a fine.

### **[a] Crimes of Dishonesty or False Statement**

What qualifies as a crime of "dishonesty or false statement" is not always clear. In *United States v. Brackeen*, 969 F.2d 827 (9th Cir. 1992) (per curiam), for example, the defendant was indicted on one count of aiding and abetting an armed bank robbery and two counts of unarmed robbery. The defendant pled guilty to both counts of unarmed robbery and was tried and convicted of aiding and abetting the armed bank robbery. At the trial of the aiding and abetting charge, the court permitted the defendant to be impeached with the

robbery convictions under Federal Rule of Evidence 609(a)(2), as crimes of dishonesty or false statement. On appeal, the Ninth Circuit, *en banc*, reversed. The court held that the unarmed robberies were not crimes of dishonesty or false statement for purposes of Rule 609. The phrase "dishonesty or false statement" could have been intended to refer either to crimes broadly evidencing a lack of integrity or those more narrowly indicating a breach of trust, such as deceit or fraud. The Court chose the narrower construction, stating that Congress, in enacting the rules, intended the narrower view. The phrase is limited to crimes that are "crimen falsi," i.e., crimes that are bad in and of themselves and have some relationship to deceit and lying. It does not include "those crimes which, bad though they are, do not carry with them a tinge of falsification." *Id.* at 830 - 831. The Court proceeded to cite with approval similar constructions from other circuits.

### [b] Felony Convictions

Prior felony convictions are not automatically permitted for the purpose of impeaching a witness. Rule 609 was modified in 1990 to provide that the use of felony convictions first must satisfy the unfair prejudice test of Rule 403 for all witnesses, with the exception of a testifying criminal defendant, when a special balancing test is used. The exclusion of some felonies reflects the belief that a felony conviction is less likely to bear on a witness' truthfulness than a crime of dishonesty or false statement. (For the situation that preceded the rule change, see *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 109 S. Ct. 1918, 104 L. Ed. 2d 557 (1989)). Rule 609 provides greater protection to criminal defendants who choose to testify on their own behalf. The rationale for this special treatment is to prevent felony convictions offered to impeach the accused from being used by the trier of fact as substantive evidence of guilt. Under a special balancing test, felony convictions will be permitted to impeach the testifying accused only if their probative value outweighs the prejudicial effect to the accused. This balancing test reverses Rule 403's built-in presumption in favor of admissibility and favors the accused.

Courts may consider a variety of factors in determining whether a defendant's felony conviction will be excessively prejudicial when offered as impeachment evidence. One important factor is the similarity between the impeachment felony and the crime charged. The greater the similarity, the greater the likelihood that the impeachment will be misused by the jurors as evidence that "if the defendant did it before, it is more likely the defendant did it again." (E.g., "Once a criminal, always a criminal.") Other factors include the importance of the defendant's credibility to the case, the nature and date of the impeachment crime, and the significance of the defendant's testimony to the case overall. See, e.g., *United States v. Sloman*, 909 F.2d 176, 180-181 (6th Cir. 1990).

The admissibility of a crime offered to impeach a testifying accused is not tied to the use of that crime in other ways, such as its use as an "other act" under Rule 404(b). A conviction may be used to impeach even if the underlying crime has been offered — and rejected by the trial court — as an "other act" pursuant to Rule 404. In essence, the fact that evidence is impermissible for one purpose does not mean it is impermissible for another purpose. See, e.g.,

*United States v. Haslip*, 160 F.3d 649, 653–654 (10th Cir. 1998). Of course, with evidence admitted for one purpose and not another, a limiting instruction accompanying the evidence may be appropriate. *Id.* at 655.

What constitutes a “conviction” for impeachment purposes can be perplexing, especially to a lay person. A conviction can result from a jury or court verdict, or a guilty plea. Having been indicted, arrested, or otherwise charged with a crime is insufficient to qualify as a conviction under the rules. Further, contrary to a popular misconception, a conviction is fodder for impeachment regardless of whether the accused received a sentence of incarceration, probation, or no penalty at all. A person who has been given probation and has never stepped foot in a jail cell can still have multiple felony convictions.

### [c] Impeachment on Direct Examination

Like other types of impeachment (see Rule 607), a witness’ criminal convictions may be offered on either direct or cross-examination. While the impeachment of the proponent’s own witness at first may seem counterintuitive, it is done for strategic purposes — to “lessen the sting” or “soften the blow” of the opponent’s eventual cross-examination. If a conviction is offered on direct examination, the opponent’s use of the conviction is diminished and the trier of fact is left with the inference that the proponent of the witness has nothing to hide.

If a witness denies a conviction on cross-examination, it may be proved by extrinsic evidence (see [C], *below*). For further discussion of the use of convictions for impeachment and the admissibility of “other act” evidence under Rule 404, see Chapter 5, on Character Evidence.

#### *Problem 7-19: Forgery, Fake, Fraud*

Sylvia is prosecuted for forging signatures on applications for food stamps. The prosecution, in its case-in-chief, offers a witness, Wally, who will testify that Sylvia (1) has been convicted of forgery on three prior occasions and (2) was charged with embezzlement on a fourth prior occasion.

*Are these convictions and the criminal charge admissible? Why?*

*If it had been Wally, and not Sylvia, who was convicted of forgery and charged with embezzlement, would the convictions and charge be admissible?*

#### *Problem 7-20: Medical Mal*

Mal brought suit against Dr. Sloan for failing to diagnose Mal’s prostate cancer. At trial, the plaintiff’s expert, Dr. Inos, testified. On cross-examination, the defendant wished to question the doctor about his misdemeanor conviction for willfully failing to file a federal income tax return.

*Is this impeachment permissible? See Cree v. Hatcher*, 969 F.2d 34 (3d Cir. 1992).

*May Dr. Inos be asked about a pending suspension of his medical license by the State of Iowa if he is testifying in an Arkansas federal court?*

### Problem 7-21: One Bad Apple

Johnny Apple was prosecuted for attempted murder. Johnny testified at trial and denied committing the crime charged. On cross-examination, the prosecution attempted to impeach Johnny with the following crimes. *Can any of the crimes be used to impeach Johnny? In addition, what test applies in determining whether impermissible prejudice would result?*

1. A 15-year-old conviction for attempted murder. *SAME?*
2. A seven-year-old conviction for assault, punishable by six months in jail and a fine of \$1,000. *NO!*
3. A 19-year-old juvenile adjudication for murder. *NO*
4. A 10-year-old conviction for aggravated battery, punishable by a maximum of three years in prison, for which the defendant was sentenced to two months incarceration, sentence suspended. *YES - CLEAR*
5. A six-year-old conviction for grand theft, for which the defendant was sentenced to six months incarceration. *YES - DIRECT*

#### [5] Prior Untruthful (Bad) Acts

Impeachment by prior acts under Rule 608(b) is limited to specific prior acts of the witness that reflect on the witness' capacity for truthfulness or veracity. Prior untruthful acts impeachment, as it is sometimes called, is at once distinguishable from impeachment by conviction, because no conviction is required for bad acts impeachment. In fact, the act may not have been the subject of a criminal charge at all or might even have been the subject of a criminal charge resulting in an acquittal.

The term "bad act" is, in a sense, a misnomer, since there is a limit on the type and nature of the prior acts that fall in this category. The acts that may be used for impeachment are limited to those involving truthfulness or veracity, such as fraud, obtaining property under false pretenses, or perjury. Acts of violence, such as disorderly conduct, battery, or even murder, do not constitute "bad" acts relating to truthfulness and generally cannot be used to impeach. Acts such as drug use, driving at excessive speed and filing for bankruptcy also fail to be sufficiently related to witness truthfulness to be admissible untruthful act impeachment.

Sometimes, a judge will probe beneath the surface of a crime that does not on its face appear to involve dishonesty to determine if the manner in which the crime was committed was deceitful. For example, if a larceny was directly intertwined with deceit, it might meet the requirements of Rule 608(b) impeachment. *See, e.g., United States v. Payton*, 159 F.3d 49 (2d Cir. 1998).

If impeachment by a prior act is proper, the witness may only be asked about the underlying act itself and not about an arrest, charge, indictment, suspension, or expulsion relating to the act. The witness' credibility does not hinge on the arrest, indictment, etc., but rather on commission of the act itself. Thus, it is permissible to ask, "You defrauded your insurance company, didn't you?" but not, "You were indicted for defrauding your insurance company, weren't you?"

Additionally, permissible prior acts must not be proven by extrinsic evidence. If the witness denies the act, the questioner generally must take the witness' answer without any further follow-up. Rule 608(b). Otherwise, a mini-trial would result and the jury would be distracted and misled (*see* [C], *below*).

The language of the Rules in expressing this limitation, however, needed additional clarification. Consequently, Rule 608(b) was modified in 2003 as follows, with bracketed words deleted and italicized words added:

(b) Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' [credibility] *character for truthfulness*, 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 the witness' 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 the accused's or the witness' privilege against self-incrimination when examined with respect to matters [which] *that* relate only to [credibility] *character for truthfulness*.

The rationale behind substituting the phrase, "character for truthfulness," for the word, "credibility," might not be immediately apparent. The answer lies in the fact that the term "credibility" can have broader connotations than the phrase "character for truthfulness." As the Committee Note explaining the change observes, "The rule has been amended to clarify that the absolute prohibition on extrinsic evidence applies only when the sole reason for proffering that evidence is to attack or support the witness' character for truthfulness." Advisory Committee Note to Rule 608(b). What the amendment emphasizes is that the prohibition of extrinsic evidence is limited to prior acts impeachment under Rule 608(b); other forms of impeachment are governed separately. As the Committee Note elaborates, "By limiting the application of the Rule to proof of a witness' character for truthfulness, the amendment leaves the admissibility of extrinsic evidence offered for other grounds of impeachment (such as contradiction, prior inconsistent statement, bias and mental capacity) to rules 402 and 403." (citations omitted).

### *Problem 7-22: Liar, Liar*

Janet is prosecuted for committing perjury during her testimony before the grand jury. At trial, she testifies on her own behalf and is asked the following questions on cross-examination:

PROSECUTOR: You were arrested for lying on your income tax statement last year, weren't you?

DEFENSE COUNSEL: Objection. Improper impeachment.

*Prohibited*

JUDGE: (*How should the judge rule? Why?*)

PROSECUTOR: You deceived your boss three weeks ago, didn't you, when you claimed you missed an important meeting because your train was late?

DEFENSE COUNSEL: Objection. Improper impeachment.

JUDGE: (*How should the judge rule? Why?*)

## [6] Testimonial Capacities

The term "testimonial capacities" refers to aspects of a witness' testimony that are important for accuracy: (1) perception — what the witness saw, heard, smelled, or touched at the time in question; (2) memory — the ability of the witness to recall the prior occurrence, happening, or event; (3) narration — the ability of the witness to communicate this perception and memory to others; and sometimes (4) sincerity (which is often viewed as a combination of the other three capacities) — a measurement indicating a lack of prevarication. Sincerity is distinct from accuracy, since a witness can be sincere, but still inaccurate.

Attacking a witness' testimonial capacities is accomplished by presenting intrinsic or extrinsic evidence revealing defects in any one or more of these capacities. By revealing these defects, the jury is shown the limits of a witness' ability to provide an accurate recounting of prior events. For example, many witnesses have limited and inaccurate memories, particularly with the passage of time. Additionally, the opponent is allowed to present extrinsic evidence (*see* [C], *below*) of a witness' reputation for untruthfulness, or offer a qualified witness' opinion of another witness' untruthfulness under Rule 608(a).

Defects in testimonial capacities often extend beyond common deficiencies to encompass physiological defects that result in problems of perception, memory or narration. These problems are more severe than those reflected by statements such as, "I forgot" or "I could not hear something so far away," which happen to everyone, and instead concern some physical or psychological condition, such as bad eyesight, amnesia, hearing loss or schizophrenia. Physiological defects are particularly injurious to a witness' ability to be accurate.

### *Problem 7-23: Psychotic Chips*

In a tort action for false imprisonment, Don Geo is about to testify as an eyewitness for the defense. As he takes the witness stand, he yells to the jury, "Would you like some of my fantastic psychotic chips?" referring to a bag of potato chips he is carrying. Don adds, "They're mind-altering."

1. On cross-examination, the plaintiff's attorney questions Don about two previous hospital stays for undifferentiated schizophrenia. *Are such questions permissible? Why?*

2. Don also is questioned on cross-examination about whether his psychotic chips contain any mind-altering substances. *Admissible?*

3. May Don be asked on cross-examination whether he was under the influence of alcohol or drugs at the time he observed the alleged false

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imprisonment? May he be asked whether he is currently under the influence of a mind-altering substance at the time of trial? Why?

Testimonial  
CROSS EXAM ?

### [7] Prior Inconsistent Statements

Impeachment by a prior inconsistent statement pursuant to Rule 613 is actually a specialized form of impeachment by contradiction, namely self-contradiction. Two statements by the witness are necessary for this type of impeachment. One of the statements usually occurs during the witness' testimony at trial and the second statement generally occurs prior to the testimony. The two statements must, on the whole, be inconsistent. The statements can be in the form of oral, written or assertive conduct and need not be sworn.

If the witness at trial forgets facts while testifying and says "I don't remember" in response to a question, or fails to make a certain statement at trial, there is no trial statement. If there is then only the one statement prior to trial, impeachment with that prior statement is generally forbidden. If the witness is acting in bad faith by intentionally "forgetting" the facts at trial, however, an exception is made to this requirement of two statements, and the prior statement may be used to impeach.

Federal Rule of Evidence 613 drops the common-law requirement of *The Queen's Case*, 2 Br. & B. 284, 129 Eng. Rep. 976 (1820). That case created a "fairness" rule by requiring the examining counsel to give a witness the opportunity to deny or explain the witness' own prior written statement before being impeached on it. However, Rule 613 imports its own version of fairness by requiring the contents of a prior statement to be shown or disclosed to opposing counsel on request.

#### *Example*

Jean sues Ted for allegedly breaching a commercial lease extension for Ted's Tender Chicken, a fast food restaurant located in Jean's shopping center. Ted's defense is that no extension occurred. An important issue at trial concerned a meeting at Ted's restaurant on June 24th. An eyewitness to the meeting, Sophia, testified that on the day in question at the restaurant, both Jean and Ted met, discussed the lease, appeared to agree on an extension, and signed several documents. On cross-examination, Sophia was impeached by a prior inconsistent statement.

DEFENDANT'S ATTORNEY: Now, Sophia, you have just testified on direct examination that Jean and Ted signed several documents during the meeting on the day in question?

A: That is correct.

DEFENDANT'S ATTORNEY: You discussed what happened at this meeting with me before, didn't you?

A: Yes, I believe so.

DEFENDANT'S ATTORNEY: It was during your deposition, way back in May, right?

A: Yes, I think it was in May.

DEFENDANT'S ATTORNEY: The meeting occurred only five months or so prior to the deposition, true?

A: Yes.

DEFENDANT'S ATTORNEY: At the deposition, you were under oath?

A: True.

DEFENDANT'S ATTORNEY: You swore to tell the truth?

A: Definitely. Yes.

DEFENDANT'S ATTORNEY: The whole truth and nothing but the truth?

A: Sure.

DEFENDANT'S ATTORNEY: Referring opposing counsel to the witness' deposition, page eight, line nine, I asked you during the deposition: "How many documents did Jean and Ted sign?" and you answered: "They signed only one document." Isn't that correct?

A: Yes, that is what you asked and I answered.

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### Two-Way Admissibility

Significantly, some prior inconsistent statements are admissible in two ways — for their truth as well as to impeach a witness. To determine whether this "two-way" admissibility situation exists, the nature of the prior inconsistent statement matters. As discussed further in Chapter 12, on Rule 801, if a prior inconsistent statement of a witness has certain qualifying features (e.g., it was made under oath in a prior proceeding, like those in a deposition), it will be admitted not only for its impeachment value, but also for the truth of the matter asserted. This means that in the example above, if the deposition statement by the witness, Sophia, qualifies under Rule 801, it can be considered by the jury not only for the effect of the apparent inconsistency on Sophia's believability, but also for the truth of the matter asserted — what was actually signed at the meeting and by whom.

Special significance also accrues to prior statements of testifying parties offered against them. These statements may qualify as admissions of a party opponent under Rule 801(d)(2) and would be admitted for their truth as well as for impeachment purposes.

Sometimes, a witness confronted with a prior inconsistent statement denies making the statement, even if the statement was taken down by a court reporter as part of a deposition. If this occurs, the witness may be impeached by extrinsic evidence of the statement (such as a writing or a witness) but only if the inconsistency is about a matter at issue in the case (*see* [C], *below*). If extrinsic impeachment is permitted, a foundation must be laid for the extrinsic evidence. To promote efficiency, it is worth attempting to use the witness to be impeached to help lay the foundation. If a new witness is required, and the witness to be impeached may be needed at a later time, it is important not to excuse the witness, but rather to explain to the court the intended additional use of the witness.

*Problem 7-24: Yeah, Right*

Ted, the primary witness for the defense in a tort action, states on direct examination that he was not aware that a lawsuit had been filed until four days prior to trial. On cross-examination, Ted is asked whether he told a good friend eight months earlier, right after the suit had been brought, "I heard that good old Plaintiff filed suit this week." *Is this question permissible impeachment?*

**[8] Refreshing the Witness's Memory**

Stuck somewhat incongruously in the middle of the impeachment rules, Rule 612 pertains to refreshing a witness' memory. The Rule appears incongruous in several ways. Refreshing a witness' memory most often occurs during the direct examination of the proponent's own witness and is generally performed to bolster the witness' credibility by facilitating an accurate memory of events or occurrences. Thus, it effectively accredits the witness, instead of impeaching the witness' credibility. A witness who has forgotten events that happened long ago often appears more believable than one who remembers prior events with crystal clarity.

Another incongruity is that impeachment is a form of evidence to be considered by the jury, while refreshing a witness' recollection is not. Because the items used to refresh memory are not being offered into evidence, but rather are being used as memory aids, whatever an attorney may employ to refresh a witness' memory is not subject to the rules of authentication or put to the usual test of admissibility. This means that inadmissible hearsay, or even inadmissible real evidence, may be used to refresh a witness' memory. While this may sound like a "free ride," a way to sneak in evidence under the guise of refreshing memory, it is not; the items must be disclosed to the opposing counsel and may be used to impeach the witness as well.

The process of refreshing memory comes closest to impeachment when it is being employed during cross-examination, where a witness' forgetfulness may be highlighted by an examiner to show duplicity or inaccuracy, particularly if a prior written statement made by the witness exists. The hearsay exemption for witnesses' prior inconsistent statements is addressed in Chapter 13. Rule 612 is discussed further in Chapter 14.

Judges retain discretion to refuse to permit some writings to be used for refreshing the recollection of witnesses. If a writing is to be used as the actual basis for testimony and not merely to refresh a witness' memory, for example, it may be excluded by the court.

*Problem 7-25: "Sammy Says"*

Sammy testifies for the plaintiff in a complex commercial litigation action. He is asked on direct examination about a particular business meeting the previous year and he answers "Hmmm, I really don't remember it." Counsel then shows Sammy the notes Sammy took during the meeting.

1. May plaintiff's counsel give Sammy his own meeting notes to refresh his memory? What is the proper procedure by which to refresh recollection? May Sammy read the notes to the jury?

2. Do the notes have to be authenticated? ← *not ex. D or L*
3. Does it matter if the notes were not written by Sammy, but by someone else at the meeting? May Sammy still rely on the notes to refresh his memory about the meeting? May Sammy read the notes to the jury?
4. If Sammy reviews his notes during the direct examination, may he be questioned about the notes on cross-examination?
5. If Sammy carefully took the notes immediately after the meeting when the events were fresh in his mind, but he has no current recollection about the meeting, may the notes be admitted in evidence at trial? *See Rule 803(5).*

## [9] Problems

### *Problem 7-26: "You Took The Tag Off Of Your Mattress?!"*

Cheryl is prosecuted for shoplifting from the "We R Toys" store. The store clerk, Laurie, testifies for the prosecution. On cross-examination, the clerk is asked the following questions:

DEFENSE COUNSEL: Isn't it true that the "We R Toys" store has only four parking spaces out front and not five, as you testified?

PROSECUTOR: Objection. (*On what grounds?*)

JUDGE: (*How should the judge rule? Why?*)

DEFENSE COUNSEL: You've been arrested for child abuse, haven't you?

PROSECUTOR: Objection. (*On what grounds?*)

JUDGE: (*How should the judge rule? Why?*)

DEFENSE COUNSEL: Laurie, you faked a worker's compensation injury last year to collect benefits, didn't you?

PROSECUTOR: Objection. (*On what grounds?*)

JUDGE: (*How should the judge rule? Why?*)

DEFENSE COUNSEL: You were told by your boss that you'd get an extra vacation day if you testified today, isn't that correct?

PROSECUTOR: Objection. (*On what grounds?*)

JUDGE: (*How should the judge rule? Why?*)

DEFENSE COUNSEL: Laurie, you were convicted last year of shoplifting at a "Toys R Not U" store, isn't that right?

PROSECUTOR: Objection. (*On what grounds?*)

JUDGE: (*How should the judge rule? Why?*)

DEFENSE COUNSEL: You took the tag that says "do not remove" off of your mattress, didn't you?

PROSECUTOR: Objection. (*On what grounds?*)

JUDGE: (*How should the judge rule? Why?*)

*Problem 7-27: Defamation Redux*

Sue is called an "inept, tabloid-loving, dimwit surgeon" in the local newspaper. She sues for libel. At trial, her brother, Bob, also a surgeon, testifies on her behalf as a character witness about Sue's professional competence. Bob is cross-examined by counsel for the defendant newspaper.

DEFENDANT'S ATTORNEY: So, Bob, isn't it true that you punched the defendant newspaper editor in the nose outside of Rosie O'Sady's restaurant last week?

PLAINTIFF'S ATTORNEY: Objection. Improper impeachment.

JUDGE: (*How should the judge rule? Why?*)

DEFENDANT'S ATTORNEY: Bob, you are aware that there were two incidents in which your sister was cited by the hospital for cutting into the wrong location, correct?

PLAINTIFF'S ATTORNEY: Objection! Improper impeachment.

JUDGE: (*How should the judge rule? Why?*)

DEFENDANT'S ATTORNEY: You said on direct examination that your sister has participated in at least 800 operations. Yet, in your deposition of October 5th, at page three, line four, you were asked, "In how many operations did your sister participate?" and you answered, "Oh, I don't know, maybe 400."

PLAINTIFF'S ATTORNEY: Objection! Improper impeachment.

JUDGE: (*How should the judge rule? Why?*)

DEFENDANT'S ATTORNEY: Bob, didn't you misrepresent your college class rank on your medical school application?

PLAINTIFF'S ATTORNEY: Objection. Improper impeachment.

JUDGE: (*How should the judge rule? Why?*)

*Problem 7-28: The Young Freud*

The young Dr. Von Freud testified about the cause of death in a prosecution for homicide.

1. Dr. Von Freud is asked on cross-examination whether his opinion is consistent with *Gray's Anatomy*, which is considered to be an authoritative medical treatise in the field. *Admissible? Why?*

2. He also is asked on cross-examination whether he has been convicted of child abuse. *Permitted?*

3. Dr. Von Freud is questioned on cross-examination about whether he had been fired from his previous employment because he had forged medical records. *Admissible? Why?*

**[C] Intrinsic Versus Extrinsic Impeachment**

Whether particular impeachment will be permitted depends not only on whether it is an approved form of impeachment, but also on whether it is

considered intrinsic or extrinsic. The most common impeachment is intrinsic in nature.

Intrinsic evidence impeachment depends on answers given by the witness being impeached. It is impeachment from the witness' "own mouth." A witness may be intrinsically impeached by questioning, such as, "Didn't you cheat on your driver's license exam? Didn't you tell a different story last month compared to what you are saying today on the witness stand? Don't you owe the defendant, on behalf of whom you are now testifying, \$20,000?" Extrinsic evidence impeachment depends on either a new witness, one other than the one to be impeached, or the introduction of other evidence, such as a document. Thus, cross-examination on the witness' own prior inconsistent statement in a deposition is intrinsic evidence impeachment, whereas introducing the deposition itself in evidence is extrinsic evidence impeachment.

All of the forms of impeachment (contradiction, bias, convictions of certain crimes, prior acts relating to a witness' truthfulness, testimonial capacities, and prior inconsistent statements) are permissible intrinsic evidence impeachment (see [B], *above*). Extrinsic evidence impeachment, on the other hand, is subject to greater restrictions because it has a higher potential for wasting time and distracting the jury.

The rule governing when a witness may be impeached through extrinsic evidence is popularly called the "collateral matter" or "collateral issue" rule. This rule prohibits the use of extrinsic evidence to impeach a witness on a collateral matter. Correspondingly, it permits extrinsic evidence impeachment only for non-collateral (i.e., important) matters. The non-collateral or important matters that are properly the subject of extrinsic impeachment are: (1) *bias*; (2) *impeachment relating to a fact at issue*; (3) *the witness' testimonial capacities*; (4) *convictions of a crime*; and (5) *reputation or opinion evidence about the truthfulness or veracity of another witness*. Under the collateral issue rule, therefore, extrinsic evidence may not be used to impeach a witness when: (1) contradicting the witness on a collateral fact; (2) showing a witness' prior inconsistent statement on a collateral fact; or (3) offering a prior "bad" act relating to the witness' truthfulness.

### *Example*

Harold testified for the plaintiff, Maude, in a breach of contract action. On cross-examination, Harold was asked if: (1) he was dating Maude; (2) Maude had agreed to enter into the contract without qualification; (3) Harold had been convicted of mayhem ten years earlier; and (4) Harold had lied on his bar application four years earlier. Harold answered "no" to all four questions. On rebuttal, can the defendant offer a new witness to testify: (1) Harold was dating Maude; and (2) Maude had agreed to the contract offer without qualification? Can the defense also offer: (3) a certified copy of Harold's prior conviction for mayhem; and (4) a copy of his bar application with the allegedly untruthful statement?

*Answer:* The collateral issue rule permits the defendant to impeach Harold extrinsically in three of the four instances because in those instances the impeachment is considered important or non-collateral. The new witness may

testify about: (1) whether Harold and Maude were dating, because it shows bias, which is never collateral; and (2) the dispute about Maude's responses to the contract offer, because it involves a fact in issue. The certified copy of Harold's conviction for mayhem is admissible, since convictions of crime are considered to be non-collateral matters as well. However, the prior bad act, the alleged lie on the bar application, cannot be the subject of extrinsic impeachment, because prior bad acts are considered collateral. Even if Harold is lying anew with respect to the bar application, the questioner must take the witness' answer.

*Problem 7-29: Extrinsically Yours*

Xavier testifies for the defense in an action involving the sale of real property. Xavier was an eyewitness to the alleged contract to sell the property.

1. During cross-examination by the plaintiff, Xavier is asked whether he had been convicted of attempted robbery ten years earlier. Is this question permissible?

2. Xavier denied having been convicted of attempted robbery. ("Preposterous!" he exclaimed). Can the opposing counsel offer in evidence a certified copy of the attempted robbery conviction? Why?

3. On cross-examination, Xavier is asked whether he was wearing his hearing aid at the time of the alleged sale. Xavier responded by saying that he was indeed using his hearing aid. May the opposing counsel call a different witness, Alec, to testify that Xavier was not wearing a hearing aid at the time of the alleged sale?

4. On cross-examination, Xavier is asked whether he had worn white sneakers on the day in question, not red ones as he had testified on direct. Xavier answered the question by denying that he had worn white sneakers. May the opposing counsel call a different witness in rebuttal to testify that Xavier was wearing white sneakers at the meeting about the sale?

5. Xavier also is asked whether he had said in a deposition two months before trial, "I was the first one there for the meeting about the sale," when on direct he testified that he "was only the third or fourth person there." If Xavier claims he made no such prior statement, may a rebuttal witness who was present at the deposition testify that Xavier made the statement?

6. If Xavier is asked on cross-examination whether he owes the defendant a large sum of money and he denies it, may the plaintiff call a different witness in rebuttal to confirm this fact?

*Problem 7-30: More Perjury*

Clark is being prosecuted for perjury. He calls his best friend, Lenny, with whom he went to grade school, to testify on his behalf.

**DEFENSE COUNSEL:** What is Clark's reputation for truthfulness?

**A:** Clark's reputation in the community is for complete honesty; he would never lie.

PROSECUTOR: (on cross-examination) Have you heard, Lenny, that Clark was expelled from night school for cheating on an examination two years ago? *Does this question relate to impeachment, to character evidence, or to both?*

DEFENSE COUNSEL: Objection. *On what grounds?*

JUDGE: *(How should the judge rule? Why?)*

Lenny finishes testifying and the prosecutor calls Sheila, a rebuttal witness, who testifies as follows:

A: In my opinion, Lenny is a liar. Furthermore, everyone in this community says that Clark is about as truthful as that television character, Bart Simpson; basically, Clark has a reputation for having no veracity at all.

DEFENSE COUNSEL: Objection. *On what grounds?*

JUDGE: *(How should the judge rule? Why?)*

Sheila finishes testifying, and the defense calls Sheila's estranged husband, George, to testify on behalf of Clark. On direct examination, after being asked about Sheila's and Lenny's reputations, George declares,

A: In my opinion, Sheila is a liar. In any event, Lenny's reputation in the community is one of unimpeachable honesty.

PROSECUTOR: Objection. *On what grounds?*

JUDGE: *(How should the judge rule? Why?)*

### *Problem 7-31: Bigfoot*

Bernie is charged with conspiracy to import heroin. At the time of his arrest, which occurred one week after the alleged conspiracy concluded, Bernie was apprehended with alleged heroin in his shoe. At trial, Bernie testified in his own defense and denied being a part of a conspiracy.

1. On cross-examination, the prosecution asked Bernie if he had heroin in his shoe at the time he was apprehended. Admissible?

2. If the question is permitted, and Bernie denies having had heroin in his shoe, may the prosecutor then call the arresting officer to the witness stand to testify to that fact?

### *Problem 7-32: Buddies Revisited*

Alexander is prosecuted for a felony. At trial, Alexander's fellow gang member, Preston, testifies on the defendant's behalf. On cross-examination, Preston is asked whether he belongs to the same gang as the defendant. Preston says no. On rebuttal, the prosecution calls a police officer specializing in gangs to testify that both Preston and Alexander belong to the gang, "R U Blut." The officer further testifies that the gang is known for lying to protect fellow members. Alexander is convicted and he appeals, claiming that both the cross-examination of Preston and the police officer's extrinsic testimony should have been excluded.

*What ruling and why? See United States v. Martinez, 962 F.2d 1161 (5th Cir. 1992).*

*Problem 7-33: Edna to Rachel to Frank*

In a civil assault and battery action, the defense calls an eyewitness, Edna. She testifies that the defendant was not the first aggressor, but was merely defending himself.

1. In rebuttal, the plaintiff calls Rachel, who testifies that, in her opinion, Edna is not a very truthful person. *Allowed?*

2. In surrebuttal (the reply to the rebuttal), the defendant calls a new witness, Frank, who testifies that Edna has a stellar reputation for truthfulness in the community. *Permitted?*

*Problem 7-34: Mortgage*

The defendant, Adin, was charged with the unlawful possession of a firearm.

1. The central prosecution witness, Tylie, testified in the prosecution's case-in-chief. On cross-examination, she was asked whether she had made a false statement on her recent mortgage application. *Permissible?*

2. After Tylie denied making any false statements, the judge permitted the prosecutor to offer the mortgage application in evidence. *Was this error?*

*Problem 7-35: Interregnum*

In a "slip and fall" negligence action, the defendant, Belinda, testified about the fall. Belinda stated that she observed boxes flying all around the plaintiff, Irving, as he fell. On cross-examination, plaintiff's counsel asked Belinda about her deposition, which was taken one month prior to trial.

1. The plaintiff's counsel questioned Belinda about her failure to mention flying boxes when she was asked during the deposition to describe the incident. *Is this question permissible impeachment?*

2. Plaintiff's counsel also asked Belinda whether Irving had ever fired her from a job. Belinda responded, "No!" *May plaintiff offer Belinda's former co-worker to testify that Belinda had been fired by Irving? Why?*

## **[D] Rehabilitation of Witness**

A witness' credibility can be rehabilitated generally after his or her truthfulness or veracity has been directly attacked. A direct attack on credibility includes prior convictions, prior untruthful bad acts, and reputation or opinion evidence of untruthfulness. As noted earlier, preemptive rehabilitation, which occurs in anticipation of impeachment, is not permitted. Rehabilitation can occur either through questions on redirect examination or through a separate reputation or opinion witness testifying about the impeached witness' good character for truthfulness or veracity.

*Problem 7-36: Rehab*

Maryanne was the star defense witness in a forfeiture action. The government claimed that a considerable amount of marijuana was found in the back

seat of the defendant's car, justifying its forfeiture. Anticipating a ferocious cross-examination of Maryanne, the defense first called Maryanne's partner, Marcy, to testify that, in her opinion, Maryanne has an unimpeachable character for truthfulness and veracity.

The prosecution objects to Marcy's testimony. *What ruling and why?*

After Maryanne testified on direct examination, the prosecution zealously cross-examined her, suggesting that Maryanne recently fabricated her testimony to assist the defendant's case. On redirect examination, the following occurred:

DEFENSE COUNSEL: When did you first learn of this incident?

A: Almost immediately after the forfeiture occurred.

DEFENSE COUNSEL: What did you do upon hearing about it?

A: I immediately told my friend Julian the same exact thing that I just testified to on direct, that the hitchhiker had unloaded and then repacked his bag in the back seat before leaving the car.

PROSECUTOR: Objection! *(What is the basis for the prosecutor's objection?)*

JUDGE: *(How should the judge rule? Why?)*

### **[E] Impeachment Statutes**

Compare the current form of Federal Rule of Evidence 609(a) with various preliminary draft proposals.

#### **House Subcommittee Draft (1973)**

For the purpose of attacking credibility of a witness, evidence that he has been convicted of a crime is admissible if, but only if (1) the crime involved dishonesty or false statement, or (2) the crime was punishable by death or imprisonment in excess of one year under the law under which he was convicted, unless the judge determines that the danger of unfair prejudice outweighs the probative value of the evidence of conviction.

#### **House Bill H.R. 5463 (February 1974)**

For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible only if the crime involved dishonesty or false statement.

#### **Senate Judiciary Committee Draft (October 1974)**

For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime may be elicited from him or established by public record during cross-examination but only if the crime (1) involved dishonesty or false statement or (2) in the case of witnesses other than the accused, was punishable by death or imprisonment in excess of one year under the law under which he was

convicted, but only if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect.

### **Current Version**

For the purpose of attacking the credibility of a witness, (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

Compare the current Federal Evidence Rule 609(a) with the following state rules:

#### **Alaska 609(a)**

(a) **General rule.** For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is only admissible if the crime involved dishonesty or false statement.

#### **Montana 609**

For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is not admissible.

Compare the Federal Rules of Evidence with the following state laws on impeachment:

#### **N.Y. CPLR § 4514**

In addition to impeachment in the manner permitted by common law, any party may introduce proof that any witness has made a prior statement inconsistent with his testimony if the statement was made in a writing subscribed by him or was made under oath.

#### **Indiana Code Chapter 34-1-15-1**

When a witness, whether a party to the record or not, is cross examined to lay the foundation for his impeachment by proof of an act or statement inconsistent with his testimony, and is asked if he did not do the act or make the statement, and he answers that he does not recollect having done the act or made the statement, the party thus laying the foundation for impeachment shall have the right to introduce evidence of the act or statement in the same manner as if the

witness had answered that he had not done the act or made the statement.

### Hawaii Chapter 626, Rule 609.1

(a) **General rule.** The credibility of a witness may be attacked by evidence of bias, interest, or motive.

(b) **Extrinsic evidence of bias, interest, or motive.** Extrinsic evidence of a witness' bias, interest, or motive is not admissible unless, on cross-examination, the matter is brought to the attention of the witness and the witness is afforded an opportunity to explain or deny the matter.

## § 7.05 SUMMARY AND REVIEW

1. Compare impeachment evidence and character evidence. What are the major differences? What are the major similarities?
2. How are prior inconsistent statements a form of contradiction?
3. Why is extrinsic impeachment more restrictive than intrinsic impeachment?
4. Define "bias."
5. What types of crimes may be used to impeach a witness?
6. Why are the permissible forms of impeachment by conviction limited to felonies and crimes of dishonesty or false statement?
7. Why did the Federal Rules of Evidence adopt a special "prejudice" balancing test for the use of felony convictions to impeach a criminal defendant?
8. What types of acts are permissible in "prior bad acts" impeachment? Why?
9. What is impeachment by omission?
10. What are the permissible ways to refresh a witness' memory?

## § 7.06 CHAPTER REVIEW PROBLEMS

### *Problem 7-A*

Accountant Zakkiah Jones was arrested for driving under the influence of alcohol one dark night on the main road of her Pennsylvania town. Jones testified in a subsequent trial, stating she made a left turn onto Main Street from 3rd Avenue prior to being stopped. The prosecutor did not ask her any questions on cross-examination about how she ended up on Main Street, but called Officer Lemke in rebuttal. Lemke testified, "After she was stopped, Ms. Jones told me she turned onto Main Street from 4th Avenue." *Which of the following statements about the Officer's testimony is the most accurate?*

1. It is admissible as prior inconsistent statement impeachment, so long as the two statements were inconsistent.
2. It is admissible as prior inconsistent statement impeachment if the prior statement had been made under oath.

3. It is not admissible as prior inconsistent statement impeachment because the statement's probative value is substantially outweighed by its danger of unfair prejudice.

4. It is not admissible as prior inconsistent statement impeachment because it is offered by Officer Lemke.

### *Problem 7-B*

In a negligence action arising from an automobile accident, the plaintiff called an eyewitness, Sheila Scranton, to testify about what she observed on the pertinent morning at approximately 8 a.m. The witness testified that after leaving the International House of Pancakes, where she had breakfast, she almost immediately observed the accident. On cross-examination, Sheila is asked, "Isn't it true that you were eating that morning at the Original Pancake House and not at the International House of Pancakes?" *If there is an objection to this question, how should the judge rule?*

1. Allow the question because it is permissible impeachment by prior inconsistent statement.

2. Allow the question because it contradicts Sheila's testimony.

3. Disallow the question because it is collateral to the issues in the case.

4. Disallow the question because it is confusing and unfairly prejudicial.

### *Problem 7-C*

Allan Jackson is charged with larceny. At trial, he takes the witness stand to deny committing the crime. On cross-examination, the prosecutor wishes to ask him about a nine-year-old conviction for robbery, for which the defendant received probation. *Can the prosecutor use the conviction to impeach Jackson?*

1. Yes, since the conviction is less than ten years old.

2. Yes, if the prejudicial impact does not substantially outweigh the conviction's probative value.

3. No, because the defendant did not serve any jail time on the conviction.

4. No, unless the judge determines that the probative value of the conviction outweighs its prejudicial impact on the defendant.

### *Problem 7-D*

In a murder trial, a critical witness for the defense is the cashier at the convenience store where the killing took place. The cashier will testify that the police never asked him whether the defendant looked like the perpetrator and ignored his protests about arresting the defendant. In the prosecution's case-in-chief, a police officer is called to testify that he had previously arrested the cashier and at the time the cashier kept saying, "I hate cops; I hate cops." This testimony is:

1. Admissible to impeach the cashier based on bias.

2. Admissible to impeach the cashier based on prior bad untruthful acts.
3. Inadmissible to impeach the cashier because it occurred in the prosecution's case-in-chief.
4. Inadmissible to impeach the cashier because the impeachment is extrinsic, not intrinsic.