

Copyright: *Essential Evidence Outlines, Practitioner and Student Handbook, 3<sup>rd</sup> Edition*,  
Hon. Daniel P. Ryan, PhD, JD (2009) (ISBN 978-1-4401-6841-3) (available  
[www.amazon.com](http://www.amazon.com) and [www.barnesandnoble.com](http://www.barnesandnoble.com) )

**MAY NOT BE REPRODUCED WITHOUT AUTHOR'S PERMISSION**

**Lecture 8:**

**Competency, Direct, Cross-Examination, Impeachment and Rehabilitation**

**Hon. Daniel P. Ryan**

© 2005

**1) Competency:**

- a) **FRE 601: Competency.** More than a “presumption” of competency. Under FRE 601, everyone is competent.
- b) **FRE 602: Personal Knowledge.** May not testify if lack personal knowledge unless an expert. FRE 703
- c) **FRE 603: Oath.**
  - i) Mental incapacity and immaturity
  - ii) Religious belief and “affirmation”
- d) Four Requirements:
  - i) Capacity to accurately perceive, record, and recollect impressions of fact (physical and mental)
  - ii) Personal knowledge ( Did perceive, record and recollect) fact of consequence in the case,
  - iii) The ability to tell the truth, appreciates the duty, and understands the difference between telling the truth and telling a lie,
  - iv) The capacity to understand and answer questions (with an interpreter’s aid if necessary)
- e) CL “incompetency” of:
  - i) Convicts: CL v. FRE 609
  - ii) Interested Party and Dead Man’s Statutes: Still potentially live, see FRE 602.

- iii) Spouse of a Party
- iv) Judge: CL v. FRE 605
- v) Juror: CL v. FRE 606
- vi) Lawyer: Ethical conflict
- f) Child competency: *Wheeler v. United States*, 159 U.S. 523 (1895) (5 year old child's capacity and intelligence, understands difference between telling the truth and a falsity, appreciates duty to tell the truth.)
- g) Procedure for Disqualification based on Competency: CL must assert before oath. FRE after oath but before first question, except spouse in a criminal case still same as CL.

## 2) Direct Examination and Form of the Question

- a) The non-leading question. The narrative question. The specific question. FRE 611(a). Leading permitted for foundation and transitions, adverse witness, or child witnesses
- b) Argumentative, Misleading, and Indefinite questions
- c) Judicial witnesses (FRE 614 and FRE 706) and juror questions.
- d) Refreshing recollection. (FRE 612) Recorded recollection. FRE 803(5)

## 3) The "Right" of Cross-Examination

- a) The tradition of "wide open" v. "restrictive" cross-examination. FRE 611(b)
- b) The merits of "wide open" and "restrictive" cross-examination
- c) Disclosure of writings and contents: The rule in *Queen Caroline's Case*, 2 B&B 284, 286-90, 129 Eng. Rep. 976, 11 Eng. Rul. C. 183 (1820) required disclosure to the witness versus the modern rule in FRE 613.
- d) Cross-examination of experts: FRE 705; FRE 703; Use of the hypothetical question and "assumes facts not in evidence" objection
- e) Art of Cross-Examination:
  - i) Preparation
  - ii) No cross without a purpose
  - iii) Cross for the jury, not the client
  - iv) Make a couple of key points, end on positive high note
  - v) "Leading questions" not = to "argumentative"

## 4) Impeachment: Stages of impeachment/modes of attack

- a) Six modes of attack upon credibility of a witness

- i) Prior Inconsistent Statement
- ii) Bias/Partiality
- iii) Character
- iv) Defects in Capacity
- v) Contradiction
- vi) Lack of Religious Belief
- b) Two methods or stages of attack
  - i) Extrinsic permitted: Facts discrediting witness who testifies may come through second witness or an exhibit.
  - ii) Extrinsic precluded: From the witness himself on cross-examination: “intrinsic.” Extrinsic precluded and must take answer. Also need good faith basis
- c) Cardinal rule: Never launch an attack unless justifiable and essential to case.
- d) Modern trend

**5) Prior inconsistent statement: Degree of inconsistency required.** Must have preliminary finding that pretrial “statement” is inconsistent with trial testimony.

- a) Warning unnecessary (FRE 613): Prior statements may be used without disclosing contents or source to witness but must be shown to opposing attorney upon request. Contrary to *Queen Caroline’s Case*, 129 Eng. Rep 976 (1820).
- b) Opinion in form: If trial testimony regards “facts” but prior “opinion” regarding facts is substantially inconsistent, form of impeachment is irrelevant and even inconsistent “opinions” permitted to impeach. FRE 701
- c) Extrinsic evidence permitted (FRE 613) if witness given an opportunity to explain or deny. Previous inconsistent statements as substantive evidence of the facts stated. FRE 801(d)(1). Departure from CL: impeachment value only, not substantive, and *Queen Caroline’s case, supra*. Also, see exception in FRE 806 when attacking or supporting credibility of declarant.
- d) Requirement of preliminary questions on cross-examination as “foundation” for proof by extrinsic evidence. Extrinsic proof of prior inconsistent statement is inadmissible unless the witness is given an opportunity to explain or deny. FRE 613
- e) Rule against impeaching one’s own witness (FRE 607): Anyone can impeach credibility of the witness even the party calling a witness. “Surprise” or “harm” no longer required.

Contrary to CL “voucher” rule. Potential abuse in criminal cases.

**6) Partiality/bias (FRE 401-3) *U.S. v. Abel*, 469 U.S. 45 (1984)**

- a) Favor, hostility, self interest etc...
- b) Many courts require CL foundation on cross: before extrinsic permitted must ask about “facts”. Discretion in FRE 611(a) and parallel treatment of inconsistent statements in FRE 613(b) suggests departure from the CL requirements as to bias as well.
- c) Extrinsic evidence permitted if denies

**7) Character in general: FRE 404(a) (3) to FRE 607, 608, 609.**

- a) “Uncharged” misconduct, for which there has been no criminal conviction. FRE 608(b). Recent amendment eliminated word “credibility” and replaced with character for truthfulness or untruthfulness. The character for truthfulness or untruthfulness of a witness can be challenged on cross-examination as to specific acts. Ex. filing false tax return, plagiarism of college paper, mortgage application, etc.... Reflects CL tradition of “cross-examination to credit.” Witness protection provisions:
  - i) Generally limited to intrinsic evidence,
  - ii) Specific acts in FRE 608(b) within discretion of court
  - iii) FRE 611 gives judge discretion to prohibit to prevent “harassment” or “embarrassment” of witness
  - iv) 5<sup>th</sup> Amendment and FRE 608(b)
- b) Conviction of a crime (FRE 609):
  - i) Departure from CL which precluded testimony of any witness convicted of treason, any felony, or any misdemeanor involving dishonesty or false statement (*crimen falsi*). Movement from rule of competency to rule of impeachment. CL rule precluding felon testimony initially rejected by *Rosen v. United States*, 245 U.S. 467 (1917).
  - ii) Evidence of prior conviction is admissible if a) it is a felony punishable by one year or more but subject to FRE 403 balancing, or b) if it involves an element of dishonesty or false statement regardless of the penalty. Second prong amended in 2006. False statement prong exempt from FRE 403 balancing. Subject to certain

- limitations such as time, i.e. ten years from date of conviction or release whichever is later, juvenile adjudication, appeal, etc....
- iii) Witness v. Defendant: Prong 1 Witness (FRE 403 and “substantially outweighs”) v. Defendant (shall be admitted if probative value outweighs prejudicial effect to the accused.)
  - iv) FRE 609: Pretrial Rulings and Preserving Error in Criminal Cases:
    - (1) In criminal cases in which the Defendant may consider testifying, all claims of pretrial error may be waived if defendant chooses not to testify. *Luce v. United States*, 469 US 38 (1984) in which the Supreme Court ruled that failing to testify bars an appeal on the pretrial ruling that prior convictions may be used to impeach. Involved motion in limine regarding prior conviction under FRE 609. States are split on the *Luce* doctrine.
    - (2) See also *Ohler v. United States*, 529 U.S. 753 (2000) (waiver of claimed error regarding pretrial ruling on admissibility of FRE 609 evidence when defense counsel asked defendant about conviction on direct to mitigate prejudicial impact.)
    - (3) See also, FRE 103 and the implications of its recent amendment.
  - v) 2006 Amendment to FRE 609: Expansion of Prong 2 to include crimes containing an element of dishonesty and false statement. *Crimen Falsi*.
- c) Impeachment by proof of opinion or bad reputation. FRE 608(a).
- i) Character for truthfulness or untruthfulness can also be established through reputation or opinion witnesses. FRE 608(a)
  - ii) “Community” extends to business, school or other substantial group
  - iii) Any opinions should follow FRE 701.
  - iv) May inquire on cross-examination about specific acts as they relate to formation of reputation or opinion.

## **8) Defects in capacity**

- a) FRE 601. All persons competent in federal court. More than a presumption. In cases governed by state substantive law, state law determines competency. More than a presumption. Difference between challenges regarding “competency” and attacks on “credibility.”

- b) Lack of personal knowledge (FRE 602). Personal knowledge is required of all witnesses except experts.
- c) Sensory deficiency: Inability to observe/remember/recount
- d) Drug/alcohol use/mental disturbance

**9) Contradiction:** Impeachment by “specific” contradiction not covered by any particular federal rules. FRE 401-402. Witness challenged to observe, remember, recount “facts” related to the case. Contradictory “facts” versus contradictory “statements.”

- a) Devastating
- b) Often Unnoticed
- c) Limits:
  - i) **Non-collateral** if involves: 1) Points that count on the merits; 2) points relating to truthfulness or untruthfulness; and 3) tell tale points or “lynch pin” facts. If collateral, excluded. If non-collateral, may use extrinsic evidence subject to FRE 403 to impeach.
  - ii) The CL *Hitchcock* rule provided that a witness may not be impeached by “extrinsic” evidence on “collateral” facts. If not collateral, extrinsic permitted subject to FRE 403. A matter is collateral if it is irrelevant, does not establish a fact of consequence, and is solely offered for the purpose of mere contradiction. If collateral, excluded. If non-collateral, extrinsic evidence permitted.
  - iii) Non-collateral areas of inquiry exempt from this prohibition under the common law *Hitchcock* rule include: bias, interest, corruption, coercion, alcohol or drug use, defects in mental capacity, prior convictions, lack of physical capacity or lack of exercise of the capacity to acquire personal knowledge.
- d) Summary
- e) Waiver Issues
- f) Fairness Issues: “Fight fire with fire”
- g) Constitutional Law (Criminal): Otherwise constitutionally impermissible evidence (prior statements or physical evidence) under 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup> Amendments may be permitted to impeach or contradict. See, *Michigan v. Harvey*, 494 U.S. 344 (1990); *United States v. Havens*, 446 U.S. 620 (1980); *Harris v. New York*, 401 U.S. 222 (1971)

**10) Lack of Religious Belief (FRE 610):** Religious belief or lack of religious belief is inadmissible to impeach, to enhance, or to rehabilitate the credibility of a witness. Modern day examples: calling pastor as character witness or asking witness to acknowledge if pastor is in the audience.

**11) Rehabilitation/supporting witness**

- a) Scope of redirect. FRE 611(a)
- b) Cannot bolster prior to attack (FRE 608)
- c) Can anticipate attacks
- d) Repair must meet or answer attack: “A wall breached at one point may not be shored up at another.” *McCormick on Evidence*
- e) Good character for veracity: FRE 608(a) Opinion or Reputation
- f) Rehabilitating the victim under FRE 404(a)(2)
- g) Prior consistent statements (FRE 801(d)(1)(B))
  - i) Observation re: FRE 801 (d)(1)(B)
  - ii) Pre-motive requirement: Interpreting *Tome v. United States*, 513 U.S. 150 (1995).  
Two examples: kids and snitches.
- h) Remainder of related writings: CL Rule of “Completeness” versus FRE 106

**12) Attacking the supporting character witness:** Can challenge weight and inquire regarding specific instances contrary to opinion or reputation, also may inquire regarding familiarity with convictions, indictments, and arrests relative to “untruthfulness.”

**13) Attacking and supporting the credibility of the declarant (FRE 806):** When a hearsay statement or FRE 801(d) (2) (c) (d) or (e) statement is admitted, the credibility of the declarant may be attacked or supported as if the declarant had testified at trial as a witness.  
**FRE 806**

**14) Exclusion and sequestration of witnesses (FRE 615):** Court shall exclude witnesses upon request except a party or person whose presence is essential or authorized by statute. CL rule

was “discretionary.” FRE 615 is “matter of right.” Exceptions to rule of exclusion:

- a) A party
- b) Officer, designated employee or government agent
- c) Essential witness
- d) Victim of crime

# Ryan's Roadmap to Character Evidence

Hon. Daniel P. Ryan

© 2005

## FRE 404: Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

### (a) Character Evidence Generally

(1) Character of the accused → 413  
414  
↕ 415

(2) Character of the Victim → 412

(3) Character of the Witness → 607  
608  
609

### (b) Other crimes, wrongs or acts