

IMPEACHMENT BY CONTRADICTION

Forms of Impeachment:

1. Prior Inconsistent Statements (Rule 613).
2. Bias, Prejudice & Motive and Interest (Rule 616).
3. Perceptual and Mental Incapacity Perception, Memory, Ability to Communicate, and Obligation to Give Truthful Testimony Under Oath (Rule 602).
4. Character Evidence: Opinion and Reputation Evidence of Untruthful Character (Rule 608 (a)).
5. Character Evidence: (Rule 608 (b)) Impeachment of a Witness by Evidence of Bad or Immoral Acts- subject to Rule 403.
- 6) Prior Convictions: (Rule 609).
- 7) **Impeachment by Contradiction**

Under this method of impeachment, the cross-examiner attempts to show that a fact or facts testified to on direct is inaccurate, making all or part of the witness's direct testimony not believable. The cross-examiner is trying to show that certain facts are different from what the witness testified to on direct by seeking to have the witness admit facts contradictory to his original testimony.

The witness is being induced to contradict their own direct examination testimony during cross examination. This differs, for example, from inconsistent statements that involve statements made out-of-court or in prior proceedings. Contradiction involves the witness saying two different things in the same testimony.

Where impeachment by contradiction is recognized, its availability is generally limited: a witness may be impeached by contradiction only if "the statements in issue [have] been volunteered on direct examination." *United States v. Scott*, 693 F.3rd 715, 722 (6th Cir. 2012).

Sitting outside, but in parallel with, the Federal Rules of Evidence, and the Indiana Rules of Evidence, the doctrine creates an exception to FRE 608(b) and IRE 608

(b). Under appropriate circumstances not spelled out in Rule 608(b), otherwise extraneous matters can be explored on cross examination.

Although not expressly set forth in the Federal Rules of Evidence, federal courts permit the use of specific contradiction for the purposes of impeachment. *United States v Gilmore*, 553 F.3d 266, 269-70 (3d Cir. 2009); *Mason v. Okla. Tpk. Auth.*, 115 F.3d 1442, 1456-57 (10th Cir. 1997). Some federal courts, in determining whether to allow specific contradiction evidence, apply Federal Rule of Evidence 403, (*United States v. Kincaid-Chauncey*, 556 F.3d 923, 932 (9th Cir. 2009)) while others allow extrinsic evidence of impeachment by contradiction on non-collateral, or vital matters only—that is, the courts will allow it if “..the matter itself is . . . relevant in the litigation to establish a fact of consequence, i.e., . . . relevant for a purpose other than mere contradiction of the in-court testimony of the witness.” *Beauchamp*, 986 F.2d 1 at 4 (5th Cir.1993). Further, because evidence of specific contradiction is not provided for in the Federal Rules, the evidence must “satisf[y] the Rule 403 balancing test and is not barred by any other rule of evidence.” *Id.* If the issue is tangential or collateral, the probative value of the extrinsic evidence is likely to be quite low, leading to exclusion under Rule 403. Essentially, “[i]mpeachment by contradiction is a means of “policing the defendant’s obligation to speak the truth in response to proper questions.” *Gilmore*, 553 F.3d at 271 (quoting *United States v. Greenidge*, 495 F.3d 85, 99 (3d Cir. 2007)).

Impeachment by contradiction can turn on the form of the question and the response, with the form of the question suggesting contradictory fact. i.e. “You were drinking that night, correct?” (witnesses perception affected by mental state) If denied then prove up with extrinsic evidence unless the contradictory fact is collateral

An attorney cannot contradict an opponent's witness on a trivial ("collateral") fact like the color of the hat she testified she was wearing on the day she witnessed the accident, but on more important matters normally excluded by the rules of relevance, contradiction may be allowed. Thus, a witness might not normally be permitted to testify to being a safe driver, and the opponent cannot normally prove that the driver is unsafe, but if the witness nonetheless happens to testify being a safe driver (no objection made to the question), the opponent can now contradict by eliciting on cross-examination that the

driver was involved in several accidents. Had contradiction impeachment not been permitted, the unsafe character of the witness would be barred by the rules of evidence.

Impeachment by contradiction evidence is admitted solely to impeach: it cannot be used to prove anything about the events being litigated but only to discredit the witness's credibility. The theory is that when a witness can be contradicted, it should be taken into account in determining the reliability of the witness. Hence, the jury is instructed by the judge not to use the impeachment evidence "as proof of any facts, but only to consider whether the witness in question should be believed.

Once the witness's direct testimony has opened that door, then nearly anything which contradicts the witness is fair game. The rationale for broadened cross-examination is to prevent witnesses from engaging in perjury, then using the shield of FRE 608(b) or IRE 608 (b) to preclude their successful impeachment with collateral facts.

The Notes of Advisory Committee (2003 Amendment) on Amendment to FRE 608(b) indicated that FRE 608(b) "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. *e.g., United States v. Winchenbach*, 197 F.3d 548 (1st Cir. 1999) (admissibility of a prior inconsistent statement offered for impeachment is governed by Rules 402 and 403, not Rule 608(b)); *United States v. Tarantino*, 846 F.2d 1384 (D.C. Cir. 1988) (admissibility of extrinsic evidence offered to contradict a witness is governed by Rules 402 and 403); *United States v. Lindemann*, 85 F.3d 1232 (7th Cir. 1996) (admissibility of extrinsic evidence of bias is governed by Rules 402 and 403)."

Some Indiana courts have stated that if the matter is not relevant for any purpose other than contradiction of the witness's testimony, then the matter is collateral and is therefore not subject to an impeaching question. Others have stated that contradiction of the witness's testimony is not a collateral matter. "Under the proper application of the prohibition, a party may inquire into a collateral matter on cross examination, but the questioner is bound by the answer received: the impeaching party cannot thereafter offer extrinsic evidence to disprove the answer unless the extrinsic evidence would be independently admissible". *Ind. Practice, Ind. Evidence, Miller* § 607.104.

“The prohibition against collateral matters relates only to matters raised on cross examination. If a party raises a matter on direct during its case in chief, that matter is not “collateral” as to an adversary, and the adversary may present extrinsic evidence in response without violating the rule against impeachment on collateral matters”. Ind. Practice, Ind. Evidence, Miller § 607.104

Examples of Impeachment by Contradiction:

1. If the witness testifies that an incident occurred at “high noon at the OK Corral,” the attorney can show by cross-examination or, if denied, by calling witnesses that the incident actually occurred at midnight at the Circle K convenience store. If the fact-finder believes the counterproof offered by the attorney, the witness has been impeached in two ways. First, the fact-finder will believe that the witness lied or made a mistake on the specific fact contradicted. But second, and perhaps more significantly, the fact-finder may begin to doubt everything else the witness has said because the attorney can use extrinsic evidence rather than simply relying on cross-examination.

2. A defendant is on trial for possession of heroin. The defendant's testimony will naturally deny possessing the particular drug. Suppose the defendant foolishly testifies on direct examination, "In fact, I've never possessed heroin in my life." The prosecutor can then, on cross-examination, impeach him with an exhibit of heroin seized on an unrelated occasion, even if seized in violation of his Fourth Amendment rights. *United States v. Havens*, 446 U.S. 620 (1980)

3. An Eighth Circuit case which does not use the phrase “impeachment by contradiction” nevertheless illustrates the principle. In *United States v. Allen*, 630 F.3d 762 (8th Cir. 2011), the defendant was charged with possession of an illegal machine gun. As part of its case-in-chief, the government had introduced a video of Allen showing his mother how to fire a machine gun. Presumably in an effort to make that demonstration appear more normal, Allen testified on direct examination that he was familiar with machine guns because of his military service. Had he stopped there, he would have been fine. Instead, Allen then testified that he was very proud of his military service and hoped to share his experiences with his children, and concluded his testimony by again mentioning his pride in his military service. In the view of the district court, this lily-gilding emphasis on the quality of his service allowed the government to cross-

examine Allen about his arrests while in the military and his less-than-honorable discharge, neither of which meet FRE and IRE 608 (b)'s criteria of matters going to truthfulness. The Eighth Circuit found no abuse of discretion. Allen's direct testimony opened the door to his being cross-examined on matters which contradicted that volunteered testimony, even if it would normally have been error to allow such impeachment.

4. During his direct examination in *United States v Gilmore*, 553 F.3d 266, 269-70 (3d Cir. 2009) the criminal defendant and his attorney had the following exchange: Q: After you were indicted in this case, you got a chance to go through the evidence? A: Uh-huh. Q: That they had against you to show that you were a drug dealer, correct? A: Yes. Q: And we went through that evidence, didn't we? A: Yes, we did. Q: And did you see any evidence in this case that you're a drug dealer, sir? A: No, I didn't sell no drugs. I never did". Before beginning its cross-examination, the Government advised the District Court that it intended to ask the defendant about two prior felony drug distribution convictions in order to contradict his sworn statement that he never sold drugs. The defendant objected. The District Court overruled the objection, stating that it was "going to permit the government to cross examine [the defendant] on that conviction, to contradict his statement that he's never sold drugs." The District Court, however, would not allow the Government to offer the certified judgments into evidence unless Gilmore denied the convictions. The District Court also informed the parties that it would issue a limiting instruction to the jury to use the convictions only for credibility purposes and not as evidence of guilt. Pursuant to the District Court's ruling, the Government cross-examined Gilmore about his prior drug convictions: Q: Mr. Gilmore, you testified on direct that you never sold drugs, correct? A: Yes, I did. Q: Isn't it a fact, Mr. Gilmore, that you were convicted here in the Superior Court of Camden County on May 22nd, 1992 of possession with intent to distribute [controlled dangerous substances]? And possession of [controlled dangerous substances] with intent to distribute within a thousand feet of a school? A: That was a long time ago. Q: But you were convicted of selling drugs? A: Yes, I was, a long time ago, and I changed my life around when I got out." *Id.* at 269-70.

FIVE DO'S OF IMPEACHMENT

1. Make sure the impeachment is consistent with your Theory of Defense: Which fact or version of events do you like better for your theory— the fact from the prior statement or current statement? If the current version of events is better for your client than the previous version, don't impeach! Be sure to keep a consistent theory of defense throughout the trial!
2. Use the appropriate method to impeach: One question to establish one fact. No compound questions. No elaborate set-ups. Build up to your conclusions fact by fact, question by question.
- 3.. Attack the witness's credibility by just doing your job and get out. Let the impeaching facts speak for themselves.
4. Have a good faith basis for every question you ask for impeachment purposes. Only imply facts that are true. Ask only relevant or arguably relevant questions.
5. Be Courteous and Polite. Otherwise, the jury is likely to sympathize with the witness and not the lawyer.