The background is a dark, textured surface covered with various mathematical sketches and equations in white. There are several hand-drawn diagrams, including a large downward-pointing arrow, a circular gauge-like diagram, and various geometric shapes like triangles and rectangles. Mathematical formulas such as  $ax+by+cz=d$ ,  $x^2+y^2=z^2$ , and  $\frac{1}{x} + \frac{1}{y} = \frac{1}{z}$  are scattered throughout. The overall aesthetic is that of a chalkboard or a technical drawing board.

# **Impeachment in Louisiana State Courts:**

**La. Code of  
Evidence  
Recognizes  
Eight Ways**

**By Bobby M. Harges**

**T**o impeach or attack the credibility of a witness in Louisiana state courts, a party may examine the witness about *any* matter having a reasonable tendency to disprove the truthfulness or accuracy of his testimony.<sup>1</sup> Although there may be other means of impeachment, the Louisiana Code of Evidence (LCE) recognizes eight ways to impeach a witness. A witness may be impeached in a Louisiana state court with evidence of: (1) bias, (2) interest, (3) corruption, (4) defect of capacity, (5) a prior inconsistent statement, (6) contradiction, (7) reputation for untruthfulness, and (8) conviction of a crime.<sup>2</sup> To impeach a witness is to introduce evidence to suggest that the witness's testimony is not credible, that is, that the testimony does not accord with the truth.<sup>3</sup> This article will address the ways that an examiner can suggest that a witness is not telling the truth.

### Bias

Evidence of a witness's bias is allowed under Article 607 of the LCE.<sup>4</sup> A witness's bias suggests that the witness has a reason to testify for or against a party. The fact-finder has a right to know of any relationship that the witness has with one of the parties and how that relationship could influence testimony.<sup>5</sup> For example, the fact that the mother of a criminal defendant is testifying at the trial would be a critical relationship that should be known to the trier of fact. Impeachment based on a witness's bias can occur through intrinsic impeachment with Article 607(C) and extrinsic impeachment with Article 607(D).<sup>6</sup> Article 607(C) allows a witness to be intrinsically impeached with evidence of bias, which occurs when a witness is questioned directly about matters that may affect her character for truthfulness or veracity.<sup>7</sup> Asking questions about the facts supporting the bias allows the examiner to create a narrative that could show the witness is unable to be impartial and truthful because of her existing bias. This, in turn, achieves the examiner's goal of creating doubt surrounding

the witness's credibility. An example is the cross-examiner asking the witness, "Isn't it a fact that the defendant is your son?"

Additionally, Article 607(D) allows bias to be shown by extrinsic evidence.<sup>8</sup> Extrinsic impeachment involves presenting evidence from any source except the witness, such as the testimony of another witness, the use of documentary evidence such as a deposition, a tape recorded statement, or a videotaped statement, to impeach the witness.<sup>9</sup> Extrinsic impeachment is permitted when the witness has denied the fact asked by the examiner.<sup>10</sup> When this occurs, the examiner can either "take the answer" or proceed with extrinsic impeachment. Stated differently, extrinsic impeachment allows the examiner to introduce other evidence to impeach the witness.<sup>11</sup>

### Interest

Closely related to bias is the witness's interest in the lawsuit, which may demonstrate that the witness may be personally affected by the outcome of the case. For example, under Article 607(C), a witness could be intrinsically impeached about the fact that she would be affected by the outcome of the matter.<sup>12</sup> In a civil matter, if the plaintiff won a breach of contract action filed against the defendant, a witness with personal knowledge of the contract could be questioned about the fact that the verdict would have a positive impact on her business. If the witness denied this fact, she could be extrinsically impeached with evidence showing that she would profit after a favorable verdict for the plaintiff.<sup>13</sup> Extrinsic evidence from a deposition, showing that the plaintiff testified that the witness would receive a windfall if the plaintiff won the lawsuit, could be introduced to show the witness's interest in the matter. Although the unquestionable benefit to the witness does not necessarily mean that the witness's testimony is untruthful, this is certainly something that a fact-finder would want to know.

### Corruption

A witness's corruption (also referred to as "corrupt intent") is allowed to be inquired into under Article 607(C).<sup>14</sup> Corruption is evidenced by "conduct indicating a general scheme to make false charges or claims."<sup>15</sup> In *State v. Cappel*, the Louisiana Supreme Court stated that the defendant should have been allowed to introduce extrinsic evidence of a prosecution witness's disposition to make false charges against others.<sup>16</sup> In a burglary prosecution, the defense theory in *Cappel* was that Tallent, the alleged corrupt witness, demonstrated a pattern of falsely accusing prominent local citizens of involvement in his crimes throughout the state, and the entire defense was predicated upon proving that Tallent's charges against defendant were part of that pattern. In subsequent jurisprudence, the court held that a criminal defendant in a sexual assault case should be able to ask the victim about prior false allegations of sexual molestation by the victim and present evidence regarding same at trial.<sup>17</sup> In this instance, the Louisiana rape shield statute, Article 412, is inapplicable as the issue is one of credibility, not prior sexual behavior.<sup>18</sup>

### Defect of Capacity

Defects of capacity, sensory or mental, that may lessen the witness's ability to perceive the facts the witness purports to have observed<sup>19</sup> may be inquired into intrinsically or extrinsically.<sup>20</sup> For example, a cross-examiner should be allowed to cross-examine an eyewitness to an accident or crime about whether she used drugs or alcohol prior to the incident in question since it may affect her capacity to perceive the circumstances surrounding the incident.<sup>21</sup> Evidence of such drug or alcohol use has independent relevance because it may show a defect of capacity in the witness, which may affect her ability to observe, remember and recount the matters testified about.

## Prior Inconsistent Statement

Under Article 607(C), a witness's prior inconsistent statement may be used to intrinsically impeach the witness.<sup>22</sup> A prior inconsistent statement suggests that the witness is mistaken because she made two different statements about the same matter, one at trial and another on a prior occasion. To be admissible for impeachment, the prior inconsistent statement need not be made under oath.<sup>23</sup> For example, it could be a statement made after a motor vehicle accident to an investigating officer, a statement made after a criminal act, or a statement made in a deposition. The prior inconsistent statement suggests that the witness could be mistaken about the matter in which she testified.

## Contradiction

Contradiction is another form of intrinsic impeachment allowed under Article 607(C).<sup>24</sup> Contradictory evidence could be the testimony of another witness, an audio or video recording, photographic evidence, a document or any other evidence that differs from the testimony given by the witness.<sup>25</sup> This opposing evidence should cast doubt on the testimony given by the witness. When contradictory evidence is introduced extrinsically, that is, from a source other than the witness, it constitutes extrinsic impeachment permitted by Article 607(D).<sup>26</sup>

## Reputation for Untruthfulness

Article 608(A) allows a cross-examiner to attack the credibility of a witness by calling a reputation witness who is familiar with the principal witness's credibility to testify that, in the relevant community, the principal witness has a reputation for being untruthful.<sup>27</sup> Before the reputation witness can testify regarding the reputation of the principal witness who has already testified, a foundation must be laid showing

that the reputation witness is familiar with the principal witness's reputation.<sup>28</sup> This foundation is established by showing that the reputation witness has heard the principal witness's reputation for truth and veracity discussed in the community a sufficient amount of times and had learned of this reputation through discussions with other members of the relevant community.<sup>29</sup> Furthermore, the reputation witness may not express his personal opinion as to the character of the witness whose credibility is in issue.<sup>30</sup> In other words, although the reputation witness is allowed to express the opinion of the community as to the credibility of the principal witness, the reputation witness may not express her own opinion of the principal witness's character trait for truthfulness or untruthfulness.

## Conviction of a Crime

The LCE contains two articles addressing the use of a criminal conviction to impeach the credibility of a witness — Article 609 for civil cases and Article 609.1 for criminal cases.<sup>31</sup> Article 609 allows two classifications of crimes to be used to impeach a witness in civil cases.<sup>32</sup> The first classification consists of those crimes punishable by death or imprisonment in excess of six months under the law in which the witness was convicted.<sup>33</sup> The second classification of crimes admissible under Article 609 deals with crimes involving dishonesty or false statement, regardless of the punishment, such as crimes involving fraud, deceit, perjury, false swearing or embezzlement.<sup>34</sup> These crimes have a direct bearing on a witness's credibility because they show that the witness has been convicted in the past for some deceitful or fraudulent conduct. There is a time limitation placed on the admissibility of crimes under Article 609 as evidence of a conviction is only admissible if no more than 10 years have elapsed since the date of conviction.<sup>35</sup> Under Article 609, evidence of crimes where more than 10 years have elapsed since

the date of the conviction is not admissible.<sup>36</sup>

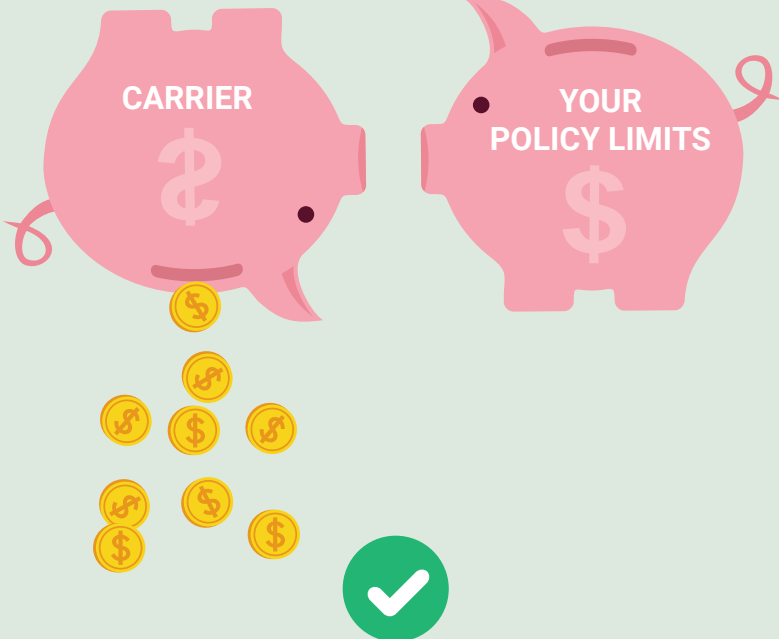
In criminal cases, Article 609.1 allows a witness to be examined about his criminal convictions; however, unlike Article 609, Article 609.1 does not contain a time limitation on the admissibility of the crime.<sup>37</sup> Consequently, the amount of time that has passed since the crime was committed is not a consideration under Article 609.1. As stated by Loyola University College of Law Professor Dane S. Ciolino, in criminal cases, "any crime committed at any time" may be used to impeach a witness in criminal cases in Louisiana.<sup>38</sup> Both intrinsic impeachment and extrinsic impeachment (if the witness denies the conviction) are permitted for criminal convictions.<sup>39</sup>

## Prior Bad Acts Not Resulting in a Conviction Cannot Be Used to Impeach

Article 608(B) explicitly prohibits extrinsic and intrinsic impeachment of a witness's prior bad acts that did not result in a conviction, meaning that the examiner is prevented from asking the witness about any prior bad act that has not resulted in the conviction of a crime.<sup>40</sup> For example, the examiner may not ask the witness whether she falsified her income tax return, cheated on an examination, or was accused of stealing money from her employer if these matters did not result in a conviction. One exception to this general rule exists — if the prior bad act has independent relevance, it is a proper subject of inquiry.<sup>41</sup> For instance, evidence of drug use or alcohol use that shows a defect of capacity in the witness that may affect her ability to observe, remember or recount the matters testified about has independent relevancy and may be inquired about for the purpose of impeachment.<sup>42</sup> If the witness fails to admit the impeaching fact, the witness may be impeached extrinsically with other evidence of the fact.<sup>43</sup>

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## Foundation for Extrinsic Impeachment Generally

Before a witness can be impeached with extrinsic evidence of bias, interest, corruption, prior inconsistent statements, conviction of crime or defects in capacity, Article 613 requires a foundation to be laid.<sup>44</sup> That is, the examiner must have directed the witness's attention to the impeaching statement, act or matter alleged, and the witness must have the opportunity to admit the fact and must have failed to do so.<sup>45</sup> A proper foundation may be laid by directing the witness's attention to the time, place and circumstances in which the statement was made.<sup>46</sup> This requirement is one of efficiency because, if the witness admits the fact, the witness has been impeached and no further evidence of the fact is necessary. On the other hand, if the witness denies the fact after having an opportunity to admit the fact, extrinsic evidence is allowed under Article 613.<sup>47</sup>

Article 613 does not require a foundation before the introduction of extrinsic evidence of contradiction.<sup>48</sup> Consequently, the proponent of the extrinsic evidence of contradiction can simply introduce the extrinsic evidence without directing the witness's attention to the evidence. The difference between contradiction and the other forms of impeachment is that the witness should be fully aware of the other matters listed in Article 613 such as bias, interest, corruption, prior inconsistent statement, conviction of crime and defects of capacity, whereas the witness may not necessarily be aware of contradictory information.

## Conclusion

Impeachment of a witness is critical to the prosecution or defense of any case. Knowledge of the various impeachment techniques will give advocates the best opportunity to get to the truth and the best prospects for victory.

## FOOTNOTES

1. La. Code Evid. art. 607(C) (2018).
2. *Id.* arts. 607-609.
3. *See id.* art. 607.
4. *Id.*
5. *See generally*, John L. Kane, "Judging Credibility," 33 Litig. 31 (2007) (describing the importance of the fact-finder's role in evaluating witness's credibility).
6. La. Code Evid. art. 607(C)-(D).
7. *Id.* art. 607(C).
8. *Id.* art. 607(D).
9. *See*, Frank L. Maraist et al., 19 Civil Law Treatise: Evidence and Proof § 9.1 (2d ed. 2018).
10. La. Code Evid. art. 613.
11. *See*, Maraist et al, *supra* note 9.
12. La. Code Evid. art. 607.
13. *See id.* art. 613.
14. *Id.* art. 607 cmt. 1998 (h).
15. State v. Cappo, 345 So.2d 443, 445 (La. 1977).
16. *Id.*
17. *See*, State v. Smith, 98-2045 (La. 9/8/99), 743 So.2d 199.
18. *Id.*
19. *See*, State v. Robinson, 01-0273, p. 6 (La. 5/17/02), 817 So.2d 1131, 1135.
20. La. Code Evid. art. 607(C)-(D).
21. State v. Galliano, 96-1736, p. 11 (La. App. 1 Cir. 6/20/97), 696 So.2d 1043, 1050 ("Clearly, a defect in capacity may result from the use of drugs or alcohol. If a witness was intoxicated, by use of drugs or alcohol, on the occasion respecting which he is called upon to testify, that fact goes to his credibility and the weight of his testimony.").
22. *Id.* art. 607(C).
23. *See*, Bobby Marzine Harges and Russell L. Jones, *Louisiana Practice Series: Evidence*, ch. 8 (2018) (explaining that in 2004 the Louisiana Legislature removed the requirement that prior inconsistent statements be made under oath).
24. La. Code Evid. art. 607(C).
25. *See*, Maraist et al, *supra* note 9 ("Evidence from other sources adduced at the trial also assists the trier of fact in determining credibility of the witnesses. Contradictory testimony by another witness may weaken a witness's credibility, such as where, in an intersectional collision, one witness testifies that the light facing a driver was red and another testifies that the light was green.").
26. La. Code Evid. art. 607(D).
27. *See id.* art. 608(A).
28. *Id.*
29. State v. Deaton, 412 So.2d 586, 589 (La. 1982) ("Character testimony is the opinion by a member of the community exposed over an extended period of time to hearing the discussion by other members of the community shared by himself and the person whose reputation is at issue. Before being permitted to testify, the reputation witness must be shown to be qualified to testify on the subject as a member of the community in a

position to speak with authority on the subject.").

30. La. Code Evid. art. 608(A).
31. *See id.* arts. 609-609.1.
32. *See id.* art. 609.
33. *Id.*
34. *See id.*
35. *Id.*
36. *Id.*
37. *See id.* art. 609.1.
38. Email from Dane S. Ciolino, Professor, Loyola University College of Law, to author (Oct. 3, 2018, 16:54 CDT) (on file with author).
39. *See*, State v. Smothers, 02-277, pp. 13-14 (La. App. 5 Cir. 12/30/02), 836 So.2d 559, 568 ("Evidence of other crimes is generally inadmissible in the guilt phase of a criminal trial unless the probative value of the evidence substantially outweighs its prejudicial effect and unless other safeguards are met. An exception to the rule allows evidence of a conviction for impeachment purposes of a witness, or of a defendant that chooses to testify.") (footnotes omitted).
40. La. Code Evid. art. 608(B).
41. *See id.* arts. 404, 608.
42. *See*, Smothers, 02-277 at p. 14, 836 So.2d at 568 ("[E]vidence regarding previous arrests, indictments, prosecutions, or other criminal proceedings not resulting in convictions is prohibited.").
43. La. Code Evid. art. 613.
44. *Id.*
45. *See id.*
46. *See*, State v. Laymon, 97-1520, p. 26 (La. App. 4 Cir. 3/15/00), 756 So.2d 1160, 1178.
47. *See id.* art. 613.
48. *Id.* cmt. 1998(h).

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