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COMMENTARY

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I. Introduction

The problem of the "turncoat witness" has thus far escaped sufficiently sharp analysis. The problem, although not specifically addressed by the Federal Rules of Evidence, is easily and adequately handled thereunder. This article states how that should be done. If experience teaches that the problem is not being properly resolved under the rules, then an addition thereto would be in order. This article suggests such an addition.

II. The Problem

Mr. Turncoat and Mr. Ringleader are arrested. Turncoat makes a statement naming Ringleader as the instigator of and principal participant in the crime. Ringleader is now on trial and Turncoat has changed his story. He now says that he will testify that Ringleader was not involved at all. The prosecutor, although he knows that Turncoat's testimony will favor the defendant, calls him as a witness. Turncoat says that Ringleader was not involved and then, under rule 607 of the Federal Rules of Evidence—"The credibility of a witness may be attacked by any party, including the party calling him"—the prosecutor impeaches him with the prior inconsistent statement.

The prior statement by Turncoat is not admissible as substantive evidence of Ringleader's guilt.[1] In fact, it is not admissible for any purpose other than its bearing on Turncoat's credibility. In this hypothetical, the only part of Turncoat's testimony that has anything to do with the case is the assertion that Ringleader was not involved. Thus, the prior statement can be admissible only as tending to show that Turncoat cannot be believed when he says Ringleader was not involved.

Suppose Turncoat's only testimony of any real significance is that he does not know whether Ringleader was involved. The out-of-court declaration, if allowed only for impeachment, may suggest to the jury that Turncoat does know whether Ringleader was involved. They can regret only that, while on the stand, he would not tell them.

Meanwhile, so that they might doubt his word, the jury has been made aware of the witness' prior statement of the defendant's guilt. The court, of course, will instruct the jury that they are not to consider this prior statement as substantive evidence of guilt but only insofar as it reflects on Turncoat's credibility. Whether such a jury instruction is anything more than "another

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1 *See* note 3, *infra* and accompanying text.

pious fiction, that we pretend to believe, to get our work done,"[2] the fiction is undeniable in the circumstances just outlined. When counsel is reasonably certain that a prior favorable statement will be retracted, the only circumstance under which he is likely to use this technique is when the damage to his opponent by the impeaching statement is greater than the damage to his case by the direct testimony. The prosecution, in each hypothetical, has used rule 607 as a subterfuge for getting otherwise inadmissible hearsay before the jury.

Before suggesting how this problem should be addressed, a word about whether there is a real problem at all. Must this sort of impeachment be restrained? Is not the previous statement more often reliable, and the later statement more often falsified?

The situation must be controlled because to do otherwise is hypocritical. Rightly or wrongly, the Federal Rules of Evidence have affirmatively decided that the prior statement cannot come in as substantive evidence of guilt.[3] This was done because of the prior statement's relative lack of trustworthiness and its potential for prejudice. To retreat from this position to one where the general rule is to let in this same "untrustworthy," potentially extremely prejudicial statement, not for the truth of what was said but because it reflects adversely on the credibility of the witness who said it when, as in the hypotheticals, the witness really has said nothing else, is at best hypocritical.

Under the common law, this problem was dealt with by allowing impeachment of one's own witness only when counsel could show both surprise and affirmative damage. In neither of our hypotheticals was Turncoat's answer a surprise; the assumption in both cases was that the prosecutor knew he had changed his story. Moreover, the testimony may not have affirmatively damaged the prosecution's case.

Under the federal rules how is the problem handled? How do the federal rules deal with the use of rule 607 as a subterfuge to get evidence otherwise inadmissible to the jury?

III. Analysis

There is a body of good literature discussing this problem, but no consensus on the proposed solutions.[4] Judge Weinstein and Professor Berger recognize that rule 403 is a general constraint on rule 607. Their analysis, then, focuses on the impeaching evidence's probative value versus its prejudicial impact.[5]

Professor Graham suggests the following analysis. He argues that the balancing required under rule 403 is too difficult, too uncertain, unnecessarily time-consuming, and too likely to result in rulings which allow this sort of

2 I. Younger, The Art of Cross Examination (ABA Litigation Section Monograph Series 1976).

3 *Compare* proposed FED. R. EVID. 801(d)(1) *with* FED. R. EVID. 801(d)(1).

4 *See* 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 607[01], at 29-34 (Cum. Supp. Dec. 1977). *See also* Graham, *The Relationship Among Federal Rules of Evidence 607, 801(d)(1)(A), and 403: A Reply to Weinstein's Evidence,* 55 TEX. L. REV. 573 (1977); Graham, *Examination of a Party's Own Witness Under the Federal Rules of Evidence: A Promise Unfulfilled,* 54 TEX. L. REV. 917, 931 (1976).

5 J. WEINSTEIN & M. BERGER, *supra* note 4, at 30. Judge Weinstein and Professor Berger analyze "the problem in terms of Rule 403—is the probative value of the impeaching evidence outweighed by its prejudicial impact?"

subterfuge impeachment. He also argues that the Weinstein approach is ineffective because, in the process of arguing rule 403, the jury will become aware of the prior inconsistent statement. He suggests, instead, that, in the case of prior-inconsistent-statement impeachment, not otherwise admissible as substantive evidence, either rule 607 be interpreted as continuing the common law requirements of surprise and damage or surprise and damage be employed as the controlling criteria in applying rule 403.

Neither approach is adequate, the former because it does not go far enough, and the latter in part, because it sets a bad precedent. Where the legislature has not indicated that the common law rule on a subject survives or is incorporated into a new statute, the courts should not be encouraged to impose that rule upon the statute. It is not the job of the courts to decide which rule, the common law rule or the statutory rule, is the better rule.

The proper solution should be analyzed in the following way. Calling a witness for the sole purpose of impeaching him should be prohibited as irrelevant.[6] If counsel calls a witness only to have him give testimony "A," although fully intending to impeach testimony "A," then "A" is offered only for the proposition that the witness is not to be believed and, therefore, that "A" is not to be believed. If "A" is not to be believed, then, under the theory of the attorney who called the witness, inquiry into "A" in the first place is irrelevant.[7]

When counsel calls a witness to get his testimony about things other than "A," and where counsel asserts that the witness' testimony in all of those other regards is to be believed, and where counsel intends to argue that only in regard to "A" is the witness not to be believed, then inquiry regarding "A" is still not relevant. If counsel asserts the truth of all of the witness' testimony except that regarding "A" and he knows in advance that he will impeach the witness' testimony regarding "A," then, under that counsel's own theory, the initial inquiry into "A" is not relevant. Given that the impeaching statement cannot be used as substantive evidence, the statement to be impeached adds nothing if offered only to show that it cannot be believed while everything else said can be believed.

The result, of course, will be different when opposing counsel wishes to bring up the impeaching matter as relevant to the credibility of the rest of the witness' direct testimony. The assumption here is that opposing counsel, having decided that the impeachment does him more damage than good, does not want to raise the point for any reason. Under these circumstances, knowing or suspecting that calling counsel is inquiring only to discredit, opposing counsel can object to that part of the testimony.

The arguments that in the process of dealing with this as a relevance problem the jury will become aware of the prior statement and that calling counsel never really knows what the witness will say until the question is asked, and particularly asked under oath, subject to the penalties of perjury, can be addressed through the use of the motion *in limine* and examination of the witness

6 The single exception here would involve the due process rights of the criminal defendant. *See* Chambers v. Mississippi, 410 U.S. 284 (1973).

7 *See* FED. R. EVID. 401, 402.

outside of the hearing of the jury. The motion *in limine,* if not resulting in a pretrial ruling, at least alerts the court to the problem. When the examination of the witness approaches the dangerous ground, subject "A," upon appropriate objection by opposing counsel the appropriate questions can be put to the witness, under oath, outside of the hearing of the jury. This issue would be handled much in the way the court handles a ruling on a hearsay objection when it cannot rule until it hears what the witness has to say.

Under this analysis, the problem has been reduced to three situations. One, of course, occurs when counsel is genuinely surprised by an answer inconsistent with a previous statement. The second occurs when counsel calls a witness and inquiries about other than "A" and the witness says something, other than "A," which results in that same counsel wanting to present a general attack on his credibility. The third involves counsel calling a witness and inquiring about other than "A"; opposing counsel then cross-examines and secures favorable responses; calling counsel now wants to impeach the witness. How are these problems to be resolved? The method which seems most natural under the circumstances is to balance the probative value against the prejudice, the Weinstein and Berger approach, and, as I see it, the Federal Rules of Evidence approach.

The process of weighing relates more directly to the problem to be resolved. As can be seen, the problem involves more than just the attorney who is surprised by an answer. And, even when counsel is surprised, the proper object of this rule is to protect a party from some level of prejudice threatened by untrustworthy material. It is artificial to focus on counsel and his knowledge as a way of protecting the opposing party. We are not trying to save counsel's face or to protect his personal record and the rule should not focus on counsel.

The mechanical application of surprise and damage misses the point. In any given case, it is only coincidentally relevant to what the rule is meant to accomplish.

One caveat must be mentioned. If Professor Graham's fears are realized and, in practice, use of the relevance rules becomes nothing more than an empty promise, if courts routinely follow the most liberal, literal interpretation of rule 607 without considering the relevance rules, then it would be time to turn to Congress for an amendment to rule 607.

Judge (then Professor) Weinstein, while a member of the Advisory Committee drafting the Rules, moved to amend rule 607, "the credibility of a witness may be attacked by any party, including the party calling him," to substitute the words "who in good faith called" for the word "calling."[8] Although a judgment of counsel's good faith might achieve the same end as the suggested relevance approach, it might be more likely that surprise and damage would be found to be the test of good faith. In any event, the focus on counsel remains misplaced.

An amendment would be designed to deal with the situation where a party wishes to impeach his own witness and such impeachment is objected to on any of the grounds stated in rule 403. In that situation, an appropriate amendment

8 Van Pelt, *The Background of Rules 611(b) and 607,* 57 NEB. L. REV. 898, 904-05 (1978).

would require the court, upon the request of any party, to state, on the record, the specific reasons for its ruling. Rule 103(b) currently allows the court to do this to create as complete a picture as possible for an appellate court. This suggestion simply goes one step further and, in this situation, upon request, requires that the court present a record which will assist effective review. It also tends to require that the court be intellectually honest and confront exactly what it is doing and why, making it more difficult for the court to participate, consciously or not, in the subterfuge under discussion.

The theory of this amendment is that you can lead the court to water and make it drink. The assumption behind not calling for an immediate amendment is that most courts can find and will drink the water on their own.