Article VI of the Federal Rules of Evidence: Witnesses

Robert W. Booksh Jr.

Repository Citation
Available at: https://digitalcommons.law.lsu.edu/lalrev/vol36/iss1/10

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.
ARTICLE VI OF THE FEDERAL RULES OF EVIDENCE: WITNESSES

An integral part of evidence law consists of rules relating to witnesses, including those rules governing the form and scope of the examination by which testimony is elicited and credibility is impeached. The Federal Rules of Evidence promulgated by the Supreme Court dealing with witnesses underwent substantial Congressional alteration. The purpose of this comment is to analyze the theoretical and conceptual foundations of the most significant provisions in Article VI of the Federal Rules of Evidence enacted by Congress, giving appropriate reference to constitutional considerations which were purposefully left open. The discussion will be developed with a view to illustrate the need for reform and codification of Louisiana evidentiary precepts.

Examination of Witnesses

Scope of Cross-Examination

Commentators have labeled cross-examination the most effective device yet developed for exposing defects in testimony; it is a safeguard of such magnitude that its denial has constitutional implications in criminal cases and significant consequences in civil trials. While complete denial of the right of cross-examination is constitutionally precluded,

3. Considerations of space preclude a thorough discussion of all the rules contained in Article VI. Not discussed are Rules 601 (abrogation of any general competency requirement with deference to state law in certain cases), 602 (requirement of personal knowledge), 603-04 (oath requirement), 605-06 (special incompetency rules for judge and juror), 614 (calling and interrogation of witnesses by the court), and 615 (exclusion of witnesses).
5. 5 J. WIGMORE, EVIDENCE § 1367 at 32 (Chadbourn rev. 1974) [hereinafter cited as 5 WIGMORE]. But see C. MCCORMICK, EVIDENCE § 31 at 63 (Cleary ed. 1972) [hereinafter cited as MCCORMICK].
7. See MCCORMICK § 19. The denial may only result in the exclusion of the evidence adduced on direct, but in a proper case, may result in reversal.
the court generally has discretionary control over the form and scope of questioning during cross-examination.8

Varying considerations have led to disagreement over the proper scope of cross-examination.9 The broad rule, embraced by Louisiana and a minority of jurisdictions, permits cross-examination on any relevant issue;10 the narrow rule, variously formulated,11 limits the inquiry on cross-examination to matters elicited on direct examination and to those affecting the witness's credibility.12 The divergence of opinion illustrates that neither mode of cross-examination is without disadvantages.13

As presented to Congress, Rule 611(b) embraced the broad rule of cross-examination, precipitating a substantial split in both Houses.14 Eventually Congress amended the proposed Rule to return to the narrow rule,15 but gave a trial judge discretion to permit inquiry into additional matters "as if on direct examination."16 Congress believed that allowing the trial judge discretion would provide sufficient flexibility to meet the necessities of trial.17

8. FED. R. EVID. 611(a); MCCORMICK § 19. See State v. Johnson, 249 La. 950, 192 So. 2d 135 (1966) (judge has full authority to control questioning).
10. See, e.g., LA. R.S. 15:280 (1950), renumbered by La. Acts 1966, No. 311, § 2: "When a witness has been intentionally sworn and has testified to any single fact in his examination in chief, he may be cross-examined upon the whole case." See also MCCORMICK § 21 at 47.
11. See generally MCCORMICK § 21.
12. A third view, now almost obsolete, allows cross-examination to extend to any matters except the cross-examiner's affirmative case, such as the defendant's affirmative defenses or cross-claims. MCCORMICK § 21 at 48.
14. See J. WEINSTEIN & M. BERGER, COMMENTARIES ON RULES OF EVIDENCE FOR THE UNITED STATES COURTS & MAGISTRATES ¶ 611[01] (1975) [hereinafter cited as WEINSTEIN & BERGER]. The Supreme Court version provided: "A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. In the interests of justice, the judge may limit cross-examination with respect to matters not testified to on direct examination." Fed. R. Evid. 611(b) (Sup. Ct. Draft 1972).
15. FED. R. EVID. 611(b): "Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination."
16. Id.
However, close scrutiny of the traditional justifications offered for the narrow rule reveals its lack of foundation. One justification for the narrow rule is that since a party vouches for the credibility of his witness, cross-examination should not be permitted beyond those matters for which the witness was originally called.\textsuperscript{18} However, Rule 607\textsuperscript{19} expressly rejects the vouching concept and thus provides no support for the narrow rule of cross-examination contained in the Rules. When counsel cross-examines he is permitted to utilize the advantageous device of the leading question.\textsuperscript{20} If he inquires about matters not covered in the direct examination, proponents\textsuperscript{21} of the narrow rule argue that counsel will be allowed to use leading questions to elicit testimony which he would otherwise have been forced to adduce during direct examination where the use of leading questions is generally precluded.\textsuperscript{22} However, their argument is more properly concerned with the propriety of the use of leading questions to elicit evidence from a witness who may be subject to suggestion and can be adequately answered by judicious application of the rules on leading questions.\textsuperscript{23} For example, if a witness's relation to the cross-examiner is such that a leading question might unduly influence the witness, the court should require that the cross-examination proceed without the aid of leading questions.\textsuperscript{24}

Finally, proponents of the narrow rule argue that it promotes orderly presentation of the evidence, and that a contrary rule would lessen the impact and persuasiveness of direct examination.\textsuperscript{25} Although this contention has merit, it appears outweighed by other considerations. The overwhelming doctrinal support which the broad rule of cross-

\begin{footnotes}
\begin{enumerate}
\item[18.] FED. R. EVID. 611(b), Adv. Comm. Note.
\item[19.] FED. R. EVID. 607: “The credibility of a witness may be attacked by any party, including the party calling him.” See text beginning at note 75, infra.
\item[20.] MCCORMICK § 6 at 9.
\item[22.] See note 39, infra.
\item[23.] FED. R. EVID. 611(c). See note 37, infra.
\item[24.] Normally, however, either the witness will be aligned with the adverse party or hostility can be shown so that the leading question would not be objectionable even though the cross-examiner is, in effect, conducting a direct examination.
\item[25.] See note 39, infra.
\end{enumerate}
\end{footnotes}
examination enjoys stems principally from its potential to effectively reveal truth and from its avoidance of unnecessary delay. The concern for orderly presentation of the evidence which the narrow rule promotes appears an accommodation to the advocate; counsel brings out only what he wants the trier of fact to hear. The result is an impediment to justice since relevant facts upon which an intelligent verdict should be based are often omitted. Although orderly presentation of evidence undoubtedly aids the jury, conservation of judicial time and energy is a strong countervailing consideration. The broad rule leaves little room for dispute or technical haggling over its application, while these results are inescapable collateral effects of the narrow rule.

In evaluating the proper scope of cross-examination a distinction should perhaps be made between criminal and civil trials. In a criminal trial when the accused testifies, the extent to which he waives his privilege against self-incrimination concerning matters not elicited on direct examination is a relevant inquiry. Some judicial language intimates that under the fifth amendment his waiver extends only to the subject matter of his testimony on direct examination and regardless of the lack of a definitive resolution of


27. But under the broad rule, the court in the exercise of sound judicial discretion can control the trial so as to keep the issues clear for the jury. Of course, when the case is tried by the court without a jury this is not an important factor.


this question, sound policy may dictate this conclusion. Although the narrow rule applied to the accused-witness would equally result in suppression of relevant evidence, if the defendant’s testimony is crucial to a particular issue but the application of the broad rule dissuades him from testifying, it seems the need for the testimony should outweigh the restraint put on the prosecution.  

In any event, the extent of an accused's waiver of his fifth amendment rights should not justify a general restrictive rule applicable in all cases. The narrow rule is not only theoretically unsound, but its application results in unfortunate practical effects. The narrow rule may simply postpone and delay the eventual introduction of evidence; furthermore, the rule may exclude relevant testimony where the witness has a privilege not to be called by the opponent. In summary, the narrow rule seems inconsistent with the general theme of the Federal Rules favoring admissibility and may result in significant restraint on the ascertainment of truth.

**Form of Questions**

Concomitant with its inherent powers over the trial, under the Federal Rules the court has discretion to control v. Pate, 357 F.2d 911, 915-16 (7th Cir. 1966); State v. Cripps, 259 La. 403, 429-30, 250 So. 2d 382, 392 (1971); State v. Kaufman, 211 La. 517, 535-36, 30 So. 2d 337, 343 (1947). The same constitutional problems could arise if the judge permits the prosecution to proceed to cross-examine the defendant “as if on direct.”

31. The court in Gordon v. United States, 383 F.2d 936, 940-41 (D.C. Cir. 1967), clarifying Luck v. United States, 348 F.2d 763 (D.C. Cir. 1965), considered this an important factor to be assessed by the trial court in determining whether the accused should be impeached by prior convictions. See note 117, infra. Cf. State v. Thomas, 208 La. 548, 23 So. 2d 212 (1945) (defendant has the right to take the stand out of the presence of the jury for the limited purpose of testifying to the involuntariness of a confession and not be subject to cross-examination upon the whole case).

32. See Mccormick § 23.

33. The plaintiff may escape a directed verdict only to lose his case when the damning testimony is elicited in his opponent’s case.

34. “Thus, the privilege of the accused, and of the spouse of the accused, not to be called by the state in a criminal case may prevent the prosecutor from eliciting the new facts at a later stage, if he cannot draw them out on cross-examination.” Mccormick § 23 at 51. See La. R.S. 15:461(2) (1950).

the form of questions asked by counsel.\textsuperscript{36} However, due to their importance, the Federal Rules expressly treat use of leading questions.\textsuperscript{37} The objectionable feature of leading questions is that they suggest to the witness the answer sought by the examiner.\textsuperscript{38} That a witness is friendly to the direct examiner, and that he may, for that reason, be receptive to prompting is assumed; consequently, in Louisiana and other jurisdictions use of leading questions is prohibited in direct examination.\textsuperscript{39} However, when a witness is cross-examined by opposing counsel, there is less likelihood that he will acquiesce to inaccurate or misleading proposals, thus, leading questions are usually proper.

Circumstances may arise which require exceptional treatment. If exclusion of leading questions substantially diminishes the ability of counsel to elicit relevant evidence on direct examination, their prohibition is outweighed by the fact-finder's need for the evidence. Such circumstances are presented if the witness's memory is exhausted, the witness is a young child or an adult with communication problems, or the questions deal with undisputed preliminary matters.\textsuperscript{40}

\textsuperscript{36} FED. R. EVID. 611(a): "The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." See State v. Johnson, 249 La. 950, 192 So. 2d 135 (1966) (judge has full authority to control questioning); MCCORMICK § 5 at 8.

\textsuperscript{37} FED. R. EVID. 611(c): "Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions." Although the Rule is not absolutely clear, if the conditions of Rule 611(c) are met, leading questions should be allowed despite the fact that the examination is proceeding "as if on direct" pursuant to Rule 611(b). See State v. Fallon, 290 So. 2d 273 (La. 1974) (the court has discretion to limit or allow leading questions).


\textsuperscript{39} LA. R.S. 15:277 (1950), renumbered by La. Acts 1966, No. 311, § 2: "A leading question is one which suggests to the witness the answer he is to deliver, and though framed in the alternative, is inadmissible when pronounced to one's own witness, unless such witness be unwilling or hostile." See MCCORMICK § 6 at 8-9.

\textsuperscript{40} FED. R. EVID. 611(c), Adv. Comm. Note.
Likewise, when cross-examination is in form only, because the witness to be cross-examined is receptive to the prompting of the cross-examiner, leading questions should be improper. Federal Rule 611(c) accommodates these considerations by giving the court limited discretion to permit use of leading questions on direct examination if "necessary to develop the testimony" or if hostility is actually shown, and to prohibit their use on cross-examination.

Rule 611(c) also permits leading questions on direct examination when a "party calls an adverse party or a witness identified with an adverse party" and thus apparently represents a broadened concept for civil cases. Statutes authorizing leading questions under these circumstances are often drafted narrowly to restrict the application of the exception to those witnesses who as agents of the party have a specified connexity with the matter in controversy. The approach incorporated in the Federal Rules, however, should discourage a restricted, mechanistic application and will ideally be broadly construed to promote the search for truth.

The most progressive element of Rule 611(c) is its innovative application of the "adverse party" rule to criminal cases. The rule cannot be used against the accused since he

41. E.g., Montgomery v. City of New Orleans, 266 So. 2d 482 (4th Cir. 1972) ("A party may be cross-examined by his own counsel only in those circumstances permitted by law, [such] as when there is proof of hostility.") Cf. Rancatore v. Evans, 182 So. 2d 102 (La. App. 4th Cir. 1966) (if the defendant-insured is in actuality aligned with the plaintiff, the cross-examination of the insured by the plaintiff can not be used against the defendant-insurer).

42. See note 37, supra.

43. The Advisory Committee believed that the phrase "necessary to develop the testimony" was sufficiently broad to provide for hostility. However, Congress added the reference to hostility to clarify that it was a permissible exception. SEN. COMM. ON THE JUDICIARY, SEN. REP. NO. 1277, 93d Cong., 2d Sess. 26 (1974).

44. FED. R. EVID. 611(c) provides: "Ordinarily leading questions should be permitted on cross-examination" (emphasis added). Leading questions may not be permitted where the cross-examination is in form only, and not in fact. FED. R. EVID. 611(c), Adv. Comm. Note.

45. Such a class of people consists of those who can be presumed hostile as opposed to those witnesses whose actual hostility must be shown. See note 43, supra.

46. E.g., LA. CODE CIV. P. art. 1634 provides in part: "'Representative' means an officer, agent or employee having supervision or knowledge of the matter in controversy, in whole or in part..."

47. The Supreme Court draft provided in part: "In civil cases, a party is
has a constitutional privilege not to be called by the prosecution.\textsuperscript{48} However, when the rule is otherwise sought to be utilized, difficulty may arise in determining which witnesses are \textit{aligned with} an adverse party within the meaning of Rule 611(c). The Senate Committee Report noted that "the rule should be applied with caution."\textsuperscript{49} Nonetheless, the final version of Rule 611(c) reflects sound policy by giving the court discretion to control interrogation of witnesses, thereby enhancing the fact-finding process and decreasing the extent to which each side is forced to rely on the other to call witnesses.\textsuperscript{50} Such an approach merges well with the abolition of the voucher rule in Rule 607.\textsuperscript{51}

\textit{Refreshing Recollection}

The technique of refreshing memory entails a witness's inspection of memoranda\textsuperscript{52} dealing with the particular experiences to be recalled, thereby affording a witness opportunity to revive his faded memory. However, the memorandum may so influence the witness that he will testify in reliance upon it rather than upon his refreshed memory.\textsuperscript{53} In order to protect entitled to call an adverse party or witness identified with him and interrogate by leading questions . . . ." Fed. R. Evid. 611(c) (Sup. Ct. Draft 1972). "The [House Judiciary] Committee . . . substituted the word 'When' for the phrase 'In civil cases' to reflect the possibility that in criminal cases a defendant may be entitled to call witnesses identified with the government . . . ." HOUSE COMM. ON THE JUDICIARY, H.R. REP. No. 650, 93d Cong., 1st Sess. 12 (1973).


\textsuperscript{49} SENATE COMM. ON THE JUDICIARY, S. REP. No. 1277, 93d Cong., 2d Sess. 26 (1974).

\textsuperscript{50} Note also that FED. R. EVID. 806 provides in part: "If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination."

\textsuperscript{51} See note 76, infra.

\textsuperscript{52} Although some court rules are more stringent, the majority of jurisdictions follow the traditional view that "any memorandum or other object may be used as a stimulus to present memory, without restriction by rule as to authorship, guaranty of correctness, or time of making." MCCORMICK § 9 at 16. Accord, LA. R.S. 15:279 (1950), renumbered by La. Acts 1966, No. 311, § 2. See State v. Holloway, 274 So. 2d 699 (La. 1973) (use of a memorandum apparently containing a mug shot); State v. Barnes, 257 La. 1017, 245 So. 2d 159 (1971) (use of another's memorandum); State v. Terrell, 175 La. 758, 144 So. 488 (1932) (use of stenographer's notes).

\textsuperscript{53} The danger is two-fold: (1) the witness might "remember" something
against potential abuse, the court should balance the likelihood that the memorandum will actually refresh the witness's memory against the possibility of undue suggestion and should prohibit the memorandum's use if the danger of improper suggestion outweighs its probable value.\textsuperscript{54}

Another safeguard against the misuse of memoranda used to refresh memory is the right of opposing counsel to inspect the memorandum in order to determine its actual capacity to refresh recollection and to discover possible inconsistencies bearing upon the witness's credibility.\textsuperscript{55} In Louisiana, as in most other jurisdictions, the right of inspection is extended only to those writings used while testifying.\textsuperscript{56} Federal Rule 612 reflects the same view, but with the modification that when the writing is used to refresh recollection before taking the stand, the court may compel production to allow inspection if the interests of justice will be served.\textsuperscript{57}

that never really occurred, or (2) the witness's memory might not actually be "refreshed," in which case the writing itself becomes the actual evidence, and must fall within the recorded recollection exception to the hearsay rule in order to be admissible.

\textsuperscript{54} \textit{E.g.}, State v. Tharp, 284 So. 2d 536, 541-42 (La. 1973); \textsc{McCormick} \S 9.

\textsuperscript{55} \textsc{McCormick} \S 9 at 17.

\textsuperscript{56} State v. Tharp, 284 So. 2d 536 (La. 1973). The court's opinion was ambiguous as to the extent of the inspection right. However, subsequent cases fixed the line at the witness stand. \textit{See} State v. Perkins, 310 So. 2d 591 (La. 1975); State v. Lane, 302 So. 2d 880 (La. 1974); State v. Payton, 294 So. 2d 211 (La. 1974). \textit{See also} cases cited in \textsc{McCormick} \S 9 at 17 n.59.

\textsuperscript{57} \textsc{Fed. R. Evid.} 612: "Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh his 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. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial" (emphasis added). For a detailed discussion of the problem area, see \textsc{McCormick} \S 9.
Congress manifested concern that an attorney's work product or other privileged matter might become the object of a fishing expedition launched under a non-discretionary rule. However, the requirement that the production of memoranda used by the witness be "for the purpose of testifying" seems adequate to have prevented such imposition.

If a witness refers to the writing immediately before taking the stand, the court, in its discretion, should prevent the slight temporal difference from becoming a means to evade the Rule. The danger of undue suggestion is always present, regardless of when the witness refers to the memorandum, and the presence of this danger alone should persuade the court in its discretion to compel production when there are no countervailing considerations.

Federal Rule 612 is subjected expressly to the Jencks Act, which provides for production of "statements" made

58. H.R. REP. NO. 650, 93d Cong., 1st Sess. 13 (1973). The original Advisory Committee draft of Rule 612 made no distinction as to the time when the witness referred to the writing.

59. See note 57, supra.

60. FED. R. EVID. 612, Adv. Comm. Note: "The purpose of the phrase 'for the purpose of testifying' is to safeguard against using the rule as a pretext for wholesale exploration of an opposing party's files and to insure that access is limited only to those writings which may fairly be said in fact to have an impact upon the testimony of the witness."


62. See text at note 58, supra. See also MCCORMICK § 9 at 17-18; 3 J. WIGMORE, EVIDENCE § 762 at 140 (Chadbourn rev. 1970) [hereinafter cited as 3 WIGMORE].

63. 18 U.S.C. § 3500 (1957). See text of Rule 612 at note 57, supra. 18 U.S.C. § 3500(a) provides: "In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a government witness . . . shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case."

64. 18 U.S.C. § 3500(e) provides: "The term 'statement,' as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—(1) a written statement made by said witness and signed or otherwise adopted or approved by him; (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or (3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury." The restrictive definition of "statement" does not apply to the general prohibition of subsection (a).
by government witnesses in a federal criminal case. In *Palermo v. United States*, the United States Supreme Court held that statements of government witnesses not subject to production under the terms of the Jencks Act are immune from all other production requirements. *Palermo* apparently remains viable under Rule 612. Since under the Jencks Act statements need not have been consulted "for the purpose of testifying" in order to compel production, the availability of statements under the Act appears broader than that authorized by Federal Rule 612. Yet, where a statement used by a government witness to refresh his memory does not fall within the purview of the Jencks Act, *Palermo* may necessarily preclude the efficacy of Rule 612. If Rule 612 is so construed, the accused would be unduly restricted. For example, a government agent's memorandum of a witness's statement used by the government agent on the stand to refresh his memory could not be produced, thereby potentially depriving the defendant of valuable impeaching evidence.

**Impeachment**

In accordance with the approach of the Uniform Rules and the Model Code of Evidence, the Federal Rules do not comprehensively treat impeachment or rehabilitation.


66. FED. R. EVID. 612, Adv. Comm. Note: "Items falling within the purview of the statute are producible only as provided by its terms, *Palermo v. United States*, 360 U.S. 343, 351 (1959), and disclosure under the rule is limited similarly by the statutory conditions."

67. Text of FED. R. EVID. 612 in note 57, supra. 18 U.S.C. § 3500(b): "After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use" (emphasis added).

68. However, when the material used by the witness is not his statement, as for example, a diagram, then *Palermo* does not apply and Rule 612 governs.

69. UNIFORM RULES OF EVID. 19-22 (1953).

70. MODEL CODE EVID. rule 106 (1942).

71. The only area comprehensively covered is impeachment by use of character evidence, including convictions. FED. R. EVID. 608-09. Other areas treated are the foundation requirements for impeachment by prior inconsistent statements (Rule 613), and the inadmissibility of religious beliefs and
These subjects must be treated by reference to the general policy of the Federal Rules favoring full admissibility of relevant evidence unless exclusion is dictated by legal or policy reasons. Proffered evidence should be analyzed in light of its probative value, and counsel should be required to explain how the evidence is relevant to credibility rather than support its admission through mechanistic application of traditional rules.

**Impeachment of One’s Own Witness**

Commentators have long advocated abrogation of the traditional rule against impeaching one’s own witness; the Federal Rules adopt their philosophy in Rule 607. Though the voucher rule may have had merit in its beginnings, in the modern adversary process one rarely can choose his witnesses, and therefore a party cannot in fact usually hold out his witnesses as worthy of belief. A rule which prevents the calling party from impeaching his own witness leaves him at the mercy of the witness and his adversary. The disadvantageous effect of the traditional voucher rule outweighs the

opinions “for the purpose of showing that by reason of their nature” credibility is impaired (Rule 610). See *McCormick* § 48.

72. The traditional methods of impeachment omitted are bias, defects in capacity to observe or recollect, and contradiction. See *McCormick* §§ 40, 45, 47.

73. *Fed. R. Evid.* 102, 401, 611(a); *Weinstein & Berger* ¶ 607[02]; *Credibility Tests* at 167.

74. Traditionally impeachment evidence was excluded if it was classified as “collateral.” Under the suggested approach the court must balance the probative value of the evidence against its impact on the jury in light of the circumstances of the particular trial; the court cannot merely justify its ruling by a label. *Weinstein & Berger* ¶ 607[06] at 607. Balancing the value of evidence against its risk should eliminate many artificial rules which developed in connection with impeachment by inconsistent statements. For example, the court should not concern itself with determining the presence of a sufficient degree of inconsistency in a prior statement; it should admit the statement if on balance it is helpful to the trier of fact. *McCormick* § 34 at 69; *Weinstein & Berger* ¶ 607[06].


76. *Fed. R. Evid.* 607: “The credibility of a witness may be attacked by any party, including the party calling him.”

77. See Ladd at 69-75.
objection that permitting impeachment of one's own witness may permit a party to coerce his witness to give testimony favorable to his client by threatening to reveal embarrassing character evidence to impeach him if he refuses.\textsuperscript{78} In addition, the existence of numerous exceptions to the traditional voucher rule raises doubts about its soundness.\textsuperscript{79} The United States Supreme Court in \textit{Chambers v. Mississippi}\textsuperscript{80} cast serious doubt on the constitutional validity of the old voucher rule at least insofar as its application denies an accused the right to present a defense. Apart from the policy reasons which favor rejection of the traditional ban against impeachment of one's own witness, impairment of the truth-finding process which results from its application alone appears sufficient to justify its abolition.\textsuperscript{81}

Rule 607 represents a change more in emphasis than in effect, since the traditional exceptions to the ban against impeaching one's own witness often permitted the same result which will obtain under the new Federal Rule.\textsuperscript{82} Furthermore, a number of impeachment methods sanctioned by the Federal Rules are available only on cross-examination.\textsuperscript{83} Since the jury often looks unfavorably upon attacks

\textsuperscript{78} McCORMICK § 38; WEINSTEIN & BERGER ¶ 607[01]; \textit{Symposium on the Proposed Federal Rules of Evidence: Part I}, 15 WAYNE L. REV. 1077, 1263-67 (1969). It has forcibly been argued that even the fear of having one's character exposed in public is not an effective coercive device. The coercion theory “assumes that all witnesses who give destructive testimony to the party who calls them, are testifying to the truth,” and this is a false premise. Ladd at 85.

\textsuperscript{79} The voucher rule is relaxed in several situations: United States v. Hicks, 420 F.2d 814 (5th Cir. 1970) (where the calling party is surprised by the witness); United States v. Browne, 313 F.2d 197 (2d Cir. 1963) (where the judge calls the witness); United States v. Freeman, 302 F.2d 347 (2d Cir. 1962) (where the accused calls a government agent); \textit{Fed. R. Civ. P. art. 32(a)(1)} (where a witness in a civil case contradicts testimony given in a deposition); \textit{La. CODE OF CIV. P. art. 1634} (where the adverse party is called as a witness in civil cases). \textit{See generally} WEINSTEIN & BERGER ¶ 607[01].

\textsuperscript{80} 410 U.S. 284 (1973) (totality of the circumstances denied the defendant due process by depriving him of a fair opportunity to present a defense).

\textsuperscript{81} Under Rule 607 “[t]he witness is no longer a partisan object to be defended by one party and attacked by the other. He becomes an instrument of the Court, and every relevant fact may be elicited from him, without rules which tend to conceal some aspects of testimony.” \textit{Symposium on the Proposed Federal Rules of Evidence: Part I}, 15 WAYNE L. REV. 1077, 1284-85 (1969).

\textsuperscript{82} \textit{See} note 79, \textit{supra}.

\textsuperscript{83} \textit{See Fed. R. Evid.} 608(b) at note 100 \textit{infra}, and 609(a) at note 120, \textit{infra}.
against one's own witness, and since ideally the necessity for impeachment of one's own witness will seldom arise, the new Federal Rule should have limited effect in practice.

Despite the arguments favoring the relaxed rule, which permits a calling party to impeach his own witness, the possibility exists that Rule 607 will be misused as a vehicle to get hearsay before the jury. When prior inconsistent statements are used to impeach a witness, a possibility always exists that the jury will give them substantive weight. As originally promulgated by the Supreme Court, Rule 801(d) (1) (A) excepted prior inconsistent statements from the definition of hearsay, and was thus consistent with Rule 607, which authorizes impeachment of one's own witness by prior inconsistent statements. Simply stated, under the original federal scheme no hearsay problem existed. However, Congress subsequently changed the Supreme Court's version of Rule 801(d) (1) (A) and provided that prior inconsistent statements not made under oath are hearsay. Pretermitting a discussion of the merits of Congress's amendment, the change apparently reflects the judgment that prior inconsistent statements not given under oath are inherently unreliable. The resulting inconsistency is unfortunate, as it places the accused in the position of possibly being convicted on evidence Congress decreed to be too untrustworthy for substantive use, if the jury in fact uses the impeaching statement substantively.

In most jurisdictions prior inconsistent statements may be brought to the attention of the jury if the direct examiner is surprised or during cross-examination, and arguably an equivalent opportunity for abuse exists. However, in these situations introduction of a prior statement serves a legitimate impeachment function and is not offered for the sole purpose of avoiding the hearsay prohibition. The policy reasons which prompted Congress to prohibit substantive use of prior statements not given under oath should be equally

84. See Ladd at 69.
85. Absent surprise, when an advocate attempts to impeach his own witness using prior inconsistent statements, the most obvious inference is that he is attempting to do indirectly what he can not do directly.
87. See MCCORMICK § 38 at 76.
88. WEINSTEIN & BERGER ¶ 607(01); Ladd at 85.
applicable in the impeachment arena, since a jury cannot sufficiently discriminate between evidence offered solely for impeachment purposes and evidence intended to be given its natural probative weight. Thus, Rule 607 should be modified to conform with the policy judgment reflected in Rule 801(d)(1)(A) to limit impeachment by prior inconsistent statements to cases of surprise where the introduction of the statement serves a legitimate impeachment function. Perhaps concern is greater in criminal cases and the best solution is to restrict the prosecutor's impeachment of his witnesses by prior inconsistent statements to cases of surprise where the advantages to the truth-finding process adequately outweigh the danger of a conviction based upon hearsay.

**Character and Conduct**

Though character evidence is of slight probative value, its impact upon a jury can be devastating. Consequently, the Federal Rules generally restrict its use, and where character evidence is permitted as an impeachment device, Rule 608 limits the inquiry to the witness's character for truthfulness. The limitation directs the trier's attention to evidence more probative of credibility, reduces confusion and surprise, and decreases the unfavorable aspects of testifying.

Traditionally, in Louisiana, as in most jurisdictions, proof

---

90. Cf. N.J.R. Ev. 20 which allows one generally to impeach his own witness, but not by prior inconsistent statements without surprise.
91. WEINSTEIN & BERGER ¶ 608[01].
93. FED. R. EVID. 608(a): "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, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise." Thus moral character which is of slight probative value is excluded. But see LA. R.S. 15:490 (1950): "The credibility of a witness may be attacked generally, by showing that his general reputation for truth or for moral character is bad, or it may be attacked only in so far as his credibility in the case on trial is concerned."
94. If a witness had a sordid past and incidents bearing upon that past were a proper inquiry, the witness would hesitate to take the stand; once there he could be humiliated.
of character has been limited to evidence of reputation.\textsuperscript{95} The Federal Rules adopt use of reputation evidence to establish character and additionally provide that character may be proved by testimony in the form of personal opinion.\textsuperscript{96} Allowance of personal opinion as a mode of proof of character is predicated upon its higher degree of reliability in comparison with reputation testimony.\textsuperscript{97} Since reputation testimony is often opinion in disguise, it is logical to avoid the use of indirect evidence when better proof of character is available.\textsuperscript{98} Though other reasons support the use of personal opinion testimony,\textsuperscript{99} proof of character by reputation was retained since it may be the only method of proof if no witnesses have sufficient personal contact with the person whose character is at issue to give a personal opinion.

Recognition that effective cross-examination demands some allowance for inquiries of a specific nature prompted the Advisory Committee to incorporate into the Federal Rules a provision that the character of a witness may be proved by specific instances of conduct,\textsuperscript{100} however, cognizant of the high risk of prejudice associated with a liberal view, the drafters also incorporated certain safeguards. Of primary importance is the restriction that such inquiry can only be made on cross-examination. Furthermore, extrinsic proof of specific

\textsuperscript{95} LA. R.S. 15:491 (1950): “When the general credibility is attacked, the inquiry must be limited to general reputation, and can not go into particular acts, vices or courses of conduct.” \textit{See} McCormick § 44.

\textsuperscript{96} \textit{See} note 93, \textit{supra}.

\textsuperscript{97} While reputation testimony is the conglomerate judgment of the community, opinion rests upon personal observation. 7 J. Wigmore, \textit{Evidence} § 1986 (3d ed. 1940); 120 Cong. Rec. 11-548 (Feb. 6, 1974).

\textsuperscript{98} \textit{Credibility Tests} at 173.

\textsuperscript{99} The traditional limitation that one’s character could only be established by testimony on reputation often worked as a rule of exclusion. In contemporary society an individual may not remain in one area long enough to establish a reputation. Hence, a witness having sufficient contacts with the person whose character he is describing is qualified to express his opinion as to the person’s character and thereby fill this gap.

\textsuperscript{100} FED. R. EVID. 608(b): “Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, 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 his 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.” \textit{Contra} LA. R.S. 15:491 (1950) at note 95, \textit{supra}.
instances may not be used, and the court retains wide discre-

tion to prevent abuse.\footnote{Id. Additionally, the overriding principles of Rules 403 and 611(a) should require exclusion if the prejudice or embarrassment is extreme. 102. WEINSTEIN & BERGER ¶ 608[05] at 29.}

Although the federal scheme should
afford a basis for distinction between an accused or a party-


witness, and other witnesses generally,\footnote{103. Permitting impeachment by proof of past conduct, if construed broadly, could allow inquiry into past arrests (the Rule does not bar use of prior convictions) or other prejudicial events. However, the provision should be construed, especially in a criminal case, to exclude most past acts as either not probative of truthfulness or too prejudicial. If this is so, it is questionable whether this method should be authorized at all for impeachment since specific acts probative of bias or of inconsistency within court declarations are admissible without reference to Rule 608(b) and without limitation by it. FED. R. EVID. 401; cf. WEINSTEIN & BERGER ¶¶ 607[03], 613[01]; Phillips, A Comparative Study of the Witness Rules in the Proposed Federal Rules of Evidence and in Tennessee, 39 TENN. L. REV. 379, 392 n.55 (1972).} when the advan-


tages of impeachment by specific conduct are weighed against its deleterious effects, it appears that its exclusion represents sounder policy.\footnote{104. "no tenable contention can be made that merely by testifying he waives his right to foreclose inquiry on cross-examination into criminal activities for the purpose of attacking his credibility." Hence, Rule 608 so provides,\footnote{106. FED. R. EVID. 608(b) provides inter alia: "The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility" (emphasis added). Louisiana necessarily has a similar rule since specific acts, arrests and the like are not considered proper subjects of inquiry. See LA. R.S. 15:491, 495 (1950).} but the Rule states clearly that if criminal activities have an independent relevance they may be subjects of inquiry.\footnote{107. Independent relevance would exist when the criminal acts are probative of bias, or when evidence of other crimes is admissible to prove an element of the case in chief. See discussion of Rule 404(b) in Comment, Determining Relevancy: Article IV of the Federal Rules of Evidence, 36 LA. L. REV. 70, 80 (1975).}

Though a witness may not make a partial disclosure of incriminating evidence and then invoke his privilege against self-incrimination,\footnote{105. FED. R. EVID. 608(b), Adv. Comm. Note.} "no tenable contention can be made that merely by testifying he waives his right to foreclose inquiry on cross-examination into criminal activities for the purpose of attacking his credibility."\footnote{108. MCCORMICK § 49 at 102-03 n.73.} Hence, Rule 608 so provides,\footnote{109. FED. R. EVID. 608(a)(2): "Evidence of truthful character is admis-}
constitute an attack on a witness's character sufficient to allow his rehabilitation. That opinion and reputation evidence may be used to attack the credibility of a witness does not indicate that only when these methods are used is the witness's character in fact assailed. Therefore, the Advisory Committee included the phrase "attacked by opinion or reputation evidence or otherwise," intending to provide for exceptional situations.\textsuperscript{110} Since the "no bolstering" rule is not made specifically applicable to other modes of impeachment, rehabilitation principles must be developed by reference to basic principles of relevancy.\textsuperscript{111}

\textit{Conviction of Crime}

Prior criminal convictions are a particular kind of character evidence used to impeach a witness's credibility. A jury, however, because of the social stigma attached to a criminal conviction, may tend to be particularly influenced by its use as a means of impeachment.\textsuperscript{112} Although evidence of a witness's prior convictions may unduly influence a jury in its assessment of his credibility in any trial,\textsuperscript{113} impeaching an accused by his prior convictions works a special hardship. The fact-finder may use evidence of prior convictions as circumstantial evidence of guilt of the crime charged, though the prior criminal conduct may not have been introduced specifically for this purpose.\textsuperscript{114} The jury may punish an accessible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise." \textit{Accord}, La. R.S. 15:484 (1950).

\textsuperscript{110} A general test is "whether evidence of the good character of the witness or of his consistent statements is logically relevant to explain the impeaching fact." \textit{McCormick} § 48 at 103. An earlier Advisory Committee draft provided that the mere fact of being an accused would constitute a sufficient attack upon his character to authorize rehabilitation. As worded, Rule 608(a) could be so construed.

\textsuperscript{111} See text at note 73, supra. \textit{Weinstein \& Berger} ¶ 608[08].


\textsuperscript{113} \textit{Weinstein \& Berger} ¶ 606[02] at 58.

\textsuperscript{114} See discussion of \textit{Fed. R. Evid.} 404(b) in Comment, \textit{Determining
cused because he is "bad" regardless of a lack of evidence of his present guilt. To prevent such a result an accused with a criminal record may refrain from taking the stand in his own behalf, thereby depriving the trier of fact of relevant evidence. Use of prior convictions to impeach an accused who has taken the stand does not appear to violate the Constitution, but considerations of fairness demand that some restrictions should be imposed.

Aside from the undesirable effects which a rule permitting unqualified use of prior convictions has on an accused-witness, doubt exists as to the relevance of prior convictions upon the issue of witness credibility. Commentators agree that only those crimes which reflect a witness's predisposition toward mendacity are reasonably relevant to the question of credibility.

Congress, in Federal Rule 609, attempted to reconcile the need for an effective means to expose unreliable testimony with the problems of prejudice and relevance inherent in impeachment with convictions by placing certain restrictions on their use. Crimes involving dishonesty or false statement are particularly probative of credibility and are not


115. WEINSTEIN & BERGER ¶ 609[02] at 58.
117. Louisiana allows any conviction to be used to impeach a witness. LA. R.S. 15:462 (1950). Various other approaches have been formulated: (1) complete abrogation of use of prior convictions to impeach (Credibility Tests at 191; Spector at 247); (2) exclusion left to the court's discretion [Luck v. United States, 348 F.2d 763 (D.C. Cir. 1965)].
118. "While there may be a germ of truth to the basic assumption that the 'more serious the crime the more depraved (and thus untrustworthy) the criminal,' there are so many exceptions to such a proposition so as to make it worthless as a general rule." Glick at 334. See also Credibility Tests at 176; Spector at 249.
119. WEINSTEIN & BERGER 609[02] at 57; 3A J. WIGMORE, EVIDENCE § 926 (Chadbourn ed. 1970); Credibility Tests at 191; Glick at 335; Spector at 249.
120. FED. R. EVID. 609(a): "For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment" (emphasis added).
subject to exclusion in the court's discretion.\textsuperscript{121} The Rule further provides that all felonies are admissible for impeachment purposes, but insofar as an accused\textsuperscript{122} is concerned, only if the court determines that the probative value of the conviction on the issue of credibility outweighs its prejudicial effect to him. Rule 609 does not expressly require that the witness be first afforded an opportunity to admit or deny that he has been convicted;\textsuperscript{123} the Rule authorizes proof on cross-examination by either interrogation or public record.\textsuperscript{124}

Rule 609(a) puts the burden\textsuperscript{125} on the prosecution to show that the impeachment value of a prior conviction outweighs the danger that it will improperly influence the outcome of the trial by persuading the trier of fact to convict the accused on the basis of his prior record.\textsuperscript{126} Literally, Rule 609(a) could be construed to require a balancing process when the accused's witness is on the stand, although this was probably not the legislative intent.\textsuperscript{127} However, clearly an accused may utilize any felony conviction to impeach the prosecution's witnesses, thereby gaining a distinct advantage.\textsuperscript{128}

Although Rule 609(a) reflects a progressive step in the

\textsuperscript{121} WEINSTEIN \& BERGER \textsuperscript{609[03]}; H. CONF. REP. No. 1597, 93d Cong., 2d Sess. 9 (1974).

\textsuperscript{122} Although Rule 609(a) refers to the "defendant," surely Congress intended that the balancing approach should only apply to an accused. H. CONF. REP. NO. 1597, 93d Cong., 2d Sess. 9-10 (1974): "Such evidence should only be excluded where it presents a danger of improperly influencing the outcome of the trial by persuading the trier of fact to convict the defendant on the basis of his prior criminal record" (emphasis added). In civil cases there is no rational basis for distinguishing between a plaintiff and defendant to justify such a disparity in treatment.

\textsuperscript{123} But see SENATE COMM. ON THE JUDICIARY, FEDERAL RULES OF EVIDENCE, S. REP. No. 1277, 93d Cong., 2d Sess. 15 (1974): "[A] court record of a prior conviction is admissible to prove that conviction if the witness has forgotten or denies its existence" (emphasis added).

\textsuperscript{124} Contra LA. R.S. 15:495 (1950), as amended by La. Acts 1952, No. 180, § 1 which provides in part: "[B]ut before evidence of such former conviction can be adduced from any other source than the witness whose credibility is to be impeached, he must have been questioned on cross-examination as to such conviction, and have failed distinctly to admit the same. . . ."

\textsuperscript{125} Rule 609 grants more protection to an accused than the \textit{Luck} rule discussed at note 117, supra. See WEINSTEIN \& BERGER \textsuperscript{609[03]} at 67.

\textsuperscript{126} H. CONF. REP. NO. 1597, 93d Cong., 2d Sess. 9-10 (1974).

\textsuperscript{127} Compare WEINSTEIN \& BERGER \textsuperscript{609[03]} at 66-67 and 120 CONG. REC. 12254 (daily ed. Dec. 18, 1974) with H. CONF. REP. NO. 1597, 93d Cong., 2d Sess. 9 (1974).

\textsuperscript{128} WEINSTEIN \& BERGER \textsuperscript{609[03]}; 120 CONG. REC. 12254 (daily ed. Dec. 18, 1974).
area of impeachment by convictions, it nonetheless contains objectionable features. When the witness is neither the accused nor a witness called by the accused, if the probable legislative intent is given full effect evidence of prior convictions will be automatically admissible to impeach a witness's credibility, with the court having no discretion to weigh the actual risk of prejudice against the conviction's probative value on the issue of credibility. The net effect is inconsistent with the general approach of Rules 401 and 403 providing that evidence is admissible unless excluded because the probative value is outweighed by the risk of undue prejudice. In addition, the denial of discretion to exclude crimes involving dishonesty or false statement deprives the court of flexibility needed to handle exceptional situations. Finally, the phrase "dishonesty or false statement" can be broadly construed to include all crimes having any substantial relevance to credibility. Thus, Rule 609(a) should be limited to such crimes so that only felonies substantially relevant to credibility could be used to impeach. Such a limitation would reduce the burden which the present Rule places on the prosecution and bring impeachment by convictions in line with the other rules regulating the use of character evidence to impeach credibility by restricting inquiry to the witness's character for veracity and honesty.

Other provisions designed to guard against misuse of prior convictions to impeach credibility are incorporated into Rule 609. The Rule reflects sensitivity to problems of remoteness, rehabilitation, and juvenile adjudications. In

129. For instance, if an accused is charged with perjury, the admission of his last perjury conviction would be highly prejudicial and, if not falling within certain limited exceptions, would subvert Rule 404(b).

130. In speaking of the scope of the phrase "dishonesty or false statement," Dean Ladd observed that "robbery, larceny, and burglary, while not showing a propensity to falsify, do disclose a disregard for the rights of others which might reasonably be expected to express itself in giving false testimony whenever it would be to the advantage of the witness. If the witness had no compunctions against stealing another's property or taking it away from him by physical threat or force, it is hard to see why he would hesitate to obtain an advantage for himself or friend in a trial by giving false testimony." Credibility Tests at 180.

131. Fed. R. Evid. 609(b): "Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported
summary, Rule 609 represents a substantial reform of the use of prior convictions to impeach credibility and will hopefully be construed to make the impeachment device more suited to its limited purpose; collateral effects which are the result of a discarded philosophy should be eliminated.  

Prior Statements

While the Federal Rules do not exhaustively treat the subject of impeachment, they do articulate the foundational requirements relative to prior statements of witnesses. Rule 613(a) abolishes the former rule which required the cross-examiner, prior to questioning the witness about his prior written statement, to show it to the witness. The

by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence."

132. FED. R. EVID. 609(c): "Evidence of a conviction is not admissible under this rule if: (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence."

133. FED. R. EVID. 609(d): "Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if a conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence."

134. Consider the collateral problem of the extent to which the opponent may inquire into the details of crimes purportedly introduced to impeach the witness’s credibility. In State v. Jackson, 307 So. 2d 604 (La. 1975), the Louisiana Supreme Court held that all the details, whether their effect is to minimize or magnify the value of the prior crime as an impeachment device, are proper subjects of inquiry. However, sound policy should exclude details of the prior crime, especially if it results in avoidance of other requirements limiting the admissibility of other crimes to prove knowledge, intent, and the like. See WEINSTEIN & BERGER ¶ 609(03) at 79-80.

135. See text at note 71, supra.

136. FED. R. EVID. 613(a): "In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel."

137. See generally MCCORMICK § 28.
rule was a useless impediment to cross-examination and often operated to protect a collusive witness.\textsuperscript{138} However, since the requirement was rarely enforced,\textsuperscript{139} its abrogation is of little significance.

Distinguishable is the situation where, for purposes of impeachment, a prior inconsistent statement is sought to be proved in evidence. In Louisiana, as in most jurisdictions, the cross-examiner is first required to draw the witness’s attention to the time and place of the prior statement and then give him an opportunity to explain or deny making the statement before extrinsic proof of the statement is admissible.\textsuperscript{140} Under Rule 613(b)\textsuperscript{141} the only remaining requirement is that the examiner afford the witness an opportunity to explain the statement and the opposite party an opportunity to examine the witness about the statement. Since the Federal Rules do not require that the examiner introduce a witness’s prior inconsistent statement at the first opportunity, several collusive witnesses may be examined before disclosure of a joint prior inconsistent statement.\textsuperscript{142} Even the relaxed foun-

\textsuperscript{138} FED. R. EVID. 613(a), Adv. Comm. Note.
\textsuperscript{139} MCCORMICK § 29 at 57.
\textsuperscript{140} LA. R.S. 15:493 (1950) provides: “Whenever the credibility of a witness is to be impeached by proof of any statement made by him contradictory to his testimony, he must first be asked whether he has made such statement, and his attention must be called to the time, place and circumstances, and to the person to whom the alleged statement was made, in order that the witness may have an opportunity of explaining that which is prima facie contradictory. If the witness does not distinctly admit making such statement, evidence that he did make it is admissible.” See MCCORMICK § 37 at 72.
\textsuperscript{141} FED. R. EVID. 613(b): “Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).” Through principles of expression unius est exclusio alterius, the Rule does not require any foundational pre-requisites to the admissibility of prior inconsistent conduct. FED. R. EVID. 613(b), Adv. Comm. Note.
\textsuperscript{142} FED. R. EVID. 613(b), Adv. Comm. Note. However, the Rule may conflict with FED. R. CIV. P. art. 26(b)(3) which gives a person the right to inspect his prior statements about the subject matter of the suit. If the delay in exposing the prior inconsistent statement operates merely until the witness is deposed, there should be no serious imposition. But, if Rule 613(b) is permitted to delay the production of the statements until trial, the policy of Rule 26(b)(3) will be subverted. Phillips, A Comparative Study of the Witness Rules in the Proposed Federal Rules of Evidence and in Tennessee Law, 39 TENN. L. REV. 379, 401-02 (1972).
dational requirements of Rule 613(b) need not be met where the "interests of justice otherwise require."\textsuperscript{143}

Conclusion

Though Article VI of the Federal Rules of Evidence contains many rules contrary to those obtaining in Louisiana, they are generally supported by sound policy and could serve as a model for needed clarification and modernization of Louisiana evidence law. However, if such a project is undertaken, certain Louisiana rules should be retained as reflecting a wiser policy judgment. The broad rule of cross-examination not only conserves judicial time and energy but is a more effective tool in the truth-finding process than the narrow rule. Louisiana should also maintain its prohibition of inquiry into specific instances of a witness's conduct to impeach his credibility\textsuperscript{144} due to the prejudicial effects which may often result from disclosure of such facts.

Additionally, various rules in Article VI should be modified to protect against possible jury exposure to improper evidence. Unless a policy decision is reached defining all prior inconsistent statements as non-hearsay, the prosecution's attempts to impeach its own witnesses by prior inconsistent statements should be limited to instances in which the prosecution is surprised to prevent the surreptitious introduction of hearsay. Impeachment by use of convictions should be limited to those crimes involving dishonesty or false statement. Such classification includes any crime having substantial relevance to credibility and will, therefore, exclude those crimes having slight probative value and most tending to result in jury prejudice. However, the court should be given discretion to exclude even convictions having substantial relevance to credibility in order to provide for exceptional situations where even the strong probative value of this class of crimes is outweighed by their prejudicial effect.

Robert W. Booksh, Jr.

\textsuperscript{143} See note 141, supra. \textit{E.g.}, State v. Reed, 290 So. 2d 835 (La. 1974) (foundation not laid at the preliminary hearing; witness died before trial and the admitted prior recorded testimony was held not subject to impeachment). \textit{See also} Fed. R. Evid. 806 which provides in part: "Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain."

\textsuperscript{144} See note 95, supra.