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Successful Shadowboxing: The Art of Impeaching Hearsay Declarants

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SUCCESSFUL SHADOWBOXING: THE ART OF IMPEACHING HEARSAY DECLARANTS

THE HONORABLE ANTHONY M. BRANNON*

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This article was previously presented at the Ninth Annual North Carolina Evidence Seminar and at the 1990 Conference of Superior Court Judges.
I. Introduction

As a trial judge, sitting on my woolsack with the best seat in the house, observing detachedly the fight to the finish that I am umpiring, I sometimes wonder at what seems to me the passing up of golden opportunities by the able advocate. Foremost among these lost opportunities is the virtual total neglect to do anything about the other side’s hearsay once it has been admitted by the trial judge into evidence.

True enough, the able advocate fought valiantly against the hearsay admission; but, having lost that position, he does not fall back to the next logical position — impeaching the hearsay declarant. Rather, the advocate appears to abandon altogether his battle against the hearsay declarant. Whether this abandonment is due to exhaustion of energy or unawareness of the fact that impeachment possibilities exist, I do not know.

Clearly, this is an important omission by the litigator. After all, hearsay is a commonplace item in all trials, civil and criminal. Future years and future trials will evidence an even greater use of hearsay as “the prohibition against hearsay ... faces extinction.”

As one commentator has written:

The judicial commitment to admissibility under the federal rules [of evidence] is clearest in hearsay. The decisions ... about hearsay have created theories and precedents to admit almost all probative hearsay ... in reality, important hearsay is seldom excluded .... That is true even if the hearsay seems to fit none of the express exceptions. The lawyer who proffers hearsay should no longer ask, “Can I get it in?” but “How do I get it in?”

With this in mind, trial judges and attorneys should be aware of the possibilities for impeaching hearsay evidence.

In attempting to plot out an outline for this article, I have decided, as Rule 806 of the North Carolina Rules of Evidence itself attempts, to treat the hearsay declarant as though he was an at-trial witness. Using the nine modes of impeachment recognized by

2. Id. at 14.
the common law, I will examine some of the possibilities for impeaching hearsay declarants. As I explore each mode, I will discuss whether extrinsic, as well as intrinsic, evidence may be used to impeach the hearsay evidence.

The latter part of this article addresses four problem areas stemming from Rule 806 or from an extension of its principles. First, the article discusses impeachment of the non-hearsay facts or data that an expert witness uses to base his at-trial expert opinions upon. Second, the article explores the extent to which a defense attorney is entitled to discovery of co-defendants' and/or co-conspirators' statements. Third, the article addresses the possible admission of supporting evidence when the credibility of a hearsay declarant has been attacked. Fourth, the article examines the right of a party opposing a hearsay statement to call and cross-examine the hearsay declarant as a witness.

II. THE RATIONALE OF RULE 806

Before we begin our inquiry into the modes of impeachment and other problem areas, it is important to familiarize ourselves with Rule 806. The rationale behind Rule 806 is sufficiently stated by the Advisory Committee's Note in the Federal Rules of Evidence: "The declarant of a hearsay statement which is admitted in evidence is in effect a witness. His credibility should in fairness be subject to impeachment and support as though he had in fact testified." 4

North Carolina's Rule 806, entitled "Attacking and Supporting Credibility of Declarants," is constructed of three sentences:

1. When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by evidence which would be admissible for those purposes if the declarant had testified as a witness.  
2. Evidence of a statement or conduct by the declarant at anytime, inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain.  
3. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to

4. FED. R. EVID. 806 advisory committee's note.
examine him on the statement as if under cross-examination.\(^5\)

Sentence one employs a pattern of equivalency.\(^6\) Sentence two is the only exception to this pattern of equivalency.\(^7\) It allows a party to impeach an out of court declarant by evidence of his inconsistent statements, whether or not he has been "afforded an opportunity to deny or explain."\(^8\)

III. THE NINE MODES OF IMPEACHMENT

As commonly recognized, there are nine ways in which a trial lawyer may impeach witnesses.\(^9\) The first four modes of impeachment deal with elements of competence and eligibility even to be a witness.\(^10\) Modes five through nine seek to discredit the testimony (but not the competency or eligibility) of the witness.\(^11\)

A. Oath and/or Affirmation

A witness testifying at trial must take either an oath or affirmation to tell the truth.\(^12\) Clearly, this is an impossibility for most types of hearsay.\(^13\) Even for a witness at trial, credibility impairment or enhancement based on religious belief or opinions is flatly barred by Rule 610.\(^14\) But, there is nothing in the law that prevents a good lawyer from stressing to the jury that one of the reasons they might discount the hearsay is that it was not said under oath, one of the traditional tests for truthfulness.

B. Perception

Perception, or the ability to perceive, is a question of testimo-
nial competency. Here, the law is basically dealing with a witness’s five senses. Could the testifying witness see the things he says he saw, hear the things he says he heard, smell the things he says he smelled, feel the things he says he touched, tasted the things he says he tasted?

It is conceivable that an opposing lawyer could show on voir dire that an alleged excited utterance eyewitness, having a cane in one hand and his seeing eye dog’s leash in the other, was in fact legally blind on the date in question and therefore could not have been an eyewitness. More likely, however, such question as to whether the hearsay declarant could have perceived what he said he perceived will not be resolved by the trial judge as a question of law or competency. Rather, it will be left to the opposing advocate to impeach the credibility of the hearsay declarant, making it a question of fact for the jury.

How is the opposing lawyer to proceed? First, of course, he may cross-examine the witness on the stand who has just uttered the hearsay statement allegedly made by the hearsay declarant. For example the opposing lawyer might ask:

Q: “Now sir, isn’t it a fact that the hearsay declarant eyewitness (1) had prescribed eyeglasses one inch thick and (2) he didn’t even have them on at the time of the event he allegedly spoke about?”

Clearly, a “yes” answer to these two questions will have sufficiently impeached the hearsay declarant. But, what if the witness either denies or says he does not know the answer to these questions? Is counsel bound by his answer? Or can opposing counsel do something to prove the truth of these cross-examination questions?

Generally speaking, the answer to these questions depends upon whether the matter is determined to be collateral or not. If a matter is collateral — it does not relate to facts which are material to the trial — the questioner is bound by the answer of a witness. But, if the matter relates to material facts in the testimony of the witness, it is not collateral and may be proved by other evidence, including other witnesses. The offer of such proof by other wit-

15. “Excited utterance eyewitness” refers to an eyewitness who makes a statement “relating to a startling event or condition . . . while . . . under the stress of excitement caused by the event or condition.” Fed. R. Evid. 803(2).

nesses is called extrinsic evidence or extrinsic proof. The subject matter of the witness testifying about the hearsay declarant’s ability to perceive the matters spoken about is material and not collateral.

A case that demonstrates these points is *State v. Howard.*

Mr. Clough, terminally ill with cancer, received non-medical (quack) treatment from the defendants and was hospitalized with burns as a result. While in the hospital, Clough gave a written statement to the police regarding the words and deeds of the defendants. Before trial, Clough died; and, at trial the prosecutor introduced his statement into evidence.

The trial court allowed the defense the opportunity, on cross-examination of the police officer who had taken the deceased’s statement, to explore the “apparent state of mind of Clough at the time the statement was taken.” In addition, the defense extensively examined Clough’s burn treatment doctor as to what medication Clough had taken prior to the time the written statement was given, as well as the possible effects of the medication.

The appellate court agreed with the trial court that the statement by Clough concerned material facts and was therefore admissible. As this statement was non-collateral, the trial court properly allowed the defense to offer extrinsic evidence as to Clough’s competence.

C. Memory and Recollection

Memory and recollection simply require a witness, or hearsay declarant, to remember the matters they are speaking about. The same rules and guidelines apply to memory and recollection as apply to the mode of perception.

17. J. McELHANEY, TRIAL NOTEBOOK 280-81 (2d ed. 1987) [hereinafter McELHANEY].
20. Id. at 271, 337 S.E.2d at 604.
21. Id.
22. Id. at 272, 373 S.E.2d at 605.
23. Id.
24. Id. at 271, 373 S.E.2d at 604.
25. Id. at 272, 373 S.E.2d at 605.
D. Communication

Generally, a witness must have the ability to perceive and communicate, in some rational manner, the substance of what he perceived. Because a hearsay declarant does not appear before the court, the question arises as to how the opposing lawyer is to assess the declarant's communication ability.

During examination of an at-trial witness, the opposing lawyer will size up the witness and develop opinions as to the witness's intelligence and credibility. The same is true in the case of a hearsay declarant. The lawyer, through the witness on the stand, develops impressions of the hearsay declarant's level of intelligence and ability to communicate. When the lawyer realizes the hearsay declarant has been credited with communicating a statement that is clearly outside of his intellectual capacity to understand, the probability that the declarant has done nothing more than act like a human tape recorder is likely.

Take, for example, a situation where the witness relates on direct examination that the hearsay declarant told him the defendant practiced antidisestablishmentarianism. The cross-examining lawyer will attempt to impeach the hearsay declarant by showing that the declarant simply did not have the intellectual ability to understand the word "antidisestablishmentarianism."

Q: "Isn't it a fact that [your hearsay declarant] could not spell, pronounce, or understand any word larger than a four-letter obscenity?"

A: "No."

Later, on direct examination, the lawyer questions one of his own witnesses in the following manner:

Q: "Isn't it a fact that [the other side's hearsay declarant] did not understand any word with more than four letters?"

A: "Yes, that is true."

Finally, in summation, the lawyer should attempt to persuade the
jury that the hearsay declarant is in fact intellectually incapable of understanding the act he has accused the defendant of practicing.

E. Bias, Prejudice, Interest, Motive, Corruption

Now, we begin to dig deeply into the heart of our topic. "In very jurisdiction [North Carolina included] you may impeach a witness by showing that he is biased, prejudiced (not generally, but against someone or something in this case), interested or corrupt..."31 What if the witness denies such bias, prejudice, interest or corruption? The subject matter is not collateral, it directly affects the credibility of the witness, and the cross-examiner may contradict the witness by other evidence. Clearly, the impeacher of a hearsay declarant may show bias, etc. of the hearsay declarant by other evidence, too.

Of some interest is the fact that the entire area of bias, et cetera, was omitted from the language of the Federal and North Carolina Rules of Evidence.32 Perhaps this is true because this subject matter was so obvious and so well known. In any event, the legal standing of this most important item affecting witness credibility has now been judicially recognized by the United States Supreme Court as being explicit in the common law and implied within the Rules of Evidence.33

Two federal circuit cases that demonstrate this use of bias, et cetera for impeachment purposes are United States v. Check34 and United States v. Lechoco.35 The first case, Check, is a wild one. At

31. Id. at 263. "If the judge curtails cross-examination involving this particular mode of impeachment, there is a likelihood of reversal on appeal." Id.

32. However, bias is mentioned in the advisory committee's note to several sections of the Federal Rules of Evidence. See e.g., Fed. R. Evid. 608, 610 advisory committee's notes.

33. See United States v. Abel, 469 U.S. 45 (1984). There is much wisdom in this well written and well decided opinion. For instance, it stated that "[a trial] court is accorded a wide discretion in determining the admissibility of the evidence under the Federal Rules." Id. at 54.

Any reading of the appellate decisions in North Carolina as compared with a reading of the federal appellate courts will, I submit, convince the reader that our state appellate courts treat most state trial court evidence rulings as being matters of law, hence reversible error if the appellate judges have a different view of what should have been admitted. The federal appellate courts appear in fact to honor the rules that make most evidence rulings discretionary, hence only to be reversed for abuse of discretion.

34. 582 F.2d 668 (2d Cir. 1978).

35. 542 F.2d 84 (D.C. Cir. 1976).
trial the defense was allowed to ask an undercover police witness, who had just testified to what a hearsay declarant had said, if he was aware that the hearsay declarant "was facing a serious criminal charge in state court. . . ."36 The court found the "impeachment technique employed by the defense was entirely proper."37 Apparently, this question was allowed to show the possible motive of the hearsay declarant to have made the statement he had made.

The second case, Lechoco, is wilder yet and involves many of the aspects of this entire article. In Lechoco, the defendant was on trial for taking an ambassador hostage.38 In support of his insanity defense, Lechoco called several psychiatric witnesses with whom he had spoken.39 Lechoco's statements to these doctors were admitted into evidence.40 The prosecutor, in an attempt to discredit the doctors' testimony and raise issues as to Lechoco's truthfulness, quite properly cross-examined these defense doctors by asking if it was not true (1) that their diagnoses depended upon the defendant's truthfulness and (2) that the defendant had the motive and desire to be acquitted.41

The defendant did not testify at his trial.42 However, the defense offered a witness to testify that the defendant, now a hearsay declarant, had a "reputation for truthfulness and honesty."43 The trial court excluded this testimony.44 The appellate court reversed, stating that the prosecution's cross-examination of the defense doctors dwelt upon "the defendant's motive to fabricate a defense."45 Thus, the court held that the trial court should have allowed the defense to repel the attack by offering evidence of the defendant's character for truthfulness.46

State v. Honeycutt.47 illustrates that North Carolina follows this same rule. Honeycutt involved the third round of a murder

36. United States v. Check, 582 F.2d 668, 684 (2d Cir. 1978).
37. Id.
39. Id. at 86.
40. Id. at 87.
41. Id. at 86-87.
42. Id. at 88.
43. Id. at 87.
44. Id.
45. Id. at 89.
46. Id. at 88.
There had been two earlier trials in which the State's only eyewitness, DeBerry, had testified. In both trials, the jury had hung and the case mistried. For this, the third trial, DeBerry was unavailable as a witness, as he had become a fugitive from justice, so the transcript of DeBerry's earlier testimony was read to the jury. On appeal, the North Carolina Court of Appeals held that the trial judge erroneously refused to allow the defendant to testify about an earlier altercation between himself and DeBerry, which would have tended to show bias on DeBerry's part.

F. Prior Convictions

Prior convictions of a witness are clearly covered and controlled by Evidence Rule 609. Other than oath, affirmation, and religious beliefs, neither the Federal nor the North Carolina Rules of Evidence mention any mode of impeachment until we reach prior convictions.

In practice, the issue of whether a matter is collateral or non-
collateral will not arise with respect to prior convictions. This is true simply because when the witness is asked whether he has been convicted of a crime, he knows a public record of the crime exists. Ordinarily, he will simply not deny it. However, if the witness does deny the conviction, the matter is not collateral. The lawyer will be allowed to prove the conviction by other evidence but “will be limited . . . to the most efficient evidence available: the certified or exemplified judgment of conviction.”

There is some question as to whether or not proof of prior convictions will be a problem for lawyers in North Carolina since North Carolina failed to enact Rule 803(22). Rule 803(22) allows as an exception to the rule against hearsay, judgments of previous convictions.

The unanswered questions in North Carolina are just how and when the impeaching lawyer can logistically “establish by public record during cross-examination or thereafter" the prior criminal convictions of the hearsay declarant. The interplay or fit between Rules 806 and 609 is awkward at best. Therefore, the trial judge will probably have to fit the two together by main strength, force, and awkwardness (as with many at-trial rulings and procedures).

After all, the point of all hearsay is that it is not subject to cross-examination. If the hearsay reciter on the witness stand is not aware of the hearsay declarant's criminal convictions and the words “or thereafter” in North Carolina Rule 609(a) are taken to mean that the impeaching lawyer must wait until his time to offer

56. Id. at 269.
57. Rule 803(22) provides a hearsay exception for “[e]vidence of a final judgment, entered after a trial or upon a plea of guilty, adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year. . . .” See FED. R. EVID. 803(22).

The commentary to North Carolina’s rules provides:

Under current North Carolina practice, the judgment or finding of a court generally cannot be used in another case as evidence of the fact found, except where the principle of res judicata is involved. . . . By not adopting a hearsay exception for judgments of previous convictions, it is intended that North Carolina practice with respect to previous convictions remain the same.

N.C.R. EVID. 803 commentary (citations omitted).
58. See FED. R. EVID. 803(22), supra note 57.
59. N.C.R. EVID. 609(a).
60. The same type of problem may also exist for federal judges since the amended version of Federal Rule 609(a) is totally silent as to how and when lawyers may impeach by use of a judgment of conviction.
evidence, then the lawyer, under North Carolina procedure (though not under federal criminal procedure), faces a new dilemma. If he offers any evidence, he loses the last argument to the jury.

My trial judge’s suggested solution is analogous to the procedure authorized by Rule 106. I recommend that the trial judge first allow the cross-examining, impeaching lawyer to question the witness on the stand. This is most effective if, for example, the witness is a police officer and you feel he probably can affirmatively answer these questions. In the alternative, or in addition, the trial judge can allow the impeaching lawyer to stand up and read aloud to the jury the prior criminal convictions of the hearsay declarant.

A good example of this impeachment technique is illustrated below:

In an automobile negligence action, plaintiff introduces the deposition of Jones, who has recently died. Since Jones is unavailable, his deposition transcript qualifies as former testimony under FRE 804(b)(1). . . . [T]he defendant can introduce the fact that Jones was convicted of perjury five years ago, since this prior conviction is admissible to attack Jones’ credibility under FRE 609. This would be done by introducing a certified copy of Jones’ record of conviction. 2

This situation is governed by FRE 806. Since the declarant is not in court, it is impossible to ask him the questions normally required on cross examination. However, the opponent can introduce extrinsic evidence to impeach the out-of-court declarant whenever the impeachment is non-collateral. 3

At least two major problem areas may arise that we must deal with as to prior convictions. The first of these, the co-conspirator imbroglio, stems from the inclusion of Federal Rule 801(d)(2)(E) in Federal Rule 806. 4 Here the prosecution may be faced with a di-

61. North Carolina’s Rule 106 provides that “[w]hen a writing or recorded statement . . . is introduced by a party, an adverse party may require him at that time to introduce any other . . . writing or recorded statement which ought in fairness to be considered contemporaneously with it.” N.C.R. EvID. 106.
63. Id at 260.
64. Compare the language of Federal Rule 801(d)(2)(E): “a statement is not hearsay if . . . the statement is offered against a party and is . . . a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy” with North Carolina’s Rule 801(d)(E) which reads: “a statement is admissible as
lemma where one of two or more co-conspirators has made an incriminating statement against the conspirators and that statement is admissible under the co-conspirator exemption/exception. What happens in this situation? Early commentary suggested that if the maker of the incriminating statement was joined in trial with other co-conspirators, prejudice may result from their attempts to impeach him as a declarant.\(^6\) The maker of the statement should argue that a limiting instruction would not be enough of a safeguard and that the prosecution ought to have to forego either joiner or use of the statement.\(^6\)

But events, even before the commentary appeared in 1987, have established its author was a poor prophet. Take, for example, *United States v. Robinson*,\(^6\) where the defendant was placed on trial along with two other co-conspirators on drug charges.\(^6\) At trial, the prosecution introduced co-conspirator statements against all three defendants under Federal Rule 801(d)(2)(E).\(^6\) All three defendants indicated that (1) none of them would take the stand, yet (2) each of them, pursuant to Rule 806, wanted to present evidence of each defendant's/co-conspirator's/declarant's prior criminal convictions for the purpose of impeaching them as hearsay declarants; or, in the alternative, each wanted a severance of his own trial from his co-defendants'.\(^7\)

The trial court denied both alternative motions and this was upheld on appeal.\(^7\) The appellate court, citing *United States v.*

an exception to the hearsay rule if it is offered against a party and it is . . . a statement by a co-conspirator of such party during the course and in furtherance of the conspiracy.” *Fed. R. Evid. 801(d)(2)(E); N.C.R. Evid. 801(d)(E).*

North Carolina's Rule 806 does not include an equivalent to Federal Rule 801(d)(2)(E). The rationale for this omission is articulated in the commentary to Rule 806. Under Federal Rule 801 admissions by a party-opponent are not hearsay statements. North Carolina Rule 801(d)(E) treats such statements as exceptions to the hearsay rule. Therefore, the inclusion of Rule 801(d)(E) in Rule 806 would be superfluous. See *N.C.R. Evid. 806 commentary.*

Under both North Carolina and federal law co-conspirator statements are admitted. The only difference is that in North Carolina such admissions are exceptions to the hearsay rule while such statements are treated as exemptions (non-hearsay) under the federal rules.

\(^{65}\) P. ROTHSTEIN, *FEDERAL RULES OF EVIDENCE* 439 (2d ed. 1979).

\(^{66}\) Id.

\(^{67}\) 783 F.2d 64 (7th Cir. 1986).

\(^{68}\) United States v. Robinson, 783 F.2d 64, 65 (7th Cir. 1986).

\(^{69}\) Id. at 67.

\(^{70}\) Id.

\(^{71}\) Id. at 68.
Bovain, 72 treated both decisions as being within the trial court's discretion and found no abuse of discretion. 73 As to the denial of impeachment under Rule 806, the court held:

[t]he trial court judge in this case pursued a course which is, on balance, more favorable to defendants than the Bovain solution. Weighing the value to each co-defendant of being able to impeach the credibility of the others against the prejudice to each of having his criminal convictions before the jury, the judge elected to protect the defendants' presumption of innocence by refusing to allow impeachment with evidence of prior convictions. 74

The appellate court appeared to sum up the trial court's denial of the defendant's severance motions by saying that the defendants "were erroneously assuming that admission of the prior crimes evidence would automatically entitle them to severance. . . ." 75

Lawyers reeling from the Robinson holding must now encounter the Freddie Kruger76 of the co-conspirator trials, Bovain. In Bovain the prosecutor tried one Finch and one Rickett for drug offenses. 77 The prosecutor called as a witness a former member of the conspiracy who testified at length to co-conspirator statements made by Finch about the criminal activities of Rickett. 78 Neither Finch nor Rickett testified at trial. 79 Rickett moved to introduce certified records of Finch's larceny and drug convictions for purposes of impeaching Finch as a hearsay declarant under Rule 806. 80 The trial court allowed the non-testifying defendant Finch's criminal convictions pursuant to Rule 609. 81 But, the trial judge, pursuant to Rule 105, limited admissibility and carefully instructed the jury that the evidence of Finch's convictions could only be used to impeach or discredit his hearsay declarations. 82 These prior convic-

72. 708 F.2d 606 (11th Cir. 1983).
73. United States v. Robinson, 783 F.2d 64, 68 (7th Cir. 1986).
74. Id.
75. Id.
76. Freddie Kruger was the terrifying dream master in the movie, Nightmare on Elm Street.
77. United States v. Bovain, 708 F.2d 606 (11th Cir. 1983).
78. Id. at 613.
79. Id.
80. Id.
81. Id. It should be noted that the ten (10) year time limit for prior convictions runs back from the time of making of the statement, not from its use at trial. 4 LOUISELL & MUELLER, supra note 6, § 501, at 1253.
82. United States v. Bovain, 708 F.2d at 606, 613 (11th Cir. 1983).
tions could not be considered as substantive evidence of Finch’s guilt. A second problem area deals with what happens to the defendant who manages to get his own self-serving hearsay statements received in evidence. After all, it’s not unusual for a District Attorney to put a mixed statement in, part harmful and part helpful. Clearly, the defendant will not want to invoke Rule 806 and impeach himself as a hearsay declarant by introducing his prior criminal convictions. That’s like pulling the pin on a grenade, then holding it close to your breast like Cleopatra did her asp! But what the defense won’t do, the prosecution will be able to do under Rule 607, which states quite simply, “[t]he credibility of a witness may be attacked by any party, including the party calling the witness”.

United States v. Newman proves this point. The defendant’s self-serving statements made to others were received into evidence. The defendant did not testify. The prosecutor was allowed to put in evidence of certified copies of the defendant’s criminal convictions. This, of course, led to the following Rule 105 limiting instruction:

The evidence on Mr. Newman’s convictions which you have just heard is only to be considered by you as possible impeachment of Mr. Newman’s out-of-court statements. You may not consider these past convictions as evidence in any way of Mr. Newman’s guilt on the charges presently before you.

G. Prior Bad Acts

Rule 608(b) limits the old North Carolina common law as to the impeachment of a witness for his non-conviction bad acts. In essence, the Rule states: “Specific instances of the conduct of a

83. Id.
84. Fed. R. Evid. 607. Under Rule 806, there is no doubt that any party may seek to discredit the hearsay declarant, including the party who introduced his hearsay statement. See 4 Louisell & Mueller, supra note 6, § 501, at 1240 (citing Fed. R. Evid. 806).
87. Id. at 161-63.
88. Id. at 163.
89. Id.
witness, for the purpose of attacking or supporting his credibility. . . 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. . .”

This language would appear to say, using old but still familiar North Carolina language, that the cross-examiner is bound by the answer of the witness about his earlier bad acts tending to show a lack of truthfulness. In other words, the opposing lawyer is prohibited from putting on evidence himself about the opposing witness’s bad acts.

What is the defense lawyer to do? Rule 608(b) speaks literally of (1) asking the witness on the stand about prior bad acts and (2) being barred from introducing extrinsic evidence.91 Take, for example, a situation where the defense/opposing lawyer asks the witness, who has just testified on direct examination to what the hearsay declarant said about the defendant:

Q: “Isn’t it a fact that the hearsay declarant lied to the IRS about his money laundering operations?”
A: “I don’t know anything about that.”

Now what is the defense lawyer to do? A literal application of Rule 608(b) treats the matter as collateral. Therefore, the inquiry stops, and the defense lawyer is out of luck.92

There is one form of impeachment that may be unavailable: impeachment by prior bad acts. Since Rule 608 restricts impeachment to questions addressed to a witness on the stand and binds the examiner to the answers, it may well be that bad act impeachment of a hearsay declarant who is not present to testify will be impermissible.93

But since this result runs counter to the philosophical pattern of equivalency that Rule 806 is supposed to embody, let me offer you better counsel and commentary which treats the matter as non-collateral, therefore allowing further inquiry.

Rule 806 should be read as modifying the otherwise applicable Rule [608] to the extent of permitting extrinsic evidence of such

90. Fed. R. Evid. 608(b) (emphasis added).
91. Id. Extrinsic evidence which is barred by Rule 608(b) is generally defined as evidence outside the cross-examination. McElhaney, supra note 17, at 281.
93. Id.

http://scholarship.law.campbell.edu/clr/vol13/iss2/1
misconduct [prior bad acts]. Otherwise the attacking party could employ this form of attack only if the out-of-court declarant took the witness stand, or perhaps if he were unavailable, and it is unfair to restrict the attack: The impeaching party ought not to be put to the burden of calling the declarant to the stand even if he is available, since his adversary has adduced the statement which gave rise to the need for impeachment.\(^n\)

One pre-rule North Carolina case is of interest here, at least for its literal, conservative approach to the then existing law of impeachment of a dying declaration declarant. In *State v. Stevens*,\(^n\) the trial judge refused to let the defense introduce a deceased's record of criminal convictions to impeach the deceased declarant.\(^n\) The defendant's argument was that had the deceased lived and testified, he could have been cross-examined about his convictions... and since such cross-examination is impossible in the case of a dying declaration, the deceased declarant's criminal record should have been admitted in lieu of cross-examination.\(^n\) The supreme court disagreed with the defendant's argument and affirmed the trial court's ruling.\(^n\)

Since *Stevens* is a pre-rule decision and deals with what is now Rule 609, not Rule 608 (which is the subject of this inquiry), it is neither controlling nor persuasive on this current issue. I side with the better thought-out and fairer position, where Rule 806 modifies the limiting effect of Rule 608 and allows extrinsic evidence of the declarant's prior bad acts.

One fairly recent and well publicized case provides a good example of what happens when you plug Rule 608(b) into Rule 806. In *United States v. Friedman*,\(^n\) the trial judge allowed the prosecutor to put in evidence numerous hearsay statements made by Manes as co-conspirator declarations pursuant to Federal Rule 801(d)(2)(E).\(^n\) The defense, in an attempt to impeach Manes as a

94. 4 LOUISELL & MUELLER, supra note 6, § 501, at 1241.
97. Id. at 34, 243 S.E.2d at 779.
98. Id.
99. 854 F.2d 535 (2d Cir. 1988). In this case, the defendants were convicted of turning a City of New York department into a RICO racketeering enterprise for the financial benefit of themselves and their political friends, one of whom, Donald Manes, was a major figure in New York politics, until his suicide in the spring of 1986.
100. United States v. Friedman, 854 F.2d 535, 569 (2d Cir. 1988), cert. de-
hearsay declarant, offered evidence of Manes' prior bad acts. Defense evidence tended to show that Manes had lied to law enforcement authorities about his first unsuccessful suicide attempt. Manes was found bleeding from slash wounds and told the police officer who found him that he had been abducted and cut by two men. But, at the hospital, Manes admitted to reporters "that his wounds were self-inflicted and that he had fabricated the story of his abduction." The appellate court agreed with the trial court that this evidence should be excluded because it was not probative on the issue of the credibility of Manes's conspiratorial statements.

The appellate court's affirmation of the trial court's ruling was deliberately not founded upon the language of Rule 608(b), forbidding extrinsic evidence of specific instances of conduct to show untruthfulness. Rather, the opinion rests upon the trial court's discretion as set forth in Rule 608(b) itself.

H. Prior or Later Inconsistent Statements

It has been said that "[i]mpeachment by prior inconsistent statement is the most frequently used mode of impeachment and, perhaps, the simplest." Like most North Carolina lawyers and judges, I strongly agree with the first thought, and just as strongly disagree with the latter thought.

Many commentators also believe that this is the most important mode of impeachment.

Probably the single most effective means of attacking the testimony of an adverse witness is to show that he previously made statements in direct conflict with damaging testimony he has just given in the trial. Properly done, exposing a prior inconsistent statement can be an electrifying turning point in a trial.

101. Id.
102. Id.
103. Id.
104. Id.
105. Id. at 570.
106. Id.
108. YOUNGER, supra note 3, § 15.5 at 272.
109. McELHANEY, supra note 17, at 280.
When one refers to an inconsistent statement of an at-trial witness he is almost inevitably speaking about a prior statement, one made prior to the witness getting on the stand to tell his story. But, reference to an inconsistent statement of a hearsay declarant could just as easily refer to a later inconsistent statement—a statement made after the hearsay declaration, but prior to the hearsay declaration being introduced in court.

What is the significance of this obvious practical difference between prior inconsistent statements of an at-trial witness and a subsequent or later inconsistent statement of a hearsay declarant? Federal Rule 613(b) does not allow the impeaching lawyer to introduce extrinsic evidence of a prior inconsistent statement of a witness unless and until (1) that witness was first afforded the opportunity to explain or deny the statement and (2) the opposite party was also afforded an opportunity to interrogate the witness. The requirements of Rule 613(b), if required for hearsay declarations, are impossible to meet.

Recognizing this impossibility, the drafters of Federal Rule 806 eliminated the requirements of 613(b) for hearsay declarations by adding the second sentence of Federal Rule 806: “Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant’s hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain.”

A good example of the application of Rule 806 occurred in United States v. Bernal. In this case a co-conspirator’s hearsay declaration was received in evidence against the defendant. The defense lawyer impeached that declarant by eliciting, on cross-examination of a prosecution witness, that this same co-conspirator (the hearsay declarant) had given a quite different version which

110. See Fed. R. Evid. 806 advisory committee’s note, reprinted in large part in N.C.R. Evid. 806 commentary.
111. North Carolina, though it should have, has not adopted an equivalent to Federal Rule 613(b). The North Carolina commentary states that “since subdivision (b) [of Federal Rule 613] is omitted, foundation requirements for admitting inconsistent statements will be governed by case law. See 1 BRANDIS, supra note 16, § 48, at 228-29.
112. See Fed. R. Evid. 613(b).
114. 884 F.2d 1518 (1st Cir. 1989).
exculpated the defendant from guilt. Such evidence is received not as substance evidence, but, rather as non-substance impeachment evidence to be considered by the jury in determining the hearsay declarant’s credibility.

I. Reputation for Veracity

The last of our nine modes of impeachment [of a witness on the stand] differs from the first eight in that it is not used on cross-examination of the witness. Instead, the lawyer who seeks to impeach [a testifying witness] calls, as part of the lawyer’s own case, another witness whose testimony consists of this ninth mode.

Rule 608(a) is the key to this last mode of impeachment. It allows the credibility of a witness to be attacked by evidence in the form of opinion or reputation.

An old case showing an attack on a hearsay declarant is Carver v. United States, where the United States Supreme Court held that a dying declarant “may be discredited by proof that the character of the deceased was bad.” A more modern case, already discussed with respect to bias, et cetera, is Lechoco. In that case the prosecutor cross-examined the defense psychiatrists about the defendant’s motive and interest. On review by the District of Columbia Circuit Court of Appeals, the court held that the defense should have been allowed to offer evidence pursuant to Rule 608(b) about the defendant’s reputation for truthfulness.

IV. The Extension of Rule 806 to Rule 703

By its express words, Rule 806 is wedded to Rule 801, which refers to attacking or supporting the credibility of a hearsay declarant. “Hearsay” is defined in Rule 801(c) as “a statement ... offered in evidence to prove the truth of the matter asserted.” What, you may ask, can be a statement offered in evidence for a purpose other than to prove the truth of the matter asserted? How

116. Id.
117. See 1 BRANDIS, supra note 16, § 46, at 219.
118. YOUNGER, supra note 3, § 15.5, at 277.
119. 164 U.S. 694 (1897).
120. Carver v. United States, 164 U.S. 694, 697 (1897).
122. Id. at 86-88.
123. FED. R. EVID. 801(c).
about Rule 703 Basis of Opinion Testimony By Experts, which in pertinent part states that "the facts or data . . . upon which an expert bases an opinion . . . need not be admissible in evidence."124 Can you impeach the facts or data on which the expert bases his opinion, even though such (in legal fiction) have not been received in evidence for their truth? One highly acclaimed and conservative legal writer announces that you can:

Although Rule 806 only addresses issues concerning the attack or support of the credibility of the declarant of a hearsay statement . . . the principles underlying the rule apply equally to the declarant of a statement not admitted as substantive evidence, but reasonably relied upon by an expert witness in accordance with Rule 703.125

The wisdom behind allowing a lawyer to impeach facts and data used as a basis of expert opinion is exhibited in two cases, one North Carolina and one federal. The federal case, Lechoco, as you may recall appeared earlier; but, now I present it with the facts modified just a bit. Suppose that Lechoco had talked to his several psychiatrists (as he did) and they then talked to several other psychiatrists. Since these other psychiatrists were more attuned and experienced in declaiming upon the witness stand for filthy lucre, they were the experts actually called to the stand. All of the things the second set of psychiatrists had been told by the first set would be the basis for the second set's expert opinion. Surely it isn't justice to say that this information isn't subject to impeachment?126

The second case is a recent case from the North Carolina Court of Appeals, Segrest v. Gillette.127 In this wrongful death case the major controversy, at trial and on appeal, was the admissibility of a Miscellaneous Lab Slip (the "IGM slip").128 The IGM slip had apparently been generated, created or fabricated and put in the hospital records at least two years and nine months after the little

126. See Fed. R. Evid. 102 (requiring that the Rules of Evidence "be construed to secure fairness in administration . . . to the end that truth may be ascertained . . . ").
girl's death.\textsuperscript{129}

The appellate court reversed the trial court for not giving a Rule 105 limiting instruction to the jury about the IGM slip.\textsuperscript{130} The Segrest court held that due to the IGM slip's belated entrance into the hospital record, the IGM slip didn't pass admissible hearsay muster under Rule 803(6) Business Records, and therefore did "not possess the guarantees of trustworthiness sufficient to justify its admission into evidence."\textsuperscript{131} But the court went on to hold that even though the IGM slip was inadmissible hearsay, it was admissible to show the basis of the expert opinion testimony.\textsuperscript{132}

Surely the facts of this case clearly show the absolute need to apply the same impeachment techniques and values to facts and data of experts as are used for hearsay. Trials are, after all, supposed to be a search for the truth.

V. PRE-TRIAL DISCOVERY: NOTICE OF HEARSAY

In civil cases, as a particular matter, discovery gives each side to learn most everything about the other side's case. In essence we have gone from trial by ambush to trial by avalanche.

But, in criminal cases there is somewhat less discovery.\textsuperscript{133} A logical question a criminal defense attorney would ask is what pre-trial and at-trial discovery of hearsay declarants' statements can I get from the prosecution? The answer is not much, perhaps nothing. For Rule 803 and Rule 804 exceptions to the hearsay rule, there is probably no hope at all for pre-trial discovery.\textsuperscript{134}

The real quarrel between the prosecution and the criminal de-

\textsuperscript{129}. Id. at 440, 386 S.E.2d at 90.

\textsuperscript{130}. Id. at 441, 386 S.E.2d at 91.

\textsuperscript{131}. Id. at 440, 386 S.E.2d at 90.

\textsuperscript{132}. Id. at 441, 386 S.E.2d at 91. This statement apparently assumes that the Rule 703 decision as to whether or not the facts or data which the expert bases his opinion upon is "of a type reasonably relied upon by experts in the particular field in forming opinion" is a self-made call/decision by the testifying expert. By far, the better view is that it is a discretionary decision to be made by the trial judge pursuant to Rule 103. But, in dicta (I think), the North Carolina Court of Appeals has indicated the paid expert should make the call. See Barbecue Inn, Inc. v. Carolina Power & Light Co., 88 N.C. App. 355, 363 S.E.2d 362 (1988).


\textsuperscript{134}. It is unlikely that either of these are covered by the Jencks Act or N.C. GEN. STAT. § 15A-903(a) (i.e. they are not vicariously or otherwise statements of the defendant). See 18 U.S.C. § 3500 (1988); N.C. GEN. STAT. § 15A-903(b) (1988).
defense may be to what extent, if any, the defense is entitled to dis-
covery of co-defendants' and co-conspirators' statements. Federal
Rule of Criminal Procedure 16 gives no pre-trial discovery relief
whatevsoever. The rule does not provide for any discovery of co-de-
fendants' statements at all. This is narrower than the pre-trial dis-
covery provided by N.C. Gen. Stat. § 15A-903(b)(1) and (2). Basi-
cally, N.C. Gen. Stat. § 15A-903(b)(1) allows a defendant to learn
before trial the details of a co-defendant's statement which the
state intends to offer at a joint trial of the defendants. 135

You might wonder why the language of Federal Criminal Pro-
cedure Rule 16, which provides the defendant with pre-trial dis-
covery (for the most part) of "any statement made by the defend-
ant," 136 does not cover the statement of a co-conspirator and co-
defendant. In United States v. Roberts, 137 a three judge panel of
the Fourth Circuit held that Rule 16 did provide pre-trial discov-
er y of such statements. 138 But that decision was reversed en banc
by the Fourth Circuit where the court construed Rule 16 literally
and said the defendant was entitled to pre-trial discovery only of
statements made by the defendant himself, and not those which
would be imputed to him as vicarious admissions. 139 Since N.C.
Gen. Stat. § 15A-903(a) uses the identical language of "statements
made by the defendant," 140 the same legal result may follow in
North Carolina state court. It depends upon how persuasive Roberts (panel or en banc) is to our state courts.

At trial, discovery in federal court is controlled by the Jencks
those statutes call for the prosecuting attorney to furnish prosecu-
tion witness statements to the defense after such a witness has
completed his direct examination. 142 Reading these statutes in con-
junction with the aims of Rule 806, it would appear that hearsay
statements also should be so furnished. 143 But this is a Pyrrhic vic-

137. 703 F.2d 580 (4th Cir. 1986), rev'd en banc, 811 F.2d 257 (4th Cir. 1987).
banc, 811 F.2d 257 (4th Cir. 1987).
143. This should be the case notwithstanding the fact that the narrow defini-
tion of "statement" in each of these statutes does not cover hearsay declarants’
tory inasmuch as those statements would have already been read or told to the jury on the direct exam, thus already having been discovered.

VI. SUPPORTING OR REHABILITATING HEARSAY DECLARANTS

By the express words of Rule 806, whenever the credibility of a hearsay declarant has been attacked, it "may by supported . . . by any evidence which would be admissible for those purposes if [the] declarant had testified as a witness." 144 Frankly, there is a paucity of reported cases dealing with this point, but two will be discussed here. In *Lechoco*, the sequence of events was as follows: defense psychiatric witnesses testified, at length, to what the defendant (who chose not to testify) had told them about his thoughts and actions. The prosecutor cross-examined the psychiatric witnesses about their testimony and expert opinions, pointing out that, at least to some extent, their opinions were based on what the defendant had told the witnesses. 145 By such questioning, the prosecutor implied that the defendant's statements were motivated by his desire to be acquitted. 146 Then the defense offered evidence that the defendant enjoyed a good reputation for truthfulness which the trial court refused to admit. 147

On appeal the ruling of the trial judge was reversed. 148 The appellate court held that the prosecutor's cross-examination of the psychiatrists constituted an attack upon the hearsay declarant's (the defendant's) credibility as covered by Rule 806. 149 The *Lechoco* court stated that "in light of this attack, the defendant is permitted by Rule 806 to present supporting credibility evidence notwithstanding his exercise of his Fifth Amendment right." 150

The last case on this point shows the ramifications of co-conspirator statements. In *United States v. Bernal* 151 the prosecutor put into evidence a co-conspirator statement by one Corsey that he did not have cocaine at his own house, but had to go get it from his

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146. *Id.* at 87.
147. *Id.* at 84.
148. *Id.*
149. *Id.*
150. *Id.* at 89 n.6.
151. 719 F.2d 1475 (9th Cir. 1983).
connection.\textsuperscript{152} This also included evidence that Corsey then drove to Bernal's home and came back with Bernal and the drugs.\textsuperscript{153} The defense attorney, on cross-examination of a DEA witness, got the agent to testify that Corsey had said to him that the cocaine in question had always been at his house, thus impeaching the hearsay declarant, Corsey, and weakening the inference that Bernal had supplied the drugs.\textsuperscript{154} On redirect examination, the same DEA agent was allowed to testify over objection that Corsey had stated that same day that Bernal had told Corsey that Bernal would have an associate deliver a pound of cocaine to Corsey's residence in a couple of hours.\textsuperscript{155} Legal analysis, in reverse chronological order, shows the evidentiary use of a co-conspirator's statement to bolster, support, and rehabilitate a co-conspirator who had been impeached with a prior inconsistent statement after having become a co-conspirator hearsay declarant on the prosecution's case-in-chief.

VII. EXAMINING HEARSAY DECLARANTS

The last sentence of Rule 806 allows "[a] party against whom a hearsay statement has been admitted" to call the declarant as a witness and "examine the declarant on the statement as if [he were] under cross-examination."\textsuperscript{156} At first blush, this appears simple enough and fair enough. When hearsay is used against you, by golly, you should have the right to cross-examine the declarant. But wait a minute. What if it's a civil case and one party is using the deposition of the opposing party or those employed by or otherwise identified with such opposing party? Wouldn't it be unfair to allow the party whose own people were deposed as adverse witnesses to have the flat, absolute statutory right to cross-examine the declarant. What in fact is a friendly witness? What you would have is this party's own lawyer throwing out well-phrased leading questions which provide this party's full story and contentions expressed in the lawyer's well-chosen words, leaving the witness only to give assent and legal substance to it by simply saying "yes."

The short answer to this dilemma is that the legal answer depends upon whether this case is being tried in federal or state court. That's because North Carolina decided to modify the lan-

\textsuperscript{152} United States v. Bernal, 719 F.2d 1475, 1477 (9th Cir. 1983).
\textsuperscript{153} Id.
\textsuperscript{154} Id. at 1478.
\textsuperscript{155} Id.
\textsuperscript{156} Fed. R. Evid. 806.
language of Federal Evidence Rules 801 and 806 for reasons that have nothing to do with this problem, and the iron law of unintended consequences has taken over.

In federal court such bogus cross-examination should not be permitted by the trial judge. But this is not so in North Carolina state courts! Note the critical differences between North Carolina Rule 801 and 806 as compared to Federal Rule 806 and 801. In North Carolina we treat all party admissions, personal and vicarious, as being hearsay exceptions where the Federal Rules treat these as hearsay exemptions. Under the specific categoric language of Rule 806, I now hold that in our North Carolina state courts a party who has had any kind of hearsay admissions used against him via depositions, interrogatories, or otherwise, has the absolute and unabridgeable right to (1) call that hearsay declarant as a live witness and (2) examine him on the statement as if under cross-examination.

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157. As stated by Louisell & Mueller:
Federal Rule 806 applies by its terms only in connection with declarants whose out-of-court hearsay statements are admitted under [the Rule 803 and Rule 804] exceptions [or] in connection with declarants whose out-of-court statements are received pursuant to [Federal Rule] 801(d)(2), (C), (D), or (E). Thus it does not apply to a party-declarant whose statement is received under Federal Rule 801(d)(2)(A) or (B), and therefore Federal Rule 611 applies when such a party-declarant takes the stand to explain away the statement, which means that ordinarily the questioning is cast in the mode of direct examination.

4 Louisell & Mueller, supra note 6, at 1249 n.14.
158. See supra note 64 and accompanying text.
159. Rule 611 has no application here.