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HOW TO ADMINISTER THE "BIG HURT" IN A CRIMINAL CASE: THE LIFE AND TIMES OF FEDERAL RULE OF EVIDENCE 806

Fred Warren Bennett*

I. INTRODUCTION

"How can you impeach somebody that hasn’t testified?" the defense attorney wondered in a federal drug trial. As this question suggests and this article will demonstrate, the admission of hearsay testimony into evidence from the mouth of an out-of-court declarant poses a significant problem for the party against whom it is admitted: how to impeach the out-of-court declarant who is not present to testify.

Cross-examination provides opposing counsel with the best way to test a witness' credibility and truthfulness. In fact, an essential purpose of the Confrontation Clause is to allow the opportunity for cross-examination. Trial courts permit cross-examination not only to impeach the general credibility of a witness, but also to "expose possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand." By exploring the partiality of a witness, opposing counsel can discredit the witness and reduce the weight of his testimony.

With cross-examination automatically available to attack an in-court witness, fairness requires that an attorney be allowed to attack the credibility of an absent hearsay declarant whose statement has been admitted

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2. Kentucky v. Stincer, 482 U.S. 730, 736 (1987) (recognizing that cross-examination "is critical for ensuring the integrity of the factfinding process"); Davis v. Alaska, 415 U.S. 308, 316 (1974) (noting that part of what makes cross-examination such an effective tool is the ability of the attorney to impeach the witness); see Randolph N. Jonakait, Restoring the Confrontation Clause to the Sixth Amendment, 35 UCLA L. REV. 557, 588 n.96 (1988).
4. Davis, 415 U.S. at 316.
against a party. Rule 806 of the Federal Rules of Evidence embodies this fairness by providing attorneys with the ability to attack and support the credibility of absent hearsay declarants.\(^5\)

This article explores the options available to both prosecutors and defense attorneys under Rule 806. The article will examine the common law antecedents to Rule 806, followed by a discussion of the rationale and scope of the Federal Rule. The true heart of the article is the discussion of the defense counsel's use of Rule 806 because the defense attorney can best exploit the potential benefit of the rule. The section addressing defense counsel's use of Rule 806 explores the use of the rule by examining the nine modes of impeachment. The section on the prosecution's use of Rule 806 considers the implications of the Constitution's Confrontation Clause on both hearsay and on Rule 806 as used against criminal defendants. The last three sections of the article discuss other uses of the rule: its application to Federal Rule of Evidence 703, its use in supporting or rehabilitating the credibility of declarants, and its use in examining hearsay declarants on the witness stand.

II. **Common Law Antecedents of Federal Rule of Evidence 806**

At common law, a hearsay statement admitted into evidence stood "testimonials as the equivalent of a statement made on the stand and subject to cross-examination."\(^6\) Thus, courts considered the declarant of a hearsay statement a witness even though absent from the courtroom.\(^7\) As such, the testimonial rules of qualification that applied to statements made on the witness stand also applied to hearsay statements.\(^8\) Namely, the declarant had to be a competent witness with personal knowledge of the subject matter of the out-of-court statement.

Because hearsay statements admitted into evidence stood as the equivalent of in-court testimony, it was also proper to subject those statements to the same impeachment methods as an in-court statement.\(^9\) At common law, courts admitted evidence of perception, memory, and narration to impeach the credibility of the declarant.\(^10\) In addition, evidence of a declarant's prior convictions was admissible to impeach his or her

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5. *Fed. R. Evid.* 806 (noting that a declarant's credibility can be attacked, and if attacked, supported).
7. See *id*.
8. *Id*.
9. *Id*.
10. *Id.* § 989, at 921.
credibility. The declarant’s credibility was also impeachable by the admission of evidence of his or her bias in making the statement. Likewise, courts admitted evidence of the declarant’s interest in the subject matter of the litigation for impeachment purposes.

The cross-examining attorney had yet another method of impeaching hearsay declarants at common law. The attorney could introduce other hearsay evidence to impeach previously admitted hearsay statements of an absent witness. In response to opening the door to credibility attacks, common law also provided for rehabilitation of an absent declarant whose credibility had been attacked.

The Federal Rules of Evidence and common law both permit the impeachment of hearsay declarants. There is, however, one area of significant difference between common law and the Federal Rules of Evidence. At common law, courts required an attorney to establish a proper foundation before impeaching a declarant with a prior inconsistent statement. Common law required that a cross-examiner give the declarant an opportunity to explain or deny the inconsistent statement before impeachment. By contrast, the Federal Rules of Evidence do not require the cross-examiner to establish a foundation before impeaching an absent declarant with an inconsistent statement. The discussion of inconsistent statements under the provisions of Federal Rule 806 will further explore this distinction between common law and the Federal Rules.

11. Id. § 980, at 828 (noting that admissibility of the record of judgments is universally accepted).
12. Id. § 948, at 783-84.
13. Id. § 966, at 812 (discussing evidence of the declarant’s interest in civil litigation).
14. Trade Dev. Bank v. Continental Ins. Co., 469 F.2d 35, 43 (2d Cir. 1972) (stating that “hearsay evidence may be received to impeach previously-admitted hearsay statements of an absent witness”).
15. 5 WIGMORE, supra note 6, § 1514, at 423.
16. See FED. R. EVID. ARTICLE VIII advisory committee’s note (comparing the Federal Rules of Evidence approach to hearsay with the common law approach).
17. 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S EVIDENCE ¶ 806[01], at 806-6 (1995).
18. 3A WIGMORE, supra note 6, § 1025, at 1020 (noting that the witness should also be asked whether he made the statement, thereby removing any surprise that the statement will be used against the witness).
19. FED. R. EVID. 806. The Federal Rules of Evidence acknowledge explicitly that Rule 806 “is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain.” Id.
20. See infra notes 128-56 and accompanying text (discussing the foundation requirements of evidence of inconsistent statements).
III. THE RATIONALE AND SCOPE OF FEDERAL RULE OF EVIDENCE 806

A. The Rationale of Federal Rule of Evidence 806

The theory that the absent declarant of an admitted hearsay statement is a witness provides the basis for Federal Rule of Evidence 806.21 Therefore, like an in-court witness, the trial court should allow a party to subject the hearsay declarant's credibility to impeachment and support as though he or she testified in court.22 Federal Rule of Evidence 806 provides:

When a hearsay statement, or a statement defined in Rule 801(d)(2), (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. 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. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.23

One purpose of Rule 806 is to provide fairness for the party unable to cross-examine the declarant of a hearsay statement.24 Rule 806 allows the opposing party to impeach both the declarant and the hearsay statement despite the declarant's absence from court. Thus, with the aid of Rule 806, a party can use the permissible modes of impeachment and rehabilitation under the Federal Rules of Evidence to impeach or rehabilitate the absent hearsay declarant.25

B. The Scope of Rule 806

Rule 806 allows parties to impeach hearsay declarants when ordinarily this would be impossible without calling the declarant to the stand. However, the rule also allows a party, in its case-in-chief, to call the declarant

21. FED. R. EVID. 806 advisory committee's note.
22. Id.
23. FED. R. EVID. 806.
25. 4 WEINSTEIN & BERGER, supra note 17, § 806[01], at 806-10 to 806-12 (Cumulative Supp. 1995). Other permissible modes of impeachment include evidence of prior convictions, reputation, and prior inconsistent statements. Id. at 806-10.
to the stand and question him as if under cross-examination.\textsuperscript{26} The party
does not have to wait for the proponent of the hearsay to call the declar-
ant or demonstrate that the declarant was a hostile witness.\textsuperscript{27} Obviously,
the ability to examine the declarant as if under cross-examination applies
only if the declarant is present at the trial or hearing, and the party is able
to call the declarant as a witness.\textsuperscript{28}

Because courts often admit hearsay when the declarant is unavailable
to testify in court, Rule 806 does not give a party the absolute right to
face-to-face cross-examination.\textsuperscript{29} However, even though Rule 806 and
the Sixth Amendment's Confrontation Clause are not perfectly conso-
nant, an example of Rule 806-Confrontation Clause harmony occurs
when the declarant is unavailable, and the court disallows cross-examina-
tion of a witness who is present and is testifying to the declarant's out-of-
court statement. The court would violate both the Confrontation Clause
and Rule 806 if such a situation is the defendant's only chance to impeach
the declarant.\textsuperscript{30}

There are limits on Federal Rule of Evidence 806's applicability. The
rule applies only to impeach hearsay statements. If a court admits an out-
of-court statement into evidence that is not offered to prove the truth of
the matter asserted, Rule 806 does not apply because the statement is not
hearsay.\textsuperscript{31} Furthermore, Rule 806 does not apply to statements admitted
under Federal Rule of Evidence 801(d)(2)(A) or (B); although it does

\textsuperscript{26} \textit{FED. R. EVID.} 806; \textit{United States v. Inadi}, 475 U.S. 387, 397 (1986) (recognizing
that Rule 806 allows a party to call the declarant and examine as if under cross-
examination).

\textsuperscript{27} \textit{Inadi}, 475 U.S. at 397-98.

\textsuperscript{28} \textit{United States v. Paris}, 827 F.2d 395, 400 (9th Cir. 1987). In \textit{Paris}, the declarant
invoked his Fifth Amendment privilege against self-incrimination. \textit{Id.} at 397. The trial
court then excused the declarant from testifying. \textit{Id.} at 398. Thus, the defendant was un-
able to cross-examine the declarant. \textit{Id.} at 400.

\textsuperscript{29} \textit{Miller v. Keating}, 754 F.2d 507, 510 (3d Cir. 1985); see \textit{Paris}, 827 F.2d at 400.

\textsuperscript{30} \textit{United States v. Bruton}, 937 F.2d 324, 329 (7th Cir. 1991). In \textit{Bruton}, the trial
court refused to allow the defendants to impeach an informant who did not testify. \textit{Id.} at
327. The informant taped conversations with the defendants which the prosecution admit-
ted into evidence. \textit{Id.} Because the tape included statements from the informant, the de-
fendants argued that the informant was a witness against them and they could impeach his
credibility. \textit{Id.} The Seventh Circuit found no Confrontation Clause violation because the
unavailability of the declarant was never established. \textit{Id.} at 329. The Seventh Circuit ex-
plained that the defendants could have asked for a subpoena or asked that the government
produce the declarant. \textit{Id.}

\textsuperscript{31} \textit{United States v. Becerra}, 992 F.2d 960, 965 (9th Cir. 1993) (recognizing that Rule
806 does not apply if the statement is not admitted for the truth of the matter asserted, and
therefore is not hearsay). In order for a statement to be hearsay, it must be offered for the
truth of the matter asserted. \textit{FED. R. EVID.} 801(c); see \textit{People v. Ross}, 154 Cal. Rptr. 783,
790 (Cal. Ct. App. 1979) (commenting that no Sixth Amendment guarantees attach to
hearsay evidence not received for the truth of the matter asserted).
apply to evidence admitted under 801(d)(2)(C), (D), and (E).\textsuperscript{32} Statements admitted under 801(d)(2)(A) or (B) are admissions of a party-opponent, therefore, credibility of those statements is always subject to attack.\textsuperscript{33}

Another possible limitation of Rule 806 is whether a party can impeach a hearsay declarant’s out-of-court conduct with evidence of an inconsistent statement or conduct by the absent declarant. The language of Rule 806 does not indicate whether a party may impeach out-of-court conduct which is admitted as hearsay evidence.\textsuperscript{34} However, if a court admits out-of-court conduct of the declarant as hearsay, it is likely that Rule 806 would allow impeachment of such evidence. This is true because the mention in Rule 806 of inconsistent conduct as impeachable evidence would likely cover both a declarant’s hearsay statement or his/her conduct.\textsuperscript{35} Similarly, if the court admits the conduct of the declarant as non-hearsay, nothing in Rule 806 prevents the opponent from arguing that the conduct was an assertion of fact by the actor, and thus, trying to impeach the actor pursuant to Rule 806.\textsuperscript{36} This would be a matter of discretion for the trial court.

Other Federal Rules of Evidence limit the application of Rule 806. There is no guarantee of admissibility under Rule 806; the rule specifically states that evidence used to impeach or rehabilitate a declarant must be admissible in the same way as if the declarant had actually testified as an in-court witness.\textsuperscript{37} The limits on impeachment and rehabilitation of in-court witnesses, as prescribed by Article VI of the Federal Rules of Evidence, apply equally to both the impeachment and rehabilitation of absent hearsay declarants.\textsuperscript{38} Additionally, the Federal Rules of Evidence regarding relevancy limit Rule 806. Evidence admitted under Rule 806

\begin{itemize}
\item[32.] FED. R. EVID. 806.
\item[33.] Notes of the Committee on the Judiciary, S. REP. NO. 1277, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S.C.C.A.N. 7051, 7069 n.28. Thus, a party does not need Rule 806 to impeach the declarant of 801(d)(2)(A) or (B) hearsay evidence.
\item[34.] See FED. R. EVID. 806 (showing the rule is silent with regard to out-of-court conduct of the declarant).
\item[35.] Id. When applicable, Rule 806 states a party can admit evidence of a statement or conduct by the declarant which is inconsistent with the declarant’s hearsay statement.
\item[36.] 4 DAVID LOUISELL & CHRISTOPHER MUELLER, FEDERAL EVIDENCE § 501, at 1255 (1980) [hereinafter LOUISELL & MUELLER].
\item[37.] FED. R. EVID. 806; United States v. Finley, 934 F.2d 837, 839 (7th Cir. 1991) (noting that “Rule 806 does not allow the use of evidence made inadmissible by some other Rule”); United States v. Mejia-Valez, 855 F. Supp. 607, 615 (E.D.N.Y. 1994) (stating that “[a] party is allowed no greater latitude in impeaching a hearsay declarant pursuant to Rule 806, than the party would otherwise be permitted by the rules of evidence in impeaching a witness that testified at trial”).
\item[38.] 4 LOUISELL & MUELLER, supra note 36, § 501, at 1252-53.
\end{itemize}
must be relevant to the hearsay statement that it is offered to impeach or support.39 Finally, the probative value of the evidence offered under Rule 806 must not be substantially outweighed by unfair prejudice or any of the other considerations of Rule 403.40

IV. THE DEFENSE COUNSEL'S USE OF RULE 806: THE NINE MODES OF IMPEACHMENT

Traditionally, a lawyer has nine methods to impeach a witness’ credibility, whether the witness is testifying in court or is an out-of-court declarant.41 The first four modes of impeachment concern the competence and eligibility necessary to be a witness.42 These modes of impeachment include: oath, perception, memory and recollection, and communication. The last five modes are used to discredit the testimony of the witness.43 The last five modes consist of bias, prejudice, interest, motive, and corruption. This section will discuss each mode and its application under Rule 806.

A. Oath and/or Affirmation

Under Federal Rule of Evidence 603, before testifying a witness must swear an oath or affirm that he will testify truthfully.44 For most types of hearsay the oath or affirmation requirement cannot be met because the declarant is not an in-court witness.45 The notable exception is former

39. FED. R. EVID. 402 (discussing requirements for relevant evidence); United States v. Friedman, 854 F.2d 535, 570 (2d Cir. 1988), cert. denied, 490 U.S. 1004 (1989); Vaughn v. Willis, 853 F.2d 1372, 1379 (7th Cir. 1988) (discussing Rule 806 and the relevancy requirement).
40. FED. R. EVID. 403. Rule 403 provides: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Id.; see Vaughn, 853 F.2d at 1379 (applying Federal Rule of Evidence 403 to a Rule 806 impeachment).
42. Id.
43. Id. (noting that the last five modes do not seek to discredit the competency or eligibility of the witness).
44. FED. R. EVID. 603. Rule 603 provides: “Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.” See United States v. Armijo, 5 F.3d 1229, 1235 (9th Cir. 1993) (showing that the purpose of the oath is to impress upon the witness the importance of being truthful); see also United States v. Ward, 989 F.2d 1015, 1019 (9th Cir. 1992) (noting that “there is no constitutionally or statutorily required form of oath”); Gordon v. Idaho, 778 F.2d 1397, 1400 (9th Cir. 1985) (indicating that a witness does not have to use the words “swear” or “affirm” to satisfy the oath or affirmation requirement).
45. Brannon, supra note 41, at 160.
testimony given under oath or affirmation and admitted under Federal Rule of Evidence 804(b)(1).\textsuperscript{46} Obviously, if the court admits hearsay evidence under Rule 804(b)(1), a defense attorney cannot impeach the hearsay statement for not being made under oath. Thus, the concern of Rule 603 is with evidence admitted under another exception or under Federal Rule of Evidence 801(d)(2) (C),(D), or (E). The party against whom the hearsay is admitted must deal with damaging testimony not given under the penalty of perjury. During cross-examination of the in-court witness and during summation, the party's attorney may argue to the trier of fact that because the declarant did not make the hearsay statement under an oath or affirmation of truthfulness, the trier of fact should consider the statement untrustworthy and disregard it.\textsuperscript{47}

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ILLUSTRATION ONE

IMPEACHMENT OF ABSENT HEARSAY DECLARANT AS TO OATH/AFFIRMATION

Assume the defendant is on trial for a murder that took place inside a state prison and the witness on the stand, an inmate of the prison, is testifying to a coconspirator's statement made by John Doe. The statement by John Doe implicates the defendant, but Doe has invoked the Fifth Amendment and is unavailable to testify. Cross-examination proceeds as follows:

Defense Attorney: “John Doe is your friend, correct?”
Witness: “Yes.”
Defense Attorney: “And you know John Doe will not be a witness here today, don’t you?”
Witness: “That’s what I hear.”
Defense Attorney: “So John Doe will not be making any statements under oath here today like you are, will he?”
Witness: “No.”
Defense Attorney: “And when John Doe told you that my client was involved in the murder he wasn’t under oath then either was he?”
Witness: “No, he wasn’t.”

\textsuperscript{46} \textit{Fed. R. Evid.} 804(b)(1). Admission of hearsay under this rule is further conditioned on whether the party against whom the hearsay is admitted, or, in a civil proceeding, “a predecessor in interest, had an opportunity and similar motive to develop the former testimony by direct, cross, or redirect examination.” \textit{Id.}

\textsuperscript{47} Brannon, \textit{supra} note 41, at 160.
B. Perception

Perception is the second mode of impeachment that challenges the witness' competence to testify.\textsuperscript{48} Federal Rule of Evidence 601 governs the witness' competency to testify.\textsuperscript{49} The standard for admissibility under Rule 601 is extremely liberal; competency is the rule, incompetency the exception.\textsuperscript{50} Factors that relate to competency are probative generally of the weight and credibility of the testimony, rather than its admissibility.\textsuperscript{51} The witness' ability to perceive, therefore, goes normally to the weight given to the testimony and is subject to impeachment by defense counsel.\textsuperscript{52}

During cross-examination the defense attorney may question an in-court witness as to the witness' ability to perceive the subject of his or her testimony. The defense attorney utilizes this type of impeachment to diminish the weight and credibility of the testimony.\textsuperscript{53} Because the declarant is considered a witness, defense counsel may also impeach the perception of the hearsay declarant the same way as an in-court witness.\textsuperscript{54} An attorney does not have the opportunity to cross-examine the hearsay declarant, therefore, the attorney may ask the witness who is testifying to the statement, questions concerning the declarant's perception.\textsuperscript{55}

The defense attorney may impeach the declarant's perception with both extrinsic and intrinsic evidence.\textsuperscript{56} Extrinsic evidence is evidence other than the responses given by the in-court witness.\textsuperscript{57} Courts allow

\textsuperscript{48} \textit{Id.} at 160-61 (noting that perception basically deals with the witness' five senses). 
\textsuperscript{49} \textit{FED. R. EVID.} 601. \textit{Fed. R. Evid.} 601 provides in part: "Every person is competent to be a witness except as otherwise provided in these rules." 
\textsuperscript{50} \textit{See FED. R. EVID.} 601 advisory committee's note. The Advisory Committee states that "[h]is general ground-clearing eliminates all grounds of incompetency not specifically recognized in the succeeding rules of this Article." \textit{Id.} 
\textsuperscript{51} \textit{Id.} (noting that competency goes to weight because "[a] witness wholly without capacity is difficult to imagine"). 
\textsuperscript{52} \textit{Id.; see also FED. R. EVID.} 602 advisory committee's note (suggesting that only in the rare case will lack of perception be a basis for exclusion of evidence). This would occur only when a witness, or an out-of-court declarant did not see the event or transaction in question and thus, lacks personal knowledge. \textit{FED. R. EVID.} 602 (providing in part: "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter"). 
\textsuperscript{53} \textit{FED. R. EVID.} 602 (requiring the witness to have personal knowledge of the subject to testify). 
\textsuperscript{54} \textit{FED. R. EVID.} 806 advisory committee's note; \textit{see supra} notes 6-8 and accompanying text (discussing the fact that hearsay declarants are in essence, witnesses). 
\textsuperscript{56} \textit{Id.} (asserting that counsel is limited to the testimony of the witness when the matter is collateral, but may use extrinsic evidence when material facts are at issue). 
\textsuperscript{57} \textit{Id.}
impeachment by extrinsic evidence when the matter of the testimony is not collateral, namely that it relates to a material fact at issue in the litigation.\(^{58}\) A witness' in-court testimony about the hearsay declarant's perception of the subject of the hearsay statement is material, and thus, may be impeached by extrinsic evidence.\(^ {59}\) For example, the defense attorney may introduce evidence that the declarant had alcohol in his or her system when the statement was made, and therefore argue that the alcohol affected the declarant's perception.\(^ {60}\) Counsel may also introduce evidence that the declarant was under psychiatric care when the statement was made.\(^ {61}\) Allowing defense counsel to impeach the declarant's ability to perceive may persuade the trier of fact that the hearsay testimony is untrustworthy and should be discounted.

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**ILLUSTRATION TWO**

**IMPEACHING THE ABSENT HEARSAY DECLARANT AS TO PERCEPTION**

Assume the defendant is on trial for robbery and the main issue is the accuracy of the defendant's identification as the perpetrator. The witness for the prosecution testifies that ten minutes after the alleged robbery, an absent hearsay declarant, John Jones, told him that he [John Jones] just saw a man approximately 6' 2" and 235 pounds [the same general height and weight of the defendant] fleeing the crime scene. The cross-examination of the witness proceeds as follows:

**Defense Attorney:** "You know John Jones well, don't you?"

**Witness:** "Yes."

**Defense Attorney:** "Isn't it a fact that Mr. Jones wears prescription eyeglasses because he is almost legally blind?"

**Witness:** "Yes, that is true."

**Defense Attorney:** "And sir, Mr. Jones was not wearing his prescription eyeglasses when he talked to you some ten minutes after the crime, was he?"

**Witness:** "Come to think of it, you are correct. He had no glasses on when I was talking to him."

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58. *Id.* at 161.
59. *Id.* at 162.
60. United States v. Glenn, 473 F.2d 191, 195 (D.C. Cir. 1972) (per curiam) (holding that the amount of alcohol in the declarant's system goes to the weight of the statement not its admissibility).
61. United States v. Check, 582 F.2d 668, 684 n.44 (2d Cir. 1978) (noting that this line of questioning was entirely proper even though the prosecutor objected vehemently).
C. Memory and Recollection

The third mode of impeaching a witness' competency to testify includes the introduction of evidence pertaining to a witness' memory or recollection. The liberal standards of Rule 601 also govern the impeachment of memory and recollection. Concerns about the witness' memory affect the weight and credibility attributed to the witness. The defense attorney may also impeach the memory of an absent hearsay declarant because the declarant is considered a witness. The attorney may apply the same principles of impeachment to memory and recollection that apply to perception. The cross-examiner may ask the in-court witness testifying to the hearsay statement questions about the declarant's ability to remember the matters surrounding the out-of-court statement. The hearsay declarant's memory of the subject matter of the hearsay statement is material; hence the cross-examiner may also introduce extrinsic evidence that the declarant's memory is defective, and therefore, argue that the jury should give the statement little weight.

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ILLUSTRATION THREE

IMPEACHMENT OF ABSENT HEARSAY DECLARANT AS TO MEMORY/RECOLLECTION

Assume the same fact scenario as in Illustration Two regarding perception, except that now, the conversation between the witness and John Jones took place two weeks after the robbery. The same witness is on the stand and cross-examination continues as follows:

Defense Attorney: "Now, when John Jones talked to you about the alleged robbery and what he saw, that was two weeks after the incident correct?"

Witness: "Yes."

62. Brannon, supra note 41, at 162.
63. Fed. R. Evid. 601 advisory committee's note; see supra notes 49-51 and accompanying text (discussing requirements of Rule 601).
64. Fed. R. Evid. 601 advisory committee's note.
65. Fed. R. Evid. 806 advisory committee's note (asserting that the declarant should be treated like a witness and subjected to impeachment); see supra notes 6-8 and accompanying text (elaborating on the concept of treating the hearsay declarant as a witness).
66. Brannon, supra note 41, at 162.
67. Id. (stating that a hearsay declarant or witness is required to remember the events surrounding the out-of-court statement).
Defense Attorney: "Isn't it a fact that Mr. Jones [the hearsay declarant] couldn't even remember the day of the week or the time of the day when he claimed he saw a man running from the scene of the robbery?"
Witness: "Yes, I'm afraid that is correct."

D. Communication

Impeachment of a witness' communication of his or her testimony is the fourth and final mode of attacking the witness' competency to testify. The general rule of competency of Rule 601 also governs the witness' ability to communicate. Rule 806 allows impeachment of the hearsay declarant's ability to communicate. The attorney must assess the declarant's ability to communicate through cross-examination of the in-court witness and through the introduction of extrinsic evidence. Courts admit extrinsic evidence because the declarant's ability to communicate, as well as to perceive the substance of the out-of-court statement, is material to facts at issue in the trial. The attorney may attempt to establish that the statement attributed to the declarant is beyond the declarant's intellectual capacity and that the declarant repeated only what someone else had said. If the attorney is successful, the declarant's personal knowledge may be called into question, thereby diminishing the weight and credibility of the hearsay or disqualifying the out-of-court declarant as a witness.

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ILLUSTRATION FOUR

IMPEACHMENT OF ABSENT HEARSAY DECLARANT AS TO COMMUNICATION

Assume the same factual scenario as outlined in Illustrations Two and Three above. The cross-examination of the witness proceeds as follows:

68. Id. at 163.
69. Fed. R. Evid. 601 advisory committee's note (explaining that the narration of a witness is relevant to his credibility); see supra notes 49-51 (discussing this principle in greater detail).
70. See Fed. R. Evid. 806 advisory committee's note (implying that because a party can impeach a witness' ability to communicate, a party can impeach the out-of-court declarant in the same manner).
71. See Brannon, supra note 41, at 163-64 (discussing impeachment of the declarant's ability to communicate).
72. Id.
73. Id. at 163.
74. Fed. R. Evid. 602 (requiring a witness to have personal knowledge of the matter in order to testify).
Defense Attorney: "On direct examination, you testified that Mr. Jones used the word 'egregious' in describing the conduct of the 6 foot 2 inch, 235 pound man he saw running from the scene of the robbery, correct?"
Witness: "That's correct."
Defense Attorney: "What does the word 'egregious' mean to you?"
Witness: "I have no idea what the word means."
Defense Attorney: "And you know, don't you, that Mr. Jones [the absent hearsay declarant] dropped out of high school in the 9th grade, don't you?"
Witness: "Yes, he did."

E. Bias, Prejudice, Interest, Motive, Corruption

Evidence of bias or interest is the first of the five modes of impeachment used to discredit the testimony of the declarant by impeaching his or her credibility. In Article VI of the Federal Rules of Evidence, no specific rule includes evidence of bias or interest as a means of impeachment. However, its wide acceptance and established use at common law indicate that such evidence was implied in Article VI of the Federal Rules of Evidence. In fact, the Advisory Committee's notes to Rules 608 and 610 include impeachment by evidence of bias or interest. Use of extrinsic, as well as intrinsic, evidence is permitted for impeachment purposes because evidence of bias directly affects the witness' credibility.

Because the Federal Rules of Evidence regard the hearsay declarant as a witness, the cross-examiner may impeach the declarant's credibility

75. See Brannon, supra note 41, at 160, 164-65.
76. Id. at 164 (noting that bias is referred to in the advisory committee's note to Rules 608 and 610). In contrast, impeachment of a witness by showing bias or prejudice is specifically authorized in Federal Rules of Evidence 408 and 411.
77. United States v. Abel, 469 U.S. 45, 50-52 (1984) (holding that evidence of a defense witness' membership in the same prison gang as the defendants was an appropriate method of impeachment to demonstrate bias, despite the lack of a specific Federal Rule of Evidence pertaining to impeachment by bias or interest); Brannon, supra note 41, at 164 (indicating that because impeachment by bias was so obvious and well known, it did not have to be included in the Federal Rules of Evidence).
78. FED. R. EVID. 608, 610 advisory committee's note. It is perplexing, to say the least, that impeachment of a witness by proof of bias or interest is not covered directly in the Article VI rules, while impeachment by bias or prejudice is specifically authorized in Federal Rules of Evidence 408 and 411. See supra note 76.
79. Abel, 469 U.S. at 51 (recognizing that courts have accepted extrinsic evidence to show bias); Brannon, supra note 41, at 164 (explaining that because bias goes to credibility, a material issue is raised and can therefore be attacked by both intrinsic and extrinsic evidence).
80. FED. R. EVID. 806 advisory committee's note; see supra notes 6-8 and accompanying text (recognizing the hearsay declarant is regarded as a witness).
with evidence of bias, prejudice, interest, motive, and corruption.\footnote{4 \textsc{LOUISELL \& MUELLER}, \textit{supra} note 36, § 501, at 1246; \textit{see} \textsc{FED. R. EVID.} 806 advisory committee’s note.} In so doing, the cross-examiner wants to infer that bias or interest influenced the declarant in making the statement, therefore, causing the jury to question the declarant’s credibility and the statement’s veracity. For example, in \textit{United States v. Lechoco},\footnote{542 F.2d 84 (D.C. Cir. 1967).} the United States Court of Appeals for the District of Columbia Circuit allowed the government attorney to question a psychiatrist who had examined the defendant-declarant about the defendant-declarant’s motive to receive an acquittal.\footnote{\textit{Id.} at 86-87.} The court allowed questions pertaining to the impact of the defendant-declarant’s motive on the truthfulness of his responses during the psychiatric examination.\footnote{\textit{Id.}}

In \textit{United States v. Check},\footnote{582 F.2d 668 (2d Cir. 1978).} the United States Court of Appeals for the Second Circuit recognized that evidence of bias or interest is a permissible mode of impeachment.\footnote{\textit{See id.} at 684 \& n.44.} In Check, the appellate court permitted the defense attorney to impeach the declarant’s credibility with evidence of the declarant’s motive or interest in lying to a government agent.\footnote{\textit{Id.} at 684 n.44 (stating that the declarant could have had a motive to lie to the government agent because “he was facing a serious criminal charge in state court” and may have been trying to curry favor with the government).}

When a cross-examiner impeaches a hearsay declarant with an out-of-court statement indicating bias, prejudice, interest, motive, or corruption, the absent declarant will not have an opportunity to explain or deny the statement.\footnote{88. \textit{State v. Phillips}, 840 P.2d 666, 672 (Or. 1992) (holding that an out-of-court statement by an absent declarant indicating bias is not subject to the familiar foundation requirements of the state rules of evidence for bias impeachment of in-court witnesses); 4 \textsc{LOUISELL \& MUELLER}, \textit{supra} note 36, § 501, at 1247.} Likewise, if the cross-examiner impeaches the hearsay declarant with his out-of-court conduct indicating bias or interest, the absent declarant will not be afforded an opportunity to explain or deny the conduct.\footnote{89. \textit{Phillips}, 840 P.2d at 672; 4 \textsc{LOUISELL \& MUELLER}, \textit{supra} note 36, § 501, at 1247.} To require that the impeaching party provide an opportunity for the hearsay declarant to explain or deny the statement or conduct would, in effect, deny the opportunity to impeach the absent hearsay declarant, since there would be no witness declarant on the stand who made the statement or engaged in the out-of-court conduct. This principle of dispensing with any foundation requirement of confronting the witness with his out-of-court statement or conduct accords with Rule 806 which
does not require that a party give the absent declarant an opportunity to explain or deny an inconsistent statement before a court can admit evidence to impeach the hearsay testimony. 90

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ILLUSTRATION FIVE

IMPEACHMENT OF ABSENT HEARSAY DECLARANT AS TO BIAS, MOTIVE, INTEREST, PREJUDICE

Assume the defendant is on trial for arson and that two weeks after the fire, Ralph Smith, the absent hearsay declarant, told Detective Hart that he, Ralph Smith, saw the defendant running from the scene five minutes after the fire started. The cross-examination of Detective Smith proceeds as follows:

Defense Attorney: “Officer Hart, you claimed on direct examination that two weeks after the incident Ralph Smith told you that he saw my client [the defendant] running from the scene of the fire five minutes after the fire started, is that correct?”
Witness: “That’s true.”
Defense Attorney: “When Mr. Smith told you that, he was still on probation in state court for armed robbery, wasn’t he?”
Witness: “Yes, that’s correct.”
Defense Attorney: “And isn’t it a fact that Mr. Smith’s probation does not expire for another twenty-two months?”
Witness: “That’s true.”
Defense Attorney: “Detective Hart, you were the arresting officer in the armed robbery case for which Mr. Smith is now on probation, correct?”
Witness: “Yes, I was.”
Defense Attorney: “And you helped him get probation, didn’t you?”
Witness: “Yes.”
Defense Attorney: “And Mr. Smith has been helping the police by being an informant-tipster since then, hasn’t he?”
Witness: “From time to time, yes.”
Defense Attorney: “And you expect that help will continue at least until his probation is over, don’t you?”
Witness: “Yes.”

90. FED. R. EVID. 806 (stating that the rule “is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain”); see infra notes 151-56 and accompanying text (discussing the admission of a declarant’s prior inconsistent statements under Rule 806).
F. Prior Convictions

Evidence of prior convictions is another mode of impeachment available to the cross-examiner to discredit a witness. Rule 609 of the Federal Rules of Evidence governs impeachment of a witness by evidence of a prior conviction. As stated previously, a court treats a declarant's testimony as that of an in-court witness, therefore, allowing a trial attorney to impeach the declarant as if he testified in court. Defense counsel can use evidence of a prior conviction effectively to impeach the credibility of absent hearsay declarants. Defense counsel may use Rule 806 only with evidence that a court would admit if the declarant testified in court. Thus, the guidelines of Rule 609 apply strictly when impeaching a declarant with evidence of a prior conviction under Rule 806. This provides another example of how other Federal Rules of Evidence limit the scope of Rule 806.

When a party impeaches a witness with evidence of a prior conviction, there is no issue about whether the witness testified to a collateral matter. Thus, if a testifying witness denies a prior conviction, the defense counsel will not be bound by the witness' answer. The defense counsel is not bound because convictions are generally a matter of public record.

91. LOUISELL & MUELLER, supra note 36, § 501, at 1241.
92. FED. R. EVID. 609. Rule 609 provides in part:
(a) . . . For the purpose of attacking the credibility of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

FED. R. EVID. 609(a).
93. FED. R. EVID. 806 advisory committee's note. See also supra notes 6-8 and accompanying text.
94. United States v. Bovain, 708 F.2d 606, 613 (11th Cir.), cert. denied, 464 U.S. 898 (1983). In Bovain, multiple defendants were charged with conspiracy and distribution of heroin. Id. at 607-08. The Eleventh Circuit upheld the impeachment of a non-testifying defendant with his prior criminal record during cross-examination of a third party by a codefendant's counsel. Id. at 613-14. The third party witness testified regarding out-of-court statements made by one codefendant about another codefendant's role. Id. at 613.
96. See id. (demonstrating that Rule 806 is limited by Rule 609 because Rule 806 cannot be used unless the prior convictions are admissible under Rule 609).
97. Brannon, supra note 41, at 166-67 (noting that most witnesses will not deny a prior conviction because they know a public record exists).
98. Id. (stating that if the witness is not truthful about the conviction, the issue is not collateral).
The defense counsel will need extrinsic evidence of a prior conviction to impeach the credibility of a hearsay declarant when the hearsay declarant cannot be cross-examined about the prior conviction. Defense counsel may, therefore, resort to extrinsic evidence—a certified copy of a judgment of conviction—to impeach the witness.99

Just as evidence of prior convictions to impeach hearsay declarants must comply with Rule 609, so must the evidence comply with the provisions of Rule 403.100 Furthermore, before evidence of prior convictions will be admissible under Rule 609(a)(1) to impeach a declarant who is also the defendant, the trial court must find that the probative value of the prior conviction outweighs its prejudicial effect upon the defendant.101 However, Rule 609(a)(2)102 requires no such balancing of probative value against prejudicial effect, because evidence of prior convictions involving dishonesty or false statements are always probative of credibility.103

The balancing of probative value versus prejudice is important when considering the problems that occur when a codefendant is also the declarant whose credibility is vulnerable to attack by evidence of prior convictions.104 Such problems stem generally from the admission of hearsay statements under Rule 801(d)(2)(E), those of a coconspirator who is also a codefendant.105 Statements by a coconspirator are impeachable under

99. Id. Judge Brannon notes that the extrinsic evidence available to the attorney to prove a prior conviction is not without limit. Id. He states that the evidence will be limited to the most efficient evidence available, namely the certified judgment of conviction. Id.

100. To comply with Rule 403, “evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . .” FED. R. EVID. 403; see also FED. R. EVID. 806 (stating that the declarant’s credibility may be challenged by any evidence which would be admissible if the declarant was also a witness).

101. FED. R. EVID. 609(a)(1).

102. FED. R. EVID. 609(a)(2) (specifying that criminal convictions involving dishonesty shall be admitted) (emphasis added).

103. See United States v. Noble, 754 F.2d 1324, 1331 (7th Cir) (explaining that convictions involving dishonesty are demonstrative of a witness’ ability to testify truthfully), cert. denied, 474 U.S. 818 (1985). The Court of Appeals clarified that no balancing of probative value and prejudicial effect is required when the prior conviction falls under 609(a)(2) because it involved dishonesty or falsehood. Id. The Court of Appeals also added that crimes such as perjury, fraud, embezzlement, false pretenses, counterfeiting and any other crime whose commission involves some element of deceit or falsification are 609(a)(2) type crimes. Id.

104. United States v. Robinson, 783 F.2d 64, 67 (7th Cir. 1986) (explaining that the admission of prior crimes evidence against a declarant who is also a codefendant corrupts the notion that defendants are innocent until proven guilty); see also FED. R. EVID. 404(b) (discussing the admittance of character evidence).

105. Brannon, supra note 41, at 168-69; see AMERICAN BAR ASSOCIATION, EMERGING PROBLEMS UNDER THE FEDERAL RULES OF EVIDENCE 270-71 (David A. Schlueter ed., 2d
Rule 806 even though Rule 801(d)(2)(E) defines them as non-hearsay. However, admitting evidence of the declarant-codefendant's prior convictions creates a danger of compromising the declarant-defendant's presumption of innocence. Normally defense counsel would impeach a hearsay declarant with evidence of prior convictions, but when the declarant is a codefendant, this creates a fear that the jury will use the impeachment evidence to improperly decide the guilt or innocence of the declarant-codefendant before his counsel presents his case-in-chief.

The United States Court of Appeals for the Seventh Circuit in *United States v. Robinson* discussed two ways a trial court can prevent the declarant-codefendant's presumption of innocence from being compromised by evidence of prior convictions. First, the trial court may, in its discretion, admit the impeaching evidence and give a limiting instruction informing the jury to use the evidence only to assess the credibility of the declarant-codefendant, and not to determine guilt, innocence, or the declarant-codefendant's propensity to commit a crime.

In the second method, the trial court, after weighing the probative value towards credibility against the prejudicial effect on the declarant-codefendant and after concluding that the evidence's prejudicial effect outweighs its probative value, may in its discretion, exclude the impeaching evidence of a prior conviction. On appeal, this determination will

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ed. 1991) (discussing problems of Rule 806 with coconspirator declarants); *see also FED. R. EVID. 801(d)(2)(E) (allowing hearsay statements "by a coconspirator of a party during the course and in furtherance of the conspiracy," if offered against the party).

106. FED. R. EVID. 806. The rule states that when "a statement defined in Rule 801(d)(2),(C),(D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked . . . ." *Id.*


108. *Id.* at 67-68.

109. 783 F.2d at 64.

110. *Id.* at 67-68. In *Robinson*, the defendant was tried on a conspiracy charge with multiple codefendants. *Id.* at 65. The trial court admitted into evidence the out-of-court declarations of two non-testifying coconspirators. *Id.* The defendant and two non-testifying coconspirators wanted to impeach each other under Rule 806 with Rule 609 prior crimes evidence. *Id.* at 67. The trial court refused to allow any evidence of prior crimes and the Seventh Circuit upheld this decision. *Id.* at 68.

111. *Id.* at 67-68. Federal Rule of Evidence 404(b) provides in part: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." FED. R. EVID. 404(b); *see also* United States v. Bovain, 708 F.2d 606, 613 (11th Cir.) (emphasizing the impeachment value of evidence), *cert. denied*, 464 U.S. 898 (1983).

112. *Robinson*, 783 F.2d at 68. The Seventh Circuit stated that by refusing to allow the impeachment by prior conviction, the judge had been more favorable to the defendants than if he had allowed the testimony and then given a limiting instruction; this more favorable treatment is not grounds for reversal. *Id.*
not be overturned absent an abuse of discretion by the trial court.\(^{113}\) However, in dicta the \textit{Robinson} court stated that where all codefendants agree that the impeachment value of the prior convictions evidence is more important than the unfair prejudicial effect on them, the trial court may admit the evidence.\(^{114}\) Thus, defense counsel in multiple defendant conspiracy cases must be aware of tactical considerations other than those normally involved in impeaching hearsay declarants.

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**ILLUSTRATION SIX**

**IMPEACHMENT OF ABSENT HEARSAY DECLARANT WITH EVIDENCE OF A PRIOR CONVICTION**

Assume the defendant is on trial for a drug conspiracy charge. Special Agent Elliott Ness has testified on direct as to coconspirators' statements made to him by Kenny Cokehead while Agent Ness was working in an undercover capacity. These coconspirators statements implicated the defendant in the drug conspiracy. Assume further that Kenny Cokehead's trial has been severed from that of the defendant. Cross examination of Agent Ness proceeds as follows:

Defense Attorney: "Agent Ness, when you talked to Kenny Cokehead, you claimed he told you he and Isaac Innocent [the defendant on trial] could supply you with up to three kilos of heroin a week for $30,000.00 per kilo, is that correct?"

Agent Ness: "That's what Mr. Cokehead said."

Defense Attorney: "But yet no drug transactions ever took place after that conversation, did they?"

Agent Ness: "They were arrested before it got to that point."

\(^{113}\) \textit{Id.} (applying the abuse of discretion standard).

\(^{114}\) \textit{Id.} The judge in \textit{Robinson} did not admit the evidence of prior convictions of the codefendants even though each wanted to use prior criminal activity for impeachment purposes. \textit{Id.} at 67-68. The Seventh Circuit did not find abuse of discretion on the part of the trial judge and noted that one of the defense attorneys admitted that after impeachment of each codefendant, the attorneys planned to move for mistrial and/or severance. \textit{Id.} The appellate court stated that admission of prior convictions evidence does not automatically entitle defendants to severance. \textit{Id.} Otherwise, defendants would have their cake and eat it too. The defendants would use Federal Rules of Evidence 609 and 806 for impeachment purposes, then the impeached codefendant would move for a severance based on the alleged prejudice from the jury's hearing of his or her prior conviction when the codefendant was not going to testify at trial and be otherwise subject to cross-examination. This request for a severance by the codefendant would be joined undoubtedly by the other defendants who took advantage of Rule 806 in the first place.
Defense Attorney: "Were you aware when you were speaking to Mr. Cokehead that he was the same Kenny Cokehead that was convicted of perjury in federal court in Baltimore, Maryland, in 1992?"

Agent Ness: "No. I was not aware of that."

Defense Attorney: "Your Honor, I now offer as defendant's Exhibit #1 in evidence a certified copy of the judgment of conviction dated November 5, 1992 showing that Kenny Cokehead was indeed convicted of perjury in the United States District Court for the District of Maryland."

The Court: "Very well, it will be received as defendant's Exhibit #1, in evidence."

.G. Prior Bad Acts Probative of Truthfulness

Rule 608(b) of the Federal Rules of Evidence governs the impeachment use of evidence of prior bad acts that are probative of truthfulness.\(^{115}\) Rule 608(b) limits the impeachment of a witness' credibility by prior bad acts to intrinsic evidence that is probative of truthfulness—that is, evidence brought out during the in-court witness' testimony.\(^{116}\) The cross-examiner is bound by the witness' answers and cannot introduce extrinsic evidence of prior bad acts if the witness denies ever having committed them.

Because the declarant of a hearsay statement is considered a witness,\(^ {117}\) the out-of-court declarant's credibility should be subject to impeachment as if he had testified in court.\(^ {118}\) Thus, under Rule 608(b), specific instances of prior bad acts of the declarant may, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the in-court witness.\(^ {119}\)

A test does not exist for determining the probative value of Rule 608(b) impeaching evidence as set forth in Rule 806. Rule 806 only states

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115. FED. R. EVID. 608(b). Fed. R. Evid. 608(b) provides in part:
Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of a 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 the witness' 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.

Id.

116. Id.

117. FED. R. EVID. 806 advisory committee's note (noting the fairness of such an approach).

118. Id. (explaining difficulties of impeaching an out-of-court declarant).

generally the type of evidence a party may use to undermine hearsay testimony. In United States v. Friedman, the United States Court of Appeals for the Second Circuit Court set forth a useful standard for determining whether evidence of a declarant's prior bad acts are probative of truthfulness or untruthfulness and, therefore, admissible. The Friedman court stated, "[s]pecific issues of whether a declarant's past conduct may actually 'cast doubt on the credibility of [his] statements'... must be determined by comparing the circumstances of the past conduct with those surrounding the hearsay statements admitted into evidence." The trial court should determine the probative value of prior bad acts evidence. The trial court's determination will not be overturned absent a clear showing of abuse of discretion.

Although courts generally limit Rule 608(b) to impeachment by intrinsic evidence, some commentary suggests that Rule 806 modifies the applicability of Rule 608(b) and thus allows extrinsic evidence of specific instances of prior bad acts to impeach the declarant's credibility. If the court did not allow the impeaching party to introduce extrinsic evidence of the declarant's prior bad acts, he or she would be precluded from employing this type of attack unless the declarant were available to testify in court. One commentator reasoned that "it is unfair thus 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."

In situations where the declarant has not testified and has not been subject to cross-examination, extrinsic evidence is the only means of presenting the impeachment evidence to the trier of fact. Thus, where

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120. FED. R. EVID. 806 (providing that credibility of the declarant may be impeached or supported by any evidence that would have been admissible if the declarant had testified in court); Friedman, 854 F.2d at 570 & n.8.
121. 854 F.2d at 535.
122. Id. at 570 (quoting United States v. Serna, 799 F.2d 842, 850 (2d Cir. 1986), cert. denied, 481 U.S. 1013 (1987)).
123. Id. (citing United States v. Bari, 750 F.2d 1169, 1178 (2d Cir. 1984), cert. denied, 472 U.S. 1019 (1985)).
124. 4 LOUSELL & MUELLER, supra note 36, § 501, at 1241.
125. Id. (reasoning that this would give opposing counsel an unfair advantage).
126. Id.
127. Friedman, 854 F.2d at 570. In Friedman, the Court of Appeals affirmed the trial court's exclusion of evidence of prior bad acts to impeach the declarant of hearsay statements admitted pursuant to Federal Rule of Evidence 801(d)(2)(E) because the prior act was not probative on the issue of the credibility of the declarant's conspiratorial statements. Id. The declarant's hearsay statements were in furtherance of the conspiracy and implicated himself. Id. The prior bad act in question was a false statement about an unsuccessful suicide attempt. Id. This statement was made under different circumstances—he tried to shift the blame for his injuries away from himself and on to others. Id.
the impeaching party can demonstrate that the declarant committed the prior bad act under similar circumstances as the hearsay statement and is probative of the declarant’s character for truthfulness or untruthfulness, the trial court in its discretion, may admit extrinsic evidence of the prior bad act to impeach the absent hearsay declarant. Logically, the trial court should allow the attorney conducting the cross-examination to ask intrinsically worded questions of the witness on the stand as to whether he is aware of bad acts, probative of truthfulness, committed allegedly by the absent hearsay declarant.

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ILLUSTRATION SEVEN

IMPEACHMENT OF AN ABSENT HEARSAY DECLARANT BY PRIOR BAD ACTS RELEVANT TO TRUTHFULNESS

Assume the same facts as in Illustration Six above. The cross-examination of Agent Ness continues as follows:

Defense Attorney: “Agent Ness, you claimed on direct examination that Kenny Cokehead told you that my client, Isaac Innocent, was a multi-kilo distributor of heroin?”

Agent Ness: “Yes, that’s what Mr. Cokehead told me.”

Defense Attorney: “Were you aware that just two months before you talked to Mr. Cokehead, he wrote eight bad checks totalling $42,500 on bank accounts that were closed?”

Agent Ness: “No, I didn’t know that.”

Defense Attorney: “Were you also aware that Mr. Cokehead signed these eight bad checks using an alias name, ‘Kurt Smith’?”

Agent Ness: “No, I didn’t know that either.”

H. Prior or Subsequent Inconsistent Statements

Rule 613(b) of the Federal Rules of Evidence allows a defense attorney to impeach the credibility of a witness with evidence of a statement that is inconsistent with the witness’ in-court testimony. When impeaching an in-court witness in this manner, counsel may not use extrinsic evidence of a prior inconsistent statement unless the witness has been given an opportunity to explain or deny the inconsistency. This requirement of affording the witness an opportunity to explain or deny the inconsistency

128. Fed. R. Evid. 613(b); see 4 Louisell & Mueller, supra note 36, § 501, at 1242.
129. Fed. R. Evid. 613(b). Rule 613(b) provides in part: “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 the witness thereon, or the interests of justice otherwise require.” Id.
follows the common law rule requiring an attorney to lay a proper foundation before cross-examining the witness.\textsuperscript{130} Federal Rule of Evidence 613(b), however, modifies the common law rule by relaxing the foundational requirement that the witness’ attention be directed to the inconsistent statement during the cross-examination.\textsuperscript{131} Rule 613(b) provides only that the witness be given an opportunity to explain or deny the inconsistency, without specifying a particular time or sequence in the trial.\textsuperscript{132}

Prior to the Federal Rules of Evidence, courts required parties to lay a foundation for inconsistent statements made by the declarant, despite the recognized and inherent difficulties in meeting this requirement.\textsuperscript{133} In \textit{Mattox v. United States},\textsuperscript{134} the Supreme Court considered the impeachment of an absent declarant whose statement the trial court admitted as former testimony. The Court required the impeaching party to lay the proper foundation before proceeding with the impeachment.\textsuperscript{135}

Subsequent to \textit{Mattox}, some courts began to relax the rigidity of the foundational requirement for impeachment of hearsay declarants by inconsistent statements. For example, in \textit{Carver v. United States} the Supreme Court declined to extend the requirement of a proper foundation to impeachment of dying declarations by inconsistent statements.\textsuperscript{136} The Court also stated, “[a]s these declarations are necessarily ex parte, we think the defendant is entitled to the benefit of any advantage he may

\begin{itemize}
\item \textsuperscript{130} Mattox v. United States, 156 U.S. 237, 245 (1895) (noting that “before a witness can be impeached by proof that he has made statements contradicting or differing from the testimony given by him upon the stand, a foundation must be laid by interrogating the witness himself as to whether he has ever made such statements”); 3A \textit{Wigmore}, \textit{supra} note 6, § 1025, at 1020 (explaining that asking the witness on cross-examination whether he or she made the statement forecloses any possible objection for unfair surprise).
\item \textsuperscript{131} \textit{FED. R. EVID.} 613 advisory committee’s note.
\item \textsuperscript{132} \textit{FED. R. EVID.} 613; \textit{see} \textit{FED. R. EVID.} 613 advisory committee’s note (explaining there is no required time or sequence for providing the witness an opportunity to explain the inconsistent statement).
\item \textsuperscript{133} \textit{Mattox}, 156 U.S. at 248. The Supreme Court noted that other courts are unanimous in holding that, “the fact that the attendance of the witness cannot be procured, or even that the witness himself is dead, does not dispense with the necessity of laying the proper foundation.” \textit{Id.}
\item \textsuperscript{134} \textit{Id.} at 250.
\item \textsuperscript{135} \textit{Id.} at 250 (acknowledging potential hardship, but insisting that this ruling would prevent perjury).
\item \textsuperscript{136} 164 U.S. 694 (1897).
\item \textsuperscript{137} \textit{Id.} at 698. The Court stated, “[w]e are not inclined to extend [the foundational requirement] to the case of a dying declaration, where the defendant has no opportunity by cross-examination to show that by reason of mental or physical weakness, or actual hostility felt toward him, the deceased may have been mistaken.” \textit{Id.}
have lost by the want of an opportunity for cross-examination.”\textsuperscript{138} Later decisions of other courts continued this relaxation.\textsuperscript{139} The California Supreme Court in \textit{People v. Collup}\textsuperscript{140} noted that “[t]he modern tendency is to relax rigid rules of evidence—to escape from a slavish adherence to them with the accompanying hardship, injustice, and prevention of a full disclosure of all pertinent circumstances to the trier of fact.”\textsuperscript{141}

Even under the relaxed foundational standards of Rule 613(b), impeaching a hearsay declarant with an inconsistent statement may prove difficult if a trial court requires the impeaching party to afford the declarant an opportunity to deny or explain the inconsistency.\textsuperscript{142} For example, where the declarant is unavailable, the impeaching party cannot provide the declarant the opportunity to explain or deny the inconsistent statement.\textsuperscript{143} This holds true when a court admits the hearsay statement under the former testimony exception.\textsuperscript{144} Although the declarant was available for cross-examination when the former testimony was given, and could explain or deny a prior inconsistent statement whose existence is known by the impeaching party, an opportunity does not exist to explain or deny a prior inconsistent statement discovered after the cross-examination, or an inconsistent statement made subsequent to the hearsay statement admitted as former testimony.\textsuperscript{145}

Thus, Federal Rule of Evidence 806 formally abandons the common law rule of laying a proper foundation for impeaching hearsay declarants

\textsuperscript{138} \textit{Id.} (noting that in this case, the defendant and the deceased were acquainted, and the circumstances under which death occurred indicated intent other than murder).

\textsuperscript{139} \textit{See, e.g.}, \textit{Trade Dev. Bank v. Continental Ins. Co.}, 469 F.2d 35, 43 (2d Cir. 1972) (stating that “since the witness is unavailable it is unnecessary . . . to lay a foundation by first inquiring of the witness whether he made the statements”); \textit{People v. Collup}, 167 P.2d 714, 717 (Cal. 1946) (stating that “we do not believe that the foundation requirement is necessary where it is impossible to comply with it due to no fault of the party urging the impeachment”).

\textsuperscript{140} 167 P.2d 714 (Cal. 1946).

\textsuperscript{141} \textit{Id.} at 719 (concluding that the foundation requirement produces harsh results where laying the foundation becomes impossible).

\textsuperscript{142} 4 \textit{WEINSTEIN \& BERGER}, supra note 17, \S 806[01], at 806-6 to 807-7 (noting that the Rule 613 standard cannot always be met).

\textsuperscript{143} 4 \textit{LOUISELL \& MUELLER}, supra note 36, \S 501, at 1244.

\textsuperscript{144} \textit{FED. R. EVID.} 806(1). \textit{Rule 804(b)(1) provides:} 4 \textit{LOUISELL \& MUELLER}, supra note 36, \S 501, at 1244; 4 \textit{WEINSTEIN \& BERGER}, supra note 17, \S 806[01], at 806-8.

\textsuperscript{145} \textit{FED. R. EVID.} 806 advisory committee note; \textit{accord}, 4 \textit{LOUISELL \& MUELLER}, supra note 36, \S 501, at 1244; 4 \textit{WEINSTEIN \& BERGER}, supra note 17, \S 806[01], at 806-8.
with inconsistent statements.\textsuperscript{146} Rule 806 provides that evidence of a statement, inconsistent with the hearsay statement offered for its truth, is not subject to any requirement that the declarant be given an opportunity to explain or deny the inconsistency.\textsuperscript{147} Otherwise, the impeaching party would bear an unfair burden in being required to produce the declarant simply to explain or deny the inconsistency.\textsuperscript{148} The party who offered the hearsay statement is in a better position to call the declarant, and, because he invoked the hearsay exception, the court should require the party to present the declarant to elicit the explanation or denial.\textsuperscript{149} Many state court decisions have adopted the Federal Rule's example.\textsuperscript{150}

The inconsistent statement used to impeach a hearsay declarant under Rule 806 must be competent, admissible evidence.\textsuperscript{151} Second, the trial judge must determine that the impeaching statement is inconsistent with the hearsay statement in question.\textsuperscript{152} The inconsistent statement, however, does not have to fall under a hearsay exception to be admissible for impeachment purposes, but the impeaching party must specify the non-hearsay purpose for offering the statement.\textsuperscript{153} The impeaching party also must present competent evidence that the witness actually made the inconsistent statement; hearsay evidence cannot be used as such proof.\textsuperscript{154} Once a court admits the inconsistent statement to impeach the declarant's credibility, the opposing party is entitled to an instruction limiting the jury's consideration of the inconsistent statement solely for the purpose of impeachment, unless of course, the declarant made the prior inconsistent statement under oath qualifying it as substantive evidence under

\textsuperscript{146} \textit{WEINSTEIN & BERGER, supra} note 17, ¶ 806[01], at 806-6 to 806-7.

\textsuperscript{147} \textit{FED. R. EVID.} 806.

\textsuperscript{148} \textit{4 LOUISELL & MUELLER, supra} note 36, ¶ 501, at 1244 (reasoning that it was fair to burden the party taking advantage of the hearsay exception).

\textsuperscript{149} \textit{Id.} (directing counsel to reveal the statement to the opposing attorney).

\textsuperscript{150} \textit{See, e.g., In re Jean Marie W., 559 A.2d 625, 632 (R.I. 1989)} (explaining there is no requirement under state rule 806 that the witness be made aware of the prior inconsistency before impeachment); \textit{State v. Philpott, 882 S.W.2d 394} (Tenn. Crim. App. 1994) (noting the state rule “dispenses with the requirement that the declarant have an opportunity to explain when impeachment is by prior inconsistent statement”); \textit{State v. Hall, 329 S.E.2d 860, 864} (W. Va. 1985) (following the Federal Rule of Evidence 806 foundation requirement).

\textsuperscript{151} \textit{FED. R. EVID.} 806. Rule 806 permits impeachment “by any evidence which would be admissible for those purposes if declarant had testified as a witness.” \textit{Id.}

\textsuperscript{152} \textit{United States v. Graham, 858 F.2d 986, 990} (5th Cir. 1988) (noting that statement purported to be inconsistent, merely cast doubt on whether declarant made them as opposed to whether the statements were true), \textit{cert. denied, 489 U.S. 1020} (1989).

\textsuperscript{153} \textit{Id.; 4 LOUISELL & MUELLER, supra} note 36, ¶ 501, at 1245.

\textsuperscript{154} \textit{Davis v. State, 791 S.W.2d 308, 310} (Tex. Crim. App. 1990) (excluding the evidence as not competent).
Rule 801(d)(1)(A). The trial judge may exclude the inconsistent statement of the declarant, pursuant to Rule 403, upon a determination that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice resulting from the jury's potential misuse of the evidence.

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ILLUSTRATION EIGHT

IMPEACHMENT OF AN ABSENT DECLARANT BY A PRIOR INCONSISTENT STATEMENT

Assume the defendant is on trial for conspiracy to possess and receive stolen goods. The main government witness is Detective Greg Gotcha. John Jones is an alleged coconspirator of the defendant, Isaac Innocent, and the prosecution, on direct examination introduces as a coconspirator's statement, evidence that John Jones [the absent hearsay declarant] allegedly told Greg Gotcha [working in an undercover capacity] that the defendant was the mastermind of the fencing ring. Cross-examination of Detective Gotcha proceeds as follows:

Defense Attorney: "Detective Gotcha, you claimed on direct examination that John Jones told you that my client was the mastermind of the fencing ring, correct?"

Detective Gotcha: "That's what Mr. Jones said."

Defense Attorney: "Are you aware that three months later Mr. Jones testified, under a grant of immunity, before a federal grand jury in Baltimore, Maryland?"

Detective Gotcha: "No, I didn't know that."

Defense Attorney: "And are you aware that before that grand jury on page six, lines fifteen thru seventeen, Mr. Jones testified under oath as follows: 'Isaac Innocent is a small time fence. The mastermind of the ring is Ralph Marshall.'"

Detective Gotcha: "I didn't know that."

155. Federal Rule of Evidence 105 provides: "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." FED. R. EVID. 105. Furthermore, Federal Rule of Evidence 801(d)(1)(A) provides:

A statement is not hearsay if . . . [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition.

156. FED. R. EVID. 403; 4 LOUISELL & MUELLER, supra note 36, § 501, at 1245-46.
Defense Attorney: "Your Honor, we now move in as defendant’s Exhibit #1, page six of the grand jury testimony of Mr. Jones."
This evidence is admissible under Federal Rule of Evidence 806 and 801(d)(1)(A) as a subsequent inconsistent statement, and can be considered by the jury as substantive evidence."\(^{157}\)
The Court: "It will be received as defendant’s Exhibit #1, in evidence."

I. **Negative Opinion/Reputation Testimony as to Veracity**

The ninth mode of impeachment available to the defense attorney is to attack a testifying witness’ character for truthfulness or untruthfulness with negative opinion or reputation testimony.\(^{158}\) This mode of impeachment differs from the previous modes because instead of impeaching the witness through cross-examination, the impeaching party calls his own witness in his case-in-chief and elicits testimony of a former witness’ character for veracity.\(^{159}\) The impeaching testimony must be probative of the witness’ character for truthfulness or untruthfulness, rather than of the witness’ general character.\(^{160}\) If the witness is a layperson, then his or her opinion must also satisfy the requirements of Federal Rule of Evidence 701; it must be based on first-hand knowledge, and must be helpful in resolving a fact in issue.\(^{161}\)

157. Evidence that is admissible under Rule 801(d)(1)(A), unlike evidence tendered under Rule 613, comes in as substantive evidence. It, of course, can also be used to impeach the testimony of the absent hearsay declarant.

Obviously when defense counsel seeks to introduce evidence during cross-examination of a witness in the State’s case-in-chief, the defense attorney must obtain a ruling from the court that by so doing, the defense attorney does not waive his right to make a Motion for Judgment of Acquittal at the close of the State’s case.

158. **Fed. R. Evid. 608(a).** Rule 608(a) provides:

> 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.

**Fed. R. Evid. 608(2); see** Christopher B. Mueller & Laird C. Kirkpatrick, 4 Federal Evidence § 511, at 893-94 (2d ed. 1994) (discussing Rule 806 character impeachment of a hearsay declarant).


161. **Fed. R. Evid. 701.** Rule 701 provides:

If the witness is not testifying as an expert, the witness’ testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue.
An impeaching party may also attack an absent hearsay declarant’s character for truthfulness or untruthfulness through opinion or reputation testimony. Trial courts retain discretion in imposing reasonable limits on impeachment, but “they cannot place an out-of-court witness’s reputation for truthfulness beyond the scope of inquiry.”

To impeach the declarant’s character for veracity, the impeaching party may question other witnesses about their opinion of the declarant’s character for truthfulness or untruthfulness or about the declarant’s reputation for truthfulness or untruthfulness. The testimony must satisfy the same requirements of being probative of veracity and based on first-hand knowledge of the testifying witness, just as if the declarant had testified in court.

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Id.; see also Cortez, 935 F.2d at 139 (holding that government agents who only knew the witness in the context of an investigation did not know the witness well enough to offer opinion testimony on the witness’ character for truthfulness).

162. 4 Louise & Mueller, supra note 36, § 501, at 1241; 4 Weinstein & Berger, supra note 17, ¶ 806[01], at 806-12; see also People v. Tai, 547 N.Y.S.2d 989, 993-94 (N.Y. App. Div. 1989) (allowing the admission of negative character evidence to impeach the character of a non-testifying coconspirator declarant).

163. United States v. Moody, 903 F.2d 321, 329 (5th Cir. 1990). The Fifth Circuit ruled that the Confrontation Clause of the Sixth Amendment guarantees an opportunity for effective cross-examination, which includes the ability to impeach adversarial witnesses. Id. The court concluded that the trial court ruling, which had not allowed the defendant to impeach the reputation for truthfulness of two material declarants, was at odds with the Confrontation Clause. Id. The court commented in a footnote that “while it is within the discretionary authority of the trial court to limit cross-examination, that authority ‘comes into play only after there has been permitted as a matter of right sufficient cross-examination to satisfy the Sixth Amendment.’ ” Id. at n.7 (quoting United States v. Garza, 754 F.2d 1202, 1206 (5th Cir. 1985) (quoting United States v. Mayer, 556 F.2d 245, 250 (5th Cir. 1977))).

164. E.g., United States v. Lechoco, 542 F.2d 84, 88-89 (D.C. Cir. 1976). In Lechoco, the court held that the government attorney could impeach the defendant’s character for veracity through cross-examination of psychiatrists who testified on behalf of the defense as to the defendant’s mental condition. Id. at 88. The defendant’s hearsay statements to the psychiatrists were admitted as statements for the purpose of medical diagnosis, and as such, the defendant’s credibility was open to attack under Rule 806. Id. at 88-89. The government attorney could, therefore, attack his character for veracity because the testimony of the psychiatrists were based on the assumption that defendant was telling the truth during the psychiatric interviews. Id.

165. Fed. R. Evid. 806 (allowing the impeaching party to present evidence that would have been admissible had the declarant testified in court).
ILLUSTRATION NINE
IMPEACHMENT OF AN ABSENT HEARSAY DECLARANT BY
CALLING A NEGATIVE CHARACTER WITNESS FOR
TRUTHFULNESS

Assume the same factual scenario as in the immediately preceding Illustration. After Officer Gotcha testifies and the State rests its case, the defense attorney calls as his first witness a negative character witness for truthfulness. This witness is Mary Jones, the mother of the absent hearsay declarant, John Jones. Direct examination proceeds as follows:
Defense Attorney: “Ms. Jones, do you know John Jones?”
Mary Jones: “Yes, he is my son.”
Defense Attorney: “How long have you known John Jones?”
Mary Jones: “Since his birth.”
Defense Attorney: “How often do you see your son?”
Mary Jones: “At least once a week.”
Defense Attorney: “Do you have a personal opinion as to whether your son, John Jones, is a truthful person?”
Mary Jones: “Yes, I do.”
Defense Attorney: “And what is your opinion, Ms. Jones?”
Mary Jones: “I believe that he is a notorious liar.”
Defense Attorney: “Would you believe your son if he testified under oath?”
Mary Jones: “No. I wouldn’t believe a word he says.”

V. THE PROSECUTION USE OF FEDERAL RULE OF EVIDENCE 806

Just as Rule 806 may prove invaluable to the defense attorney, the rule is equally valuable and available to the prosecution to impeach hearsay declarants whose statements have been admitted against the government. The prosecutor, however, must be aware of possible conflicts

166. Believe it or not, when I served as the Federal Public Defender for the District of Maryland I called in my case-in-chief the mother of the key government witness and she testified as a negative character witness for truthfulness of her own son. The jury acquitted the defendant after deliberating for less than one hour. Thus, as can be seen, a witness testifying as a negative character witness for truthfulness can be a powerful impeachment witness. See case file in United States v. Edward J. Audy, Cr. No. Y-80-0253 in the United States District Court for the District of Maryland—not guilty verdict returned September 23, 1980.

167. State v. Zirkle, No. 03C01-9303-CR-00094, 1995 WL 59483, at *17 (Tenn. Crim. App. Feb. 13, 1995) (allowing a prosecutor to impeach a declarant under Tennessee Rule of Evidence 806, which is identical to the federal rule). The Government may also use a prior consistent statement under Rule 806 to rehabilitate a witness after an attack has been made on the Government’s witness. United States v. Bernal, 719 F.2d 1475, 1479 (9th Cir. 1983). Indeed, the Government may attack a declarant’s credibility as to some of his state-
and limitations imposed by the Confrontation Clause of the Sixth Amendment of the United States Constitution.\(^{168}\) The Confrontation Clause is particularly a stumbling block to the prosecution when the declarant does not testify at trial and is not subject to cross-examination.\(^{169}\)

This situation is governed by \textit{Ohio v. Roberts}\(^{170}\) and its progeny. The Supreme Court in \textit{Roberts} set out a two-prong test for the admissibility of hearsay evidence presented against the defendant.\(^{171}\) First, the prosecutor must show that the hearsay evidence is necessary to the government's case by demonstrating the declarant's unavailability.\(^{172}\) Second, the prosecutor must demonstrate the reliability of the hearsay evidence.\(^{173}\) A court may infer reliability by showing that the hearsay evidence falls within an exception rooted firmly in the common law, or by showing the hearsay evidence's "particularized guarantees of trustworthiness."\(^{174}\) Thus, if hearsay evidence is admissible under the \textit{Roberts} test, the prosecutor may use Rule 806 to impeach the declarant's statement admitted against the government without violating the Confrontation Clause.\(^{175}\)

Later cases interpreting the Confrontation Clause have limited \textit{Roberts} to its facts.\(^{176}\) In \textit{United States v. Inadi},\(^{177}\) the Supreme Court removed the unavailability prong for hearsay testimony in the form of coconspirator statements.\(^{178}\) The prosecution does not need to establish the unavailability of a coconspirator declarant to introduce hearsay against the defendant when the statements meet the requirements of Federal

\(^{168}\) U.S. Const. amend VI. The Sixth Amendment's Confrontation Clause provides: "In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him." Id. The Sixth Amendment is made applicable to the States through the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 406 (1965); Davis v. Alaska, 415 U.S. 308, 315 (1974).


\(^{170}\) 448 U.S. 56 (1980).

\(^{171}\) Id. at 65; see United States v. Ordonez, 722 F.2d 530, 535 (9th Cir. 1983) (following the two-part test set out in \textit{Roberts}).

\(^{172}\) \textit{Roberts}, 448 U.S. at 65.

\(^{173}\) Id.

\(^{174}\) Id. at 65-66.

\(^{175}\) Fed. R. Evid. 806; \textit{Roberts}, 448 U.S. at 65.


\(^{177}\) 475 U.S. 387 (1986).

\(^{178}\) Id. at 394.
Rule of Evidence 801(d)(2)(E). In *Bourjaily v. United States*, the Supreme Court further limited *Roberts* by removing the reliability prong for the admissibility of out-of-court coconspirator statements. The Confrontation Clause does not require the prosecution to establish independent indicia of reliability before the court will admit the hearsay statements of non-testifying coconspirators against the defendant. The coconspirator exception is rooted firmly enough in jurisprudence that a court need not inquire into the reliability of such statements where Rule 801(d)(2)(E) requirements are satisfied.

The prosecution may also avoid Confrontation Clause difficulties where the defendant presents past exculpatory statements, but does not intend to testify. The prosecutor may impeach the non-testifying declarant, the defendant in this situation, under Rule 806 with prior inconsistent statements because the defendant has opened the door to his or her credibility.

VI. USE OF RULE 806 TO IMPEACH AN EXPERT’S BASIS OF OPINION TESTIMONY UNDER FEDERAL RULE OF EVIDENCE 703

Rule 806 normally addresses the credibility of a declarant whose statement is admitted under a hearsay exception or under Rule 801(d)(2)(C), (D), or (E); however, Rule 806 may also extend to Federal Rule of Evidence 703. Theoretically, a party may impeach the basis of an ex-

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179. *Fed. R. Evid.* 801(d)(2)(E); *Inadi*, 475 U.S. at 394. The requirements for admissibility under Rule 801(d)(2)(E) are: (1) proof of a conspiracy; (2) the declarant must be a member of the conspiracy; (3) the defendant must be a member of the conspiracy; (4) the statement was made during the course of the conspiracy; and (5) the statement was made in furtherance of the conspiracy. *See Fed. R. Evid.* 801(d)(2)(E).


181. *Id.* at 182.

182. *Id.*

183. *Id.* at 183-84. In a later case, *White v. Illinois*, 502 U.S. 346 (1992), the Supreme Court explicitly recognized that the hearsay exceptions covering excited utterances and statements made for the purposes of medical diagnosis or treatment are “firmly rooted” and therefore carry sufficient indicia of reliability to satisfy the Confrontation Clause. *Id.* at 355-56 & n.8.


185. 1 *GRAHAM*, *supra* note 169, at 304.

186. *Fed. R. Evid.* 703. Rule 703 provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

*Id.*
pert's opinion, even though not received into evidence for its truth.\textsuperscript{187} Nothing in the language of Rule 806 prevents such impeachment and the principles underlying the rule seem equally applicable.\textsuperscript{188}

The United States Court of Appeals for the District of Columbia Circuit recognized the potential use of Rule 806 for impeaching the basis of an expert's opinion testimony in \textit{United States v. Lechoco}.\textsuperscript{189} In dicta, the court recognized that a jury's determination of the weight given to an expert's opinion rests, to a great extent, on the reliability of the information underlying the expert's opinion.\textsuperscript{190} The credibility of the opinion's basis is an issue and may be impeached.\textsuperscript{191}

The United States Court of Appeals for the Fifth Circuit has also recognized the use of Rule 806 to impeach the basis of expert testimony.\textsuperscript{192} The Fifth Circuit ruled that hearsay evidence disclosing the basis of an expert opinion should be admissible for impeachment, provided that an instruction limits the evidence to that purpose, and so long as the evidence has sufficient guarantees of trustworthiness.\textsuperscript{193} Therefore, if a party can show the need for the evidence of the basis of the expert's opinion, and show the evidence has some independent indicia of reliability, then Rule 806 permits the party to introduce evidence impeaching the credibility of the source of the expert's opinion.\textsuperscript{194}

\section*{VII. Supporting or Rehabilitating Hearsay Declarants}

In addition to providing for the impeachment of a hearsay declarant's credibility, Rule 806 also provides for the support or rehabilitation of the declarant's credibility.\textsuperscript{195} The same evidentiary rules governing both the admissibility of evidence and the impeachment of a witness' credibility apply when rehabilitating the credibility of hearsay declarants.\textsuperscript{196}

Rehabilitation evidence comes generally in two forms.\textsuperscript{197} The first type of rehabilitation evidence is opinion or reputation testimony of the de-
clarant’s good character for truthfulness. This kind of evidence, however, is only admissible if the other party has attacked the declarant’s character for truthfulness. For example, in *Lechoco*, the prosecutor discredited the defense psychiatrists during cross-examination which in turn attacked the defendant’s character for truthfulness by questioning the defendant’s truthfulness during his psychiatric examinations. Thus, since the prosecutor opened the door, the defense counsel was able to introduce evidence of the defendant’s good character for truthfulness to support his credibility pursuant to Rule 806. The second type of rehabilitation evidence is evidence of another statement by the hearsay declarant consistent with the hearsay statement. This evidence is admissible if the credibility of the declarant has been attacked in such a way as to make the consistency relevant to rehabilitation. For example, in *United States v. Bernal*, the government introduced an out-of-court statement under the coconspirator exception. The trial court permitted the government to introduce another statement made by the declarant, consistent with the statement admitted for its truth, after the defense attacked the declarant’s credibility. Thus, Rule 806 provides the attorney with ample means to support or rehabilitate a declarant’s credibility either through evidence of good character or through statements consistent with those admitted for their truth.

**VIII. Examining Hearsay Declarants**

Rule 806 permits the party against whom the hearsay has been admitted to call the declarant as a witness and examine him with leading questions as if under cross-examination. Under Rule 806, this type of examination applies only to declarants whose hearsay statements are admitted under Rule 803 or 804 or statements admitted in connection with

198. *Id.*
199. FED. R. EVID. 608(a)(2) (providing that “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”).
200. 542 F.2d 84 (D.C. Cir. 1976).
201. *Id.* at 86-87.
202. *Id.* at 89 n.6.
203. 4 LOUISELL & MUELLER, *supra* note 36, § 501, at 1254; see also State v. Lovin, 454 S.E.2d 229, 238 (N.C. 1995) (explaining that it was not prejudicial to exclude prior consistent statement evidence).
204. 719 F.2d 1475 (9th Cir. 1983).
205. *Id.* at 1478-79.
206. FED. R. EVID. 806.
Rule 801(d)(2)(C), (D), or (E). Cross-examination type questioning does not apply to a party-declarant whose statement is received as a party-admission under Rule 801(d)(2)(A) or (B). This means that when the party-declarant takes the stand to explain away the statement, the attorney must conduct the questioning in the direct examination mode. The party may also be unable to question the declarant as if under cross-examination when the declarant’s statements were admitted pursuant to Rule 801(d)(2)(C) or (D). The reason for this limitation is that the declarant is usually friendly to the party, and therefore willing to explain away the statement without the necessity of leading questions. This is generally true unless a party can show that the declarant is a hostile witness.

IX. Conclusion

This article focused on the use of Federal Rule of Evidence 806 to impeach absent hearsay declarants, particularly by defense attorneys. The use of Rule 806 to attack or support an out-of-court declarant’s credibility is an invaluable tool for trial lawyers. Used effectively, Rule 806 enables the trial lawyer to repair damage to his case from the admission of hearsay evidence from an absent declarant. The trial lawyer can repair this damage using Rule 806 to impeach a hearsay declarant with the traditional modes of impeachment. By allowing the trial attorney to attack and support hearsay declarants, Rule 806 ensures fairness for the party against whom the evidence was admitted.


208. 4 Mueller & Kirkpatrick, supra note 158, § 510, at 892 n.4.

209. 4 Louisell & Mueller, supra note 36, § 501, at 1249 n.14

210. Id. at 1248-49.

211. Id. at 1249 n.13.