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BIAS IMPEACHMENT AND THE PROPOSED FEDERAL RULES OF EVIDENCE

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In the fall of 1971 the Supreme Court's Advisory Committee presented to the Court the Proposed Federal Rules of Evidence. *The Committee failed to include a rule on impeachment by bias, interest, or prejudice. In failing to include such a rule, the Committee bypassed the opportunity to reconcile a conflict over both the content and methodology of this form of impeachment. The authors, in an attempt to show the need for a rule dealing with bias impeachment, analyze the present decisional conflict in this area. They conclude by proposing a rule designed to add some uniformity to this highly persuasive method of impeachment.*

The *Proposed Federal Rules of Evidence* are the culmination of a lasting hope among reformers of federal procedure. No comprehensive code of federal evidence was attempted in 1938 for fear such a project would delay the adoption of the *Federal Rules of Civil Procedure*.[1] Since that time, no internally consistent and universally applicable body of federal evidence has been evolved. On the civil side, district courts following the guidelines of rule 43 of the *Federal Rules of Civil Procedure*[2] have often looked to state rules. In criminal prosecutions, the same courts have attempted to develop their own evidence rules based on the common law as applied "in the light of reason and experience." [3]

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1 Spangenberg, *The Federal Rules of Evidence—An Attempt at Uniformity in Federal Courts*, 15 WAYNE L. REV. 1061 (1969).

2 FED. R. CIV. P. 43(a).

3 *See* FED. R. CRIM. P. 26.

After careful work over the course of several years and three drafts, the Supreme Court's Advisory Committee in the fall of 1971 presented to the Court a set of rules which will help to bring uniformity out of the current disorder. Promulgation of the rules will work a major advance in the field of trial evidence, both for the federal courts and ultimately for those states which may wish to emulate them.

In drafting a code dealing with the major problems of any field as complex as evidence, there are at least two rational approaches. On the one hand, the codifier can try to visualize and articulate every trial situation and attempt to prescribe detailed regulations, leaving little to the trial judge's discretion. On the other hand, the code can be made to sound only major evidentiary themes with relatively broad guidelines, trusting details to the wisdom of the trial judiciary. The Advisory Committee on the *Proposed Federal Rules of Evidence*, by and large, has chosen the latter approach,[4] thus avoiding a code that is too cumbersome, rigid, or intricate. It is important to recognize, however, that a broad, generalized set of evidence provisions can err by omitting problem areas where decisional conflicts exist and where uniformity would have practical advantages. This Article will attempt to show that the framers of the rules have made precisely this error by declining to include in article VI a rule on impeachment by bias, interest, or prejudice. As will be seen below, this method of impeachment presents problems for the trial judge and lawyer because decisional law is in conflict over both its content and its methodology. This Article concludes with a proposal of a rule which would make use of this highly persuasive method of impeachment easier.

BIAS IMPEACHMENT AS A TRIAL TACTIC

The purpose of showing a jury that a witness is biased or prejudiced for or against a party, or that he stands to gain or lose by a judgment is to undermine the jury's confidence in the witness' motivation to testify truthfully. For example, even the most trusting juror is likely to doubt the testimony of a government witness who was told by the judge accepting the witness' guilty plea on a connected charge:

> If you intended to plead guilty and expected a recommendation for a lenient sentence . . . it would be essential that you satisfy the Probation Department that you have given the law enforcement authorities . . . the whole story even though it might involve others.[5]

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[4] *See* Spangenberg, *supra* note 1, at 1072.

[5] Gordon v. United States, 344 U.S. 414, 417 (1952).

When the juror learns further that the witness is still awaiting sentencing even though nine months have elapsed,[6] his confidence in the witness' impartiality must disappear entirely. Similarly suspect is the testimony of the plaintiff's wife in a suit for criminal conversation that she resisted defendant's advances. If she was willing to be seduced, of course, the defendant cannot be found liable, and the plaintiff, along with the plaintiff's family, is denied recovery.[7]

While neither the government witness nor the plaintiff's wife may have been lying or slanting their stories, opposing counsel can raise a valid issue of credibility by showing that their testimonial motives are not necessarily pure. The fact that one need not accuse the witness of lying directly but need merely suggest—with total sympathy—that any respectable person might lie or exaggerate in similar circumstances makes inquiry as to bias or interest a favorite of trial lawyers. For example, the lawyer for the husband in a divorce action would not like to have a jury see him browbeat the truth out of his client's teenage daughter. But if a neighbor could testify that he heard the mother rehearsing the girl's testimony with her, the jury probably would discount not only the girl's testimony, but also the mother's.[8]

In addition to being desirable as a relatively tactful method of diminishing credibility, impeachment by proof of a motive to lie is a necessary method of truth testing in that it serves as a substitute for the many traditional incompetency rules which once served to bar from the stand witnesses who today are subject only to impeachment for bias or interest.[9] For example, the parties to an action were once barred from testifying on the theory that their interest in the outcome of the litigation rendered them incapable of testifying truthfully.[10] Although the interest and the motive remain, a party today may take the stand;[11] but his testimony will be evaluated by a factfinder who may be told by a boilerplate instruction that a witness may be influenced by his interest

[6] *Id.* at 416. The court held that together with other errors the exclusion of the transcript of the hearing at which the plea was entered was grounds for reversal. *Id.* at 422.

[7] *See* Smith v. Hockenberry, 146 Mich. 7, 109 N.W. 23 (1906).

[8] *See* Chavigny v. Hava, 125 La. 710, 51 So. 696 (1910).

[9] *See A Discussion of the Proposed Federal Rules of Evidence before the Second Annual Judicial Conference, Second Circuit*, 48 F.R.D. 39, 59 (1969) (statement of Professor F. James, Jr.).

[10] C. MCCORMICK, THE LAW OF EVIDENCE § 65, at 142 (2d ed. 1972).

[11] *See* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, JUDICIAL CONFERENCE OF THE UNITED STATES, PROPOSED FEDERAL RULES OF EVIDENCE rule 601 (Rev. Draft Oct. 1971) [hereinafter cited as PROPOSED FEDERAL RULES OF EVIDENCE]. The rule contains neither a dead-man rule nor a more general incompetency rule for parties.

to testify falsely.[12] Similarly, the status of the witness as spouse to a party, while no longer rendering him ineligible to take the stand, does make him susceptible to impeachment by bias. In other words, although the factfinder today is permitted to hear the often valuable testimony of formerly incompetent witnesses, he also may hear those facts about the witness which were once thought to make him totally untrustworthy.[13]

Following the modern trend, the *Proposed Federal Rules of Evidence* have well-nigh abolished traditional incompetency restrictions. The absence of a corollary rule admitting evidence of the formerly incompetent witness' interest in the litigation probably will not render the evidence inadmissible because it has a high degree of relevancy.[14] The range of statements and conduct from which bias, prejudice, or interest may be inferred, however, is far wider than the motives to lie which were the foundation of the traditional incompetency rules. Whether these other grounds will be as easily admitted remains questionable.

TYPES OF BIAS

Traditionally, not every conceivable motive to lie could be proven formally to a jury, either because facts considered too prejudicial may be disclosed or because the bias may be obvious from the circumstances of the case. An example of the latter occurs where the witness in a bribery case is the alleged but uncharged bribe giver—"no juror would be so dumb as not to sense the fact that immunity from prosecution lay back of the self-incriminating testimony of the witness." [15] It is also generally agreed that a jury may be instructed to take into account the general interest of the accused in being acquitted when evaluating his testimony,[16] although specific inquiry or even prosecution argument on the point is seemingly rare.

More difficult problems arise when the facts from which a motive to lie may be inferred are also facts which could be considered too preju-

[12] An example of such an instruction is the following: "A defendant is permitted to become a witness in his own behalf. His testimony should not be disbelieved merely because he is the defendant. In weighing his testimony, however, you may consider the fact that the defendant has a vital interest in the outcome of this trial. You should give his testimony such weight as in your judgement it is fairly entitled to receive." United States v. Hill, F.2d (D.C. Cir. 1972).

[13] *See* Reagan v. United States, 157 U.S. 301, 304-06 (1895) (where not excessive or unfair, judge's comment that defendant's testimony must be weighed in light of his interest held proper).

[14] *See* PROPOSED FEDERAL RULES OF EVIDENCE rule 601, Advisory Comm. Notes.

[15] People v. Kuberacki, 310 Mich. 162, 165, 16 N.W.2d 703 (1944).

[16] *See* Reagan v. United States, 157 U.S. 301, 304-06 (1895); Stapleton v. United States, 260 F.2d 415, 420 (9th Cir. 1958).

dicial to be shown to a jury; the possibly unfair prejudice must be weighed against the probative value of the bias evidence. For example, courts usually exclude evidence that the defendant is insured in a personal injury case for fear that the jury might use the information either to support an inference of negligence or, applying a "deep pocket" rule, to justify an increased award of damages.[17] When a witness for defendant is also an agent of defendant's insurance company, however, most courts will allow the employer's identity to be shown as a specific indication of bias.[18] On balance, the policy reasons for the exclusion of insurance evidence seem outweighed in the latter case by the benefits of assisting the jury in evaluating the witness' testimony. Following the majority view, proposed rule 411 would exclude evidence of insurance to prove fault but explicitly would not exclude it when offered solely to show bias or prejudice.[19] This clearly poses a "multiple admissibility" problem in which the trial court should instruct the jury to consider the insurance solely for the proper purpose.[20]

A more delicate problem of limited admissibility arises where the evidence which shows a witness' bias in favor of an accused also reveals the accused's involvement in a separate crime, one for which he is not on trial. In *Gilbert v. United States*,[21] an FBI agent was permitted to testify that defendant had confessed to robbing a bank together with his alibi witness, Goslaw. The evidence was admitted to show Goslaw's

[17] 2 J. WIGMORE, EVIDENCE § 282a, at 133-34 (3d ed. 1940).

[18] Aguilera v. Reynolds Well Serv., Inc., 234 S.W.2d 282, 283-84 (Tex. Civ. App. 1950); 29 TEXAS L. REV. 845 (1951); *see* Wabash Screen Door Co. v. Black, 126 F. 721 (6th Cir. 1903). In *Wabash*, a doctor was called by defendant's insurance agent to attend to the plaintiff. Although the insurance of defendant was thereby shown, the doctor's relationship to the insurance company was admissible to show bias.

[19] "Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness." PROPOSED FEDERAL RULES OF EVIDENCE rule 411; *see id.* Advisory Comm. Notes.

The specific exemption given proof of prejudice in rule 411 makes a special rule exclusively for motive evidence unnecessary in the insurance area. Rule 408 performs a similar function for evidence of a settlement. *See* PROPOSED FEDERAL RULES OF EVIDENCE rule 408; *cf.* Granville v. Parsons, 259 Cal. App. 2d 298, 66 Cal. Rptr. 149 (Ct. App. 1968) (settlement evidence admissible to show bias but defense lawyer improperly used evidence in closing argument to show witness, not defendant, was at fault).

[20] Rule 106 of the *Proposed Federal Rules of Evidence* 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 judge, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." PROPOSED FEDERAL RULES OF EVIDENCE rule 106.

[21] 366 F.2d 923 (9th Cir. 1966), *cert. denied*, 388 U.S. 922 (1967).

bias in favor of defendant as his former partner in crime.[22] The *Gilbert* decision might be subject to question under the *Proposed Federal Rules of Evidence*, since otherwise relevant evidence should be excluded if the balancing tests of rule 403 weigh against its admission.[23] In *Gilbert*, since the Government had already undermined Goslaw's credibility by showing that he had been convicted of a number of felonies,[24] admission of this bias evidence seems inappropriate as merely cumulative on the issue of Goslaw's credibility and unnecessarily prejudicial to defendant.[25]

Proposed rule 403, with its demand that the rules be applied thoughtfully rather than mechanically, is also of assistance where a witness may be biased for or against a class of people to which a party belongs. For example, in the Ninth Circuit a conviction for assault committed during an antiwar demonstration at the Oakland Induction Center was reversed because the trial judge did not allow defendant to ask whether the complaining witness, a federal marshall with 20 years of service in the Marines, harbored any bias against antidraft and antiwar demonstrators.[26] Similarly, in the Fifth Circuit the Government was allowed to cross-examine a defense witness about his previous troubles with the Coast Guard for illegal fishing activities, in order to demonstrate that his bias against the Coast Guard generally might distort his account of the specific Coast Guardman's action in the present case.[27] Both cases probably would be decided similarly under proposed rule 403, since

[22] *Id.* at 950.

[23] *See* PROPOSED FEDERAL RULES OF EVIDENCE rule 403, Advisory Comm. Notes. 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.* rule 403; *cf. id.* rule 404(b).

[24] 366 F.2d at 948.

[25] The difficulty of fashioning effective limiting instructions may also be considered. *See* Bruton v. United States, 391 U.S. 123, 126 (1968); PROPOSED FEDERAL RULES OF EVIDENCE rule 106, Advisory Comm. Notes (limiting instructions). *See also* People v. Sweeney, 55 Cal. 2d 27, 42-44, 357 P.2d 1049, 1057-58, 9 Cal. Rptr. 793, 800-02 (1960) (defendant shown to be unwed father of witness' children; relationship admissible to show bias despite necessary revelation of specific acts of "criminality and immorality"). Since evidence of specific acts generally are admissible to show bias but are inadmissible to show character, "it makes a difference whether one seeks to show that the witness has had illicit relations with a party to the action or with a stranger to the pending proceeding." Hale, *Specific Acts and Related Matters Affecting Credibility*, 1 HASTINGS L.J. 89, 97 (1950).

Since evidence of specific acts or misconduct or of criminal acts not subject of the present indictment can be highly prejudicial, even when the conduct shows bias as in *Gilbert*, future defense counsel in criminal cases should seek either the exclusion of the evidence under rule 403 or a limiting instruction under rule 106.

[26] United States v. Hartman, 417 F.2d 893, 897 (9th Cir. 1969).

[27] United States v. Williams, 446 F.2d 1115, 1116 (5th Cir. 1971).

the bias was highly relevant and easy to prove, requiring little courtroom time and no extrinsic evidence. But consider this more complex California fact situation.[28] A policeman, the defendant in a wrongful death action, sought to show that the plaintiff's chief witness was prejudiced against the police generally. To do so he cross-examined both the witness and his wife about the wife's and their son's arrest records and called the son's juvenile court officer for a fuller report on the child's adjudication. He also elicited a report from a co-worker that the witness had said that because he felt the police were harassing his family he would "get even with those goddam cops." [29] Although relevant bias evidence is generally admissible under the *California Evidence Code*,[30] the state supreme court found the prior arrest records of the witness and his family inadmissible. Although holding it was proper to show that the witness was biased against policemen as a class, and although agreeing that this evidence was demonstrative of such bias, the court found that the use of criminal records was impermissible because of its feared impact on suits against police generally.[31] Further, unlike either of the federal cases, proof of bias here required considerable time and embarrassment, not just to the witness but also to his family. Finally, the son's normally confidential juvenile record was exposed to public view, a procedure favored by neither California statute[32] nor the *Proposed Federal Rules of Evidence*.[33] Were a similar situation to arise in a case governed by rule 403, a majority of federal trial courts would probably conclude that the relevance of the arrests to bias is substantially outweighed by undue prejudice, consumption of time, and confusion of issues.

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[28] *See* Grudt v. Los Angeles, 2 Cal. 3d 575, 468 P.2d 825, 86 Cal. Rptr. 465 (1970).

[29] Grudt v. Los Angeles, 1 Cal. App. 3d 529, 544, 81 Cal. Rptr. 821, 831 (Ct. App. 1969).

[30] CAL. EVID. CODE § 780 (West 1966).

[31] 2 Cal. 3d at 592, 468 P.2d at 834, 86 Cal. Rptr. at 474. As Justice Mosk said:

> Were we to approve the trial judge's acceptance of this impeachment evidence, we would erect an insurmountable barrier to an aggrieved citizen's ability to gain proper civil redress against errant police officers. Parties electing to sue any policeman—for damages in tort, for contract reparations, or merely to collect a debt—would be obliged to produce witnesses willing to be subjected to the degradation of a courtroom examination of their prior arrest records and the records of all their families to show bias against police generally.

Id. The *California Evidence Code* has a section similar in import to proposed rule 403 in that it is intended to tell trial judges that "in the field of relevance *stare decisis* takes a back seat to justice." Granville v. Parsons, 259 Cal. App. 2d 298, 305, 66 Cal. Rptr. 149, 154 (Ct. App. 1968); CAL. EVID. CODE § 352 (West 1966).

[32] *Cf.* CAL. WELF. & INST'NS CODE § 503 (West 1966).

[33] *Cf.* PROPOSED FEDERAL RULES OF EVIDENCE rule 609(d) (evidence of juvenile adjudication generally not admissible).

If, as in the California case, some trial judges tend to admit mechanically whatever a rule says is admissible without regard to the wider impact of their ruling, perhaps the absence of a rule affirmatively admitting bias evidence is a blessing in disguise. However it seems sounder to explicitly regulate the admission of bias evidence, although with the caveat that the policy considerations inherent in rule 403 are of equal importance.[34]

PRESENTATION OF BIAS EVIDENCE

Deciding what types of evidence of bias or interest may be shown to the jury is only the first half of the trial judge's decision; he still must determine the method of presentation. The first question is whether the evidence is collateral or non-collateral. Traditionally, evidence of bias, prejudice, or interest has been placed in the latter class, that is, counsel have not been limited solely to the use of cross-examination when seeking to impeach by this method. In the colloquy of the courtroom, the examiner is not required to "take the answer" of the witness who denies the truth of a biasing fact or denies making a statement suggesting bias; instead, the examiner may call witnesses to testify to the fact or statement.[35] The collateral rule, which cuts off extrinsic evidence as to various remotely relevant matters, is an aspect of the trial court's power to prevent confusion of issues.[36] The allowance both of broad inquiry on cross-examination[37] and of extrinsic evidence indicates the high position of bias and interest in the hierarchy of impeachment techniques—even though either may involve a large consumption of time or the risk of jury confusion, the evidence is of such value that the risk must be undertaken. Although the *Proposed Federal Rules of Evidence* codify many existing practices[38] and specifically decide the collateral rule issue as to certain evidence of a witness' character,[39] no language deals specifically with this aspect of bias impeachment.

[34] *See* Estes, *The Need for Uniform Rules of Evidence in the Federal Courts*, 24 F.R.D. 331, 332 (1960). When one notes that the *Grudt* case was in litigation for several years before the California Supreme Court sent it back for a retrial, the desirability of a clear rule on the subject of bias increases.

[35] *See* Greatreaks v. United States, 211 F.2d 674, 676 (9th Cir. 1954); Ewing v. United States, 135 F.2d 633, 640 (D.C. Cir. 1942), *cert. denied*, 318 U.S. 776 (1943).

[36] 3A J. WIGMORE, EVIDENCE § 878, at 647 (J. Chadbourn ed. 1970).

[37] *See, e.g.*, District of Columbia v. Clawans, 300 U.S. 617, 630-31 (1937); Alford v. United States, 282 U.S. 687, 693 (1931); Spaeth v. United States, 232 F.2d 776, 778 (6th Cir. 1956); Fisher v. United States, 231 F.2d 99, 105 (9th Cir. 1956). *But cf.* United States v. Conrad, 448 F.2d 271 (9th Cir. 1971).

[38] *See, e.g.*, PROPOSED FEDERAL RULES OF EVIDENCE rules 407, 409, 411.

[39] *See id.* rule 608(b). *Compare id.* rule 609, Advisory Comm. Notes *with* D.C. CODE ANN. § 14-305(b)(1) (1967) (extrinsic evidence of prior convictions permitted).

Another important problem concerning bias impeachment relates to the need for a preliminary foundation, that is, must counsel question the witness to be impeached about matters relating to bias before he may resort to extrinsic proof? The issue may be subdivided further into two situations—1) where the mode of proof is through prior utterances of the witness; and 2) where external facts or circumstances are used as circumstantial evidence of bias. Although federal case law is in conflict as to the foundation prerequisite for utterances,[40] some courts and most commentators assert its desirability.[41] They give three reasons —basic requirements of fairness to the witness, the modern unacceptability of surprise, and efficiency of judicial administration. Suppose a witness is asked before leaving the stand whether he made the biasing statement. By this question the opposition is notified of the possibility that extrinsic evidence will be used later to give substance to the charge,[42] and the witness is given a prompt opportunity to deny or explain the statement.[43] The added possibility that the witness may admit the biasing fact and thereby obviate the need for time-consuming evidence is a third and highly persuasive reason for the preliminary questioning.[44]

The desirability of requiring a foundation as to utterances also seems wise as a policy matter, particularly where the bias evidence consists of prior out-of-court statements. A statement's meaning may be distorted by the addition or omission of a single word, by a change in tone or context, or by numerous other means. To permit one witness' testimony to be discredited by the testimony of another witness as to words susceptible to manipulation and misinterpretation without affording the first witness an opportunity to deny, correct, or explain his words is patently undesirable. For example, in *United States v. Hayutin*,[45] the defendant in a fraud case sought to show by extrinsic evidence that two government witnesses had said that they intended to frame the defendant if their scheme went awry.[46] Because the witnesses

[40] 3A J. WIGMORE, EVIDENCE § 953, at 801 n.1 (J. Chadbourn ed. 1970).

[41] Professor Wigmore suggests that, while a foundation requirement is desirable in principle, it would be better not to have one at all if, as is likely, it will import the rigidities accompanying the foundation requirements for prior inconsistent statements. *See id.* at 801.

[42] *See* Smith v. United States, 283 F.2d 16, 21 (6th Cir. 1960), *cert. denied*, 365 U.S. 847 (1961) (surprise not favored in the federal courts); Hale, *Bias as Affecting Credibility*, 1 HASTINGS L.J. 1, 4 (1949).

[43] *See* United States v. Hayutin, 398 F.2d 944, 953 (2d Cir.), *cert. denied*, 393 U.S. 961 (1968); Hale, *supra* note 42, at 4.

[44] *See* C. MCCORMICK, THE LAW OF EVIDENCE § 40, at 80 (2d ed. 1972).

[45] 398 F.2d 944 (2d Cir.), *cert. denied*, 393 U.S. 961 (1968).

[46] *Id.* at 952.

had not been asked about the statements during extensive cross-examination, the court held that the extrinsic evidence could not be used.[47] The court, however, may not have meant to convert the desirability of a foundation in this case into a requirement of a foundation in all cases. It stressed the fact that the evidence would show not only a motive for the witness to lie but also prior inconsistent statements, since the witnesses had denied that they had spoken to each other about defendant. Where both are to be shown, a foundation requirement usually should be imposed.[48]

The court's hesitancy to impose an absolute foundation requirement is well founded, since the requirement may be unfair in some situations. For example, the impeaching party, through no lack of diligence, may discover his impeaching evidence only after the witness has become unavailable. A rigid requirement that a foundation be laid would prevent the use of convincing bias evidence just because it was discovered late in the case.[49]

Federal courts have not taken an inflexible view on the question. In an early Supreme Court case, the defendant on cross-examination sought to elicit prior oral statements made by the witness.[50] His attempt was foiled when he failed to specify the time when and the place where the statement had been made. Because defendant did not make clear to the trial court that his purpose was to show the witness' bias, the Court upheld the exclusion as a correct response to an improperly laid foundation for impeachment by prior inconsistent statements.[51] The Court did not go as far as to hold, however, that impeachment by bias would require the same foundation.[52] In sharp contrast is the approach of the California Supreme Court in *People v. Sweeney*,[53] where the foundation laid for the introduction of statements indicating bias was held to be

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[47] *Id.* at 953.

[48] *Id.* Rule 613(b) of the *Proposed Federal Rules of Evidence* provides: "Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require." PROPOSED FEDERAL RULES OF EVIDENCE rule 613(b).

In *Hayutin*, not only did defense counsel fail to lay a foundation, he also refused to recall the witnesses he sought to impeach. 398 F.2d at 953. Maine dispensed with a foundation requirement for extrinsic evidence of oral statements showing bias over a century ago. *See* New Portland v. Kingfield, 55 Me. 172, 176-77 (1867).

[49] *Cf.* CAL. EVID. CODE § 770, Comment of the Law Revision Comm'n (West 1966) (foundation requirement for prior inconsistent statements may be waived if impeaching party discovered evidence too late).

[50] Oil Co. v. Van Etten, 107 U.S. 325, 335 (1882).

[51] *Id.*

[52] *Id.*

[53] 55 Cal. 2d 27, 357 P.2d 1049, 9 Cal. Rptr. 793 (1960).

insufficient because it did not meet the strict foundation requirements for impeachment by prior inconsistent statements.[54]

The most extreme position taken by a federal court against a foundation requirement where bias is evidenced by the witness' prior statements appears in dicta in *United States v. Ewing*.[55] Miss Chamberlain, the primary alibi witness in a rape case, was the defendant's business partner in several ventures, including the apartment house where they both had apartments and where the rape allegedly occurred.[56] After laying the proper foundation, the Government was allowed to discredit Miss Chamberlain's testimony by the testimony of the victim's mother that Miss Chamberlain had said that she believed defendant to be guilty but would testify for him because he faced the electric chair.[57] In affirming the conviction, the court stressed that the extrinsic evidence of the statement would be admissible even without a foundation because the bias was evidenced not just by declarations but also by objective circumstances, namely the witness' close social and business associations with the defendant.[58] Most recent federal decisions have been more traditional on the issue of requiring a foundation, but none have been faced with the unusual *Ewing* situation where two sources of bias existed.[59]

Where the bias is evidenced not by the witness' statements but by his conduct or by other facts about him, some of the few federal courts considering the issue have held a foundation to be unnecessary.[60] The distinction between statements and conduct is a traditional one arising

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[54] *Id.* at 36-37, 357 P.2d at 1054, 9 Cal. Rptr. at 798.

[55] 135 F.2d 633 (D.C. Cir.), *cert. denied*, 318 U.S. 776 (1942).

[56] *Id.* at 638-39.

[57] *Id.*

[58] *Id.* at 642-43.

[59] *Compare id. with* Smith v. United States, 283 F.2d 16, 19 (6th Cir.), *cert. denied*, 365 U.S. 847 (1960) (government witness said he would "get" defendant and eliminate thereby his competing bail bond business) *and* Burton v. United States, 175 F.2d 960, 965-66 (5th Cir. 1949), *cert. denied*, 338 U.S. 909 (1950) (government witness feared prosecution for tax evasion) *and* United States v. White, 225 F. Supp. 514, 519-21 (D.D.C. 1963) (victim's girl friend said "she would fix" defendant, *Ewing* not followed because only dicta).

[60] *See* C. MCCORMICK, THE LAW OF EVIDENCE § 40, at 80 (2d ed. 1972); 3A J. WIGMORE, EVIDENCE § 953, at 802 (J. Chadbourn ed. 1970). Despite the apparent lack of federal cases requiring a foundation for evidence of conduct from which bias could be inferred, counsel should not avoid laying such a foundation. In numerous federal cases dealing with other questions in the area of conduct indicating bias, a foundation had been laid. *See* Gilbert v. United States, 366 F.2d 923, 948 (9th Cir. 1966), *cert. denied*, 388 U.S. 922 (1967); United States v. Greatreaks, 211 F.2d 674, 676 (9th Cir. 1954); United States v. Schindler, 10 F. 547, 549 (C.C.N.D.N.Y. 1880). *But see* McKnight v. United States, 97 F. 208, 212 (6th Cir. 1899) (letter inadmissible to show bias because no foundation laid and because letter was hearsay).

out of an analogy drawn by many courts from the foundation requirement for prior inconsistent statements to justify a like requirement for statements evidencing a motive to lie.[61] Where the motive is evidenced by conduct, rather than by statements, the analogy begins to fail and with it falls the foundation requirement.[62] Thus no foundation would usually be required where the evidence of bias is the witness' family relationship to a party,[63] or where it is some aspect of the witness' conduct.[64]

Professors McCormick and Hale have criticized the differing foundation requirements for conduct and statement evidence on the ground that the distinction is too fine. In practice, words and conduct are likely to be intermingled,[65] and taking one without the other may lead to ambiguous or misleading conclusions.[66] Professor McCormick suggests that a foundation be required for both or for neither; if for both, the requirement should be coupled with a discretionary power to permit its omission.[67]

The approach advocated by Professor McCormick is consonant with the flexible approach of some federal decisions[68] and with that of the *Proposed Federal Rules of Evidence* insofar as an analogy can be drawn from rule 613 regulating the use of prior inconsistent statements. Rule 613 requires a foundation to be laid unless "the interests of justice otherwise require." [69] While prior federal case law reveals a willingness to allow the foundation requirement to be violated when necessary, it is difficult in the absence of a rule to predict that this flexibility will

[61] *See, e.g.*, Smith v. United States, 283 F.2d 16 (6th Cir. 1960), *cert. denied*, 365 U.S. 847 (1960); Hoagland v. Modern Woodmen of America, 157 Mo. App. 15, 17, 137 S.W. 900 (1911); C. MCCORMICK, THE LAW OF EVIDENCE § 40, at 80 (2d ed. 1972); Hale, *supra* note 42, at 2-3.

[62] *See* notes 65-67 *infra* and accompanying text. *Contra*, McCauley v. State, 86 Ga. App. 509, 510, 71 S.E.2d 664 (1952); Walker v. State, 74 Ga. App. 48, 50, 39 S.E.2d 75, 77 (1946). The court in *Walker* interpreted Georgia's statute regulating the admission of evidence showing a motive to lie as requiring that a foundation be laid, even though the statute is silent on the subject. *Compare id.* with GA. CODE ANN. § 38-1712 (1954) ("The state of the witness' feelings to the parties, and his relationship, may always be proved for the consideration of the jury.").

[63] *See* C. MCCORMICK, THE LAW OF EVIDENCE § 40, at 81 (2d ed. 1972); Hale, *supra* note 42, at 5.

[64] *See* notes 58-60 *supra* and accompanying text. *See also* McGinnis v. Grant, 42 Conn. 77 (1875) (no foundation required where witness was bribed by defendant and was unavailable for cross-examination by the time the bribery was discovered, despite due diligence of counsel).

[65] C. MCCORMICK, THE LAW OF EVIDENCE § 40, at 80 (2d ed. 1972).

[66] Hale, *supra* note 25, at 5.

[67] C. MCCORMICK, THE LAW OF EVIDENCE § 40, at 81 (2d ed. 1972).

[68] *See* notes 49-52 *supra* and accompanying text.

[69] PROPOSED FEDERAL RULES OF EVIDENCE rule 613(b).

continue, since not every circuit has so held. Moreover, there is no data which would show the daily practice of federal trial courts in this area.

A SUGGESTED BIAS IMPEACHMENT RULE

Adding a rule on the admissibility and methodology of impeachment by bias or interest to the *Proposed Federal Rules of Evidence* would permit both the desirability of a foundation and the necessity for flexible application of a foundation requirement to be made the uniform practice of federal trial courts.[70] Such an attempt to bring greater consistency into the important area of bias impeachment is worth making, particularly in light of the nearly unlimited assortment of witnesses who will be permitted to take the stand under the broad competency approach.[71] It is therefore suggested that the following rule could be inserted in article VI on witnesses:

> For the purpose of attacking the credibility of a witness, evidence tending to show bias, prejudice, or interest of the witness for or against any party to the case is admissible. Extrinsic evidence as to matters indicating such bias is not ordinarily admissible unless the witness has been afforded an opportunity to deny or explain such matters.

The suggested rule codifies what is essentially the current practice in the federal courts of allowing impeachment of witnesses by showing facts about or statements by a witness that demonstrate that he has a motive to falsify his testimony. The rule not only makes explicit a foundation requirement, but also indicates that it should not be applied mechanically; if a situation arises where extrinsic evidence must be used if the trial is to proceed fairly, but a foundation cannot be laid, the evidence should be admitted.

Rather than distinguishing between a witness' statements and his conduct, the rule requires a foundation to be laid whenever extrinsic

[70] Neither the *Model Code of Evidence* nor the *New Jersey Evidence Code* have a specific rule to regulate the admission of evidence of bias or interest. However, both have general rules admitting any impeachment evidence, subject only to the trial judge's determination that it is relevant and appropriate in the case. *See* N.J. REV. STAT. § 2A:84A, rule 20 (Supp. 1972); MODEL CODE OF EVIDENCE rule 106 (1942). *See also* N.J. SUP. CT. COMM. ON EVIDENCE, REPORT 59 (1963).

[71] *See* PROPOSED FEDERAL RULES OF EVIDENCE rule 601; notes 10-13 *supra* and accompanying text.

In Louisiana and Michigan a rule broadening competency was combined with a rule making the status that formerly would have rendered the witness incompetent relevant to show his bias or interest. *See* LA. CIV. CODE ANN. art. 2282 (West 1952); MICH. COMP. LAWS ANN. § 600.2158 (1968).

evidence of "matters" indicating bias is to be introduced. As Professors McCormick and Hale have shown, the two are not always such distinct entities that a witness' full meaning can be communicated by showing one exclusive of the other.[72] Further, the combination is desirable in the interests of simplicity and clarity; it will be one less judgment call on a miniscule point of evidence for the district court judge.

Finally, although not mentioned explicitly in the above proposal, the considerations outlined in proposed rule 403 are applicable to a rule on bias or interest evidence just as they are applicable to all the other rules. For example, if a witness fully admits facts which would indicate his bias, should extrinsic evidence be permitted to show the same sources of bias? Ordinarily not, according to proposed rule 403, since the countervailing policy of disallowing cumulative evidence would be apposite. If the witness' admission is too brief or too elliptical to give the factfinder a complete sense of why the witness may be motivated to falsify his testimony, however, nothing in either rule 403 or in the rule just proposed would prohibit the introduction of extrinsic evidence to amplify the admission.[73]

As a complement to rule 403, proposed rule 611(a) reposes in the trial judge the necessary power to control the questioning of witnesses and points out that it may be necessary to protect the witnesses from harassment or undue embarrassment.[74] The *Grudt* case makes it apparent that raw nerves may be touched, as when a child's juvenile record is revealed, in order to show that a witness has a motive to lie.[75] Whenever this possibility arises, both the court and opposing counsel should be alert to the controls available in rule 611.

CONCLUSION

As noted earlier, codes of evidence tend to be either extensive, covering every topic, or intensive, covering only the basic policy decisions. The tendency for the *Proposed Federal Rules of Evidence* to be intensive rather than extensive probably led to the omission of

[72] *See* notes 65-66 *supra* and accompanying text.

[73] *Contra,* Proctor v. Pointer, 127 Ga. 134, 136, 56 S.E. 111, 112 (1906) (where witness admitted that her feelings toward defendant "were not good," defendant not permitted to develop facts behind the feelings); LA. REV. STAT. § 15:492 (1950) (with "distinct" admission of bias, no extrinsic evidence admissible).

[74] PROPOSED FEDERAL RULES OF EVIDENCE rule 611(a); *cf.* GA. CODE ANN. § 38-1704 (1954) (right of witness to be protected from "harsh or insulting demeanor" and "improper questions").

[75] Grudt v. Los Angeles, 2 Cal. 3d 575, 468 P.2d 825, 86 Cal. Rptr. 465 (1970).

a rule on bias impeachment.[76] However, the principle of intensive codification should not be followed so steadfastly that the purpose of having a code is neglected, that is, to give the trial judge a tool he can use easily to make quick, fair, and predictable evidence rulings in the middle of a trial. A rule on bias impeachment should be adopted because this technique is important both in its own right and as a substitute for incompetency rules, yet it is not sufficiently easy to use in the absence of a uniform decisional background. Unless the question of limited admissibility and foundation are decided, whether in the manner suggested above or in some other uniform manner, impeachment by bias will remain an unnecessarily difficult technique, approached warily by lawyers and judges alike.

[76] The *Proposed Federal Rules of Evidence* fall short of being an intensive code in a strict sense because a number of rules are included on subjects where no conflicts exist in the decisional law. *See, e.g.*, PROPOSED FEDERAL RULES OF EVIDENCE rule 407 (subsequent remedial measures); *id.* rule 409 (payment of medical expenses); *id.* rule 411 (liability insurance); *id.* rule 507 (political vote privilege); *id.* rule 602 (personal knowledge as usual testimonial requirement); *id.* rule 614 (calling and interrogation of witness by judge).