



REFRESHING RECOLLECTION

Rule 612: Refreshing Recollection

- *Starcourt Industries, Inc. v. Acme Insurance, Inc.*
 - Establish that the witness does not remember
 - Show that the witness previously remembered
 - Establish that there is something that would help him or her remember





Rule 612: Refreshing Recollection

- *Starcourt Industries, Inc. v. Acme Insurance, Inc.*
 - Ask to approach
 - Show item to opposing counsel and the witness
 - Review item; if document, read silently
 - Put item down
 - Ask the witness if their memory has been refreshed
 - Repeat the question

Past Recollection Recorded

Rule 803(5) Exception to Hearsay Rule for Recorded Recollection:

- A record that is on a matter that a witness once knew about but now cannot recall well enough to testify to fully and accurately;
- Was made or adopted by the witness when the matter was fresh in the witness's memory; and
- Accurately reflects the witness's knowledge.
- If admitted, may be read into evidence but received as an exhibit only if offered by adverse party.

Past Recollection Recorded

Different from Rule 612:

- Anything can be used to refresh under 612
- Exception under 803(5) relates to a record
- Memory is not refreshed **after** reviewing the record
- The record establishes the fact not witness's memory

Rule 803(5): Refreshing Recollection

- *Starcourt Industries, Inc. v. Acme Insurance, Inc.*
 - Establish that the witness did remember at one time but does not now
 - Show that the witness no longer has sufficient present recollection even after reviewing
 - Recorded while fresh in memory
 - Accurately reflects the witness's knowledge



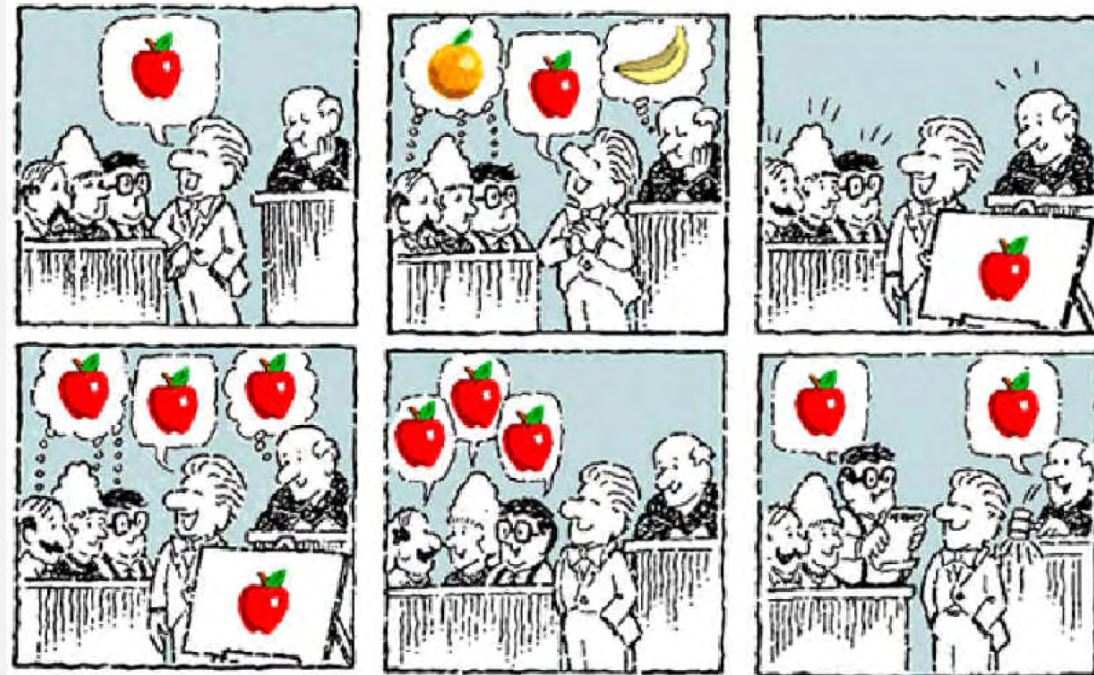


ADMISSION OF EVIDENCE AND OBJECTIONS

WHY EXHIBITS?

More
Interesting.

More
Memorable.



Confidence in
Courtroom.

Jury Toys.

Necessary
Proof.

Repeat Your
Story.

NUTS AND BOLTS

Which documents, graphics, etc. are essential to the elements of your case-in-chief, and its themes?

Who are the witnesses who best can introduce them?

➡ **Knowledge (foundation)**

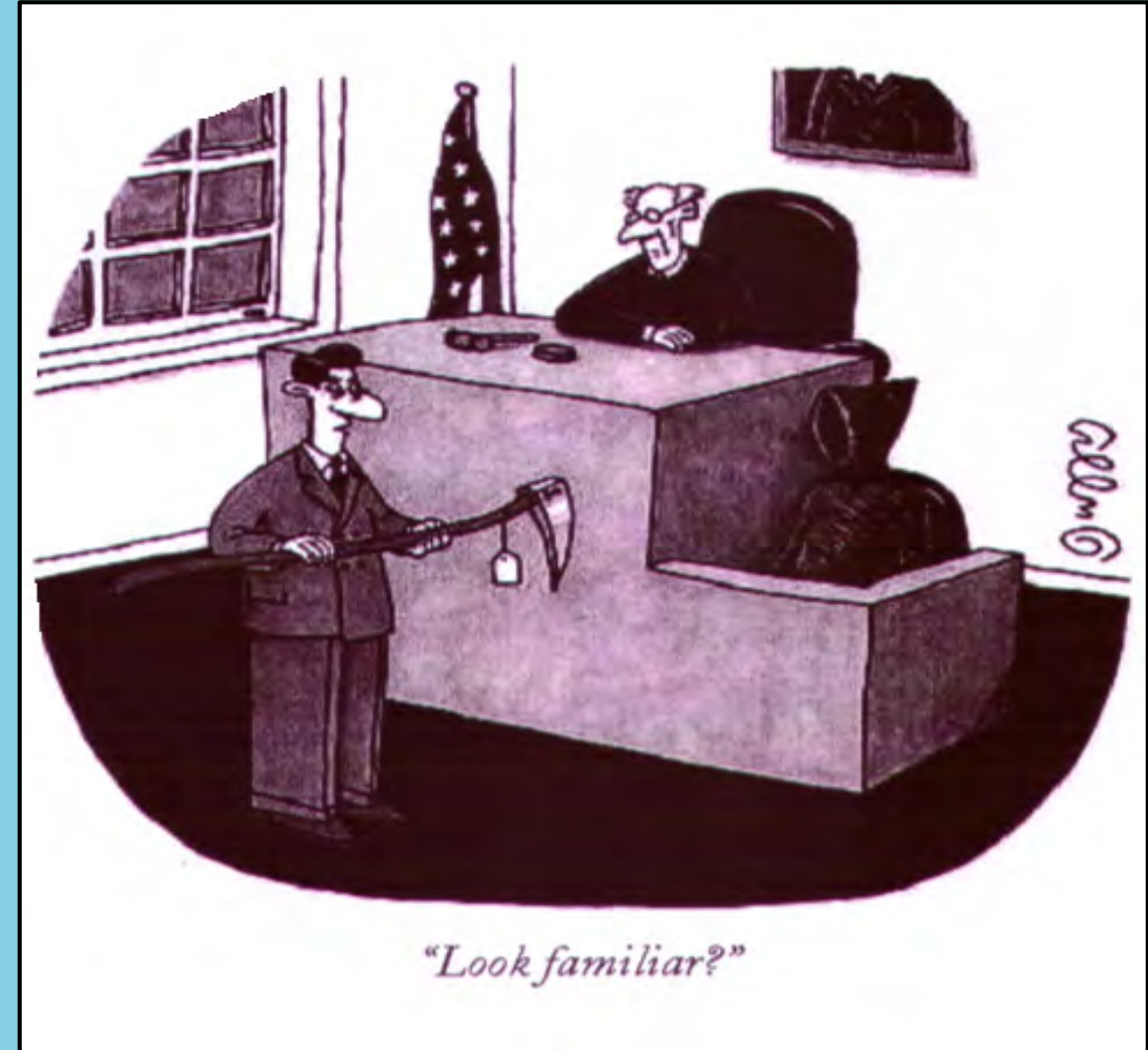
➡ **Personal involvement (foundation)**

➡ **Best impression on jury**

MECHANICS AND FOUNDATION

MECHANICS OF EXHIBIT ADMISSION

- i. Announce exhibit and number/show to counsel
- ii. Hand to witness, ask her to identify it
- iii. Lay foundation for it
- iv. Offer into evidence
- v. Publish to jury



FOUNDATION

- i. Competent witness: first-hand knowledge, personal involvement
- ii. Relevant and reliable evidence: not hearsay, or an exception to hearsay
- iii. Authentication: FRE 901 and 902

COMMON EXHIBIT TYPES

PHOTOGRAPHS

- Witness is familiar with scene or object.
- Witness explains familiarity with scene or object.
- Witness recognizes scene or object in photo.
- Photo is a *fair and accurate* depiction *at relevant time*.

BUSINESS RECORDS

Fed. R. Evid. 803(6)

- Record was made at or near time of event.
- By someone with knowledge (or based on information from someone with knowledge) who has a business duty to report.
- Routine practice of the business to prepare such reports.
- Report was made in the regular course of business (and not for purposes of litigation).

MAPS AND DIAGRAMS

- Diagram depicts a certain area or object.
- Witness is familiar with that area or object.
- Witness explains basis for her or his familiarity with the area or object.
- Diagram is an accurate depiction of that area or object.
- (Maybe) Diagram will help witness demonstrate or illustrate his or her testimony.

MASTER YOUR EXHIBITS

Use during
direct.

Use during
cross.

Use during
closing.

Use during
opening.

DON'T LET EXHIBITS CONTROL YOU




Less may
be more.



IMPEACHMENT

IMPEACHMENT FUNDAMENTALS

- 
- Attacking a W's credibility
 - Always proper under FRE 611(b), which allows cross-examination on “matters affecting the W's credibility”
 - Any party can impeach any W (FRE 611)
 - Cross-examiner must have a reasonable factual basis to believe impeaching matter.

COLLATERAL



“Waste of Time”
Analysis
(FRE 403)

NON-COLLATERAL

Non-Collateral Impeachment

(Important)



**Impeachment
is relevant to
issues in the
trial.**



**If W does not admit
impeaching matter,
cross-examiner is
required to prove
with extrinsic
evidence.**



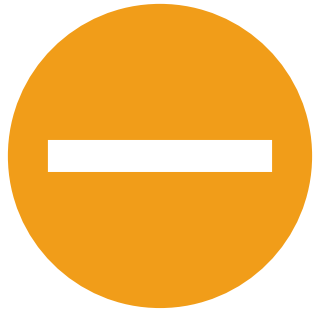
**Bias, Interest,
and Motive
=
Always
Non-Collateral**



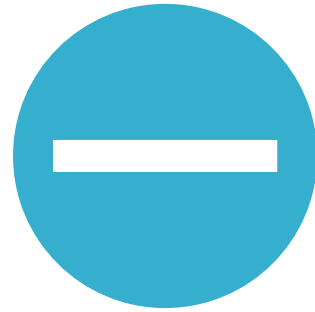
**Prior
Convictions
=
Always
Non-Collateral
(FRE 609)**

Collateral Impeachment

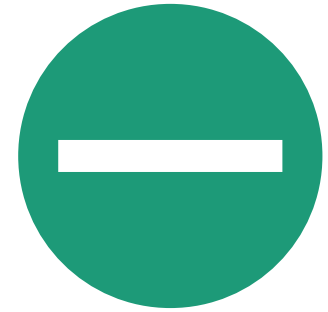
(Unimportant)



Impeachment
is relevant only
to W's
credibility.



Cross-
examiner
cannot prove
with extrinsic
evidence.



Prior Bad Acts
=
Collateral
(FRE 608(b))



IMPEACHMENT METHODS

Seven Basic Methods



Bias, Interest, and Motive (No rule; case law)



Prior Inconsistent Statements (FRE 613)



Contradictory Facts (No rule; case law)



Prior Convictions (FRE 609)



Prior Bad Acts (FRE 608(b))



Bad Character for Truthfulness (FRE 608(a))



Treatises (FRE 803(18))



BIAS, INTEREST, AND MOTIVE

W has frame of mind that might color his testimony.

Always
Non-
Collateral,
Always
Important!



PRIOR INCONSISTENT STATEMENTS (FRE 613)

“The 3 Cs:”

- COMMIT
- CREDIT
- CONFRONT



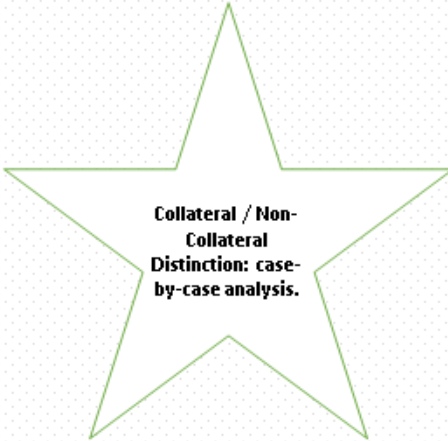
PRIOR INCONSISTENT STATEMENTS

- By Commission or Omission / Silence.
- Need not be shown written statement on cross.
- Upon request, must show to adverse party's attorney.
- If prior statement under oath, admissible for truth.
- If prior statement not under oath, admitted for limited purpose of impeachment.

Collateral /
Non-Collateral
Distinction:
case-by-case
analysis.

CONTRADICTIONARY FACTS

- W asked to admit fact inconsistent with what W testified about.
- Ethics rules govern.
(Model Rules of Prof'l Conduct r. 3.4(e))



**Collateral / Non-
Collateral
Distinction: case-
by-case analysis.**



PRIOR CONVICTIONS

(FRE 609)

Always
Non-
Collateral,
Always
Important!

- Impeached with any prior conviction involving “dishonest act or false statement” (e.g., perjury, fraud, embezzlement)
- Felony not more than 10 years old, subject to FRE 403



PRIOR BAD ACTS

(FRE 608(b))

Impeach if acts are “probative of truthfulness or untruthfulness”



Always
Collateral
!!





BAD CHARACTER FOR TRUTHFULNESS (FRE 608(a))



Fact W who testified can have his or her character for truthfulness attacked by a character W.

Must be in general reputation or personal opinion form.

W's character for truthfulness must be attacked before it can be supported.



TREATISES (FRE 803(18))

Using treatises to impeach an expert

Must be
published.

Bring to attention
of expert on cross-
examination.

Must be established
as a “reliable
authority.”

Read portions into the
record— but treatise is
not admissible.

Give court clerk copy
of page to mark as
exhibit.