OVERVIEW OF FED. R. EVID. 601, 602, 603, 607, 608, 610, and 612

(with related reference to Fed. R. Evid. 803(5))

J. EDGAR MURDOCH AMERICAN INN OF COURT

April 12, 2011

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A. Rule 601. General Rule of Competency

1. FRE 601: *Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.*

2. Presumption of Competency:

   a. Rule 601 affords an initial presumption of competency. *Norman v. City of Lorain*, 2006 U.S. Dist. LEXIS 83406 (N.D. Ohio 2006)

   b. Broad presumption applicable to all cases alleging both state and federal law claims. *Suskovich v. Anthem Health Plans of Va, Inc.*, 553 F.3d 559.

3. Three Conditions to a competent witness:

   a. He/She Must understand the duty to tell the truth

      i. Minors - A child is presumed to be competent and age is not a compelling reason to conduct a competency examination. *United States v Walker*, 261 F. Supp. 2d 1154 (D.N.D. 2003).

   b. He/She must have a minimal ability to communicate info to the trier of fact.

      i. Language difficulty does not bar testimony although it may affect weight if it undercuts understanding of prior events. *United States v. Villalta*, 662 F.2d 1205 (5th Cir. 1981)

   c. He/She must have personal knowledge of the information about which he/she will testify

      i. FRE 602: *"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. Evidence to prove personal knowledge, may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses."*

4. Grounds for Disqualification:

   a. The only grounds for disqualification are that the witness does not have knowledge of the matters about which he or she is to testify, does not have the capacity to recall, or does not understand the duty to testify truthfully. *United States v Odom*, 736 F.2d 104, 111 (4th Cir. 1984).

   b. *Hill v Cintas Corp*, 2009 U.S. Dist LEXIS 88765 (D. Neb. 2009) – A witness's bare assertion that he is not competent to testify due to his/her mental state is not sufficient to overcome the presumption.

5. Role of State Law in Determining Competency In Civil Actions

   a. Generally – In civil actions where state law supplies the "rule of decision" concerning a claim or defense, the competency of witnesses shall be determined in accordance with state law.

   b. State law may govern in diversity actions in federal court

c. State law is not applicable in federal question cases since the rule of decision is federal law.

i. *Keller v United States*, 2009 U.S. Dist LEXIS 73798 (S.D. Texas 2009) – The state Dead Man Statute did not apply and competency was determined under federal law.

B. Rule 602. Lack of Personal Knowledge

1. FRE 602: *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. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.*

2. Personal Knowledge Requirement

a. Generally – A witness may testify only about issues about which the witness had personal knowledge (ie: predicated facts within their own observation or recollection and perceived from their own senses, as distinguished from opinions and conclusions drawn from such fact)

i. Personal knowledge may include reasonable inferences grounded in observation/experience

ii. Cannot be a hunch, intuition or speculation

iii. *EEOC v BCI-Coca Cola Bottling Co. of L.A.*, 450 F.3d 476 (10th Cir. 2006) – A party's objection to a witness's testimony based on Rule 602 was incorrect as a matter of law, where the witness's affidavit recounted a conversation the witness, a company employee, personally conducted with another company employee.

b. Perfect knowledge is not required

i. *United States v Franklin*, 415 F.3d537 (6th Cir.2005) – In determining competency of a witness who later claimed he had been intoxicated at the time he made certain statements, an assertion by the witness that he could not remember precisely when those conversations occurred or precisely what the defendant had said was not sufficient to disqualify the witness.

ii. Disputed issues about the witness's observations go to the weight of the evidence but not its admissibility. *Vehicle Prot. Plus, L.L.C. v. Premier Dealer Servs., Inc.*, 650 F. Supp. 2d 800 (E.D. Tenn. 2009)

3. Establishing Personal Knowledge

a. Burden of Proof: Burden is on the proponent of the evidence to establish personal knowledge

b. Personal knowledge must be established by admissible evidence, and may include the witnesses own testimony

c. Proper foundation must be laid

i. *Terrell v Diangi*, 2009 U.S. Dist LEXIS 105538 (N.D. Ill. 2009) – In an affidavit, a statement that a witness knows something, without statements about how the witness knows that something is not admissible.

4. Low Threshold For Admitting Testimony under FRE 602

a. testimony should not be excluded for lack of personal knowledge unless no reasonable juror could believe that the witness had the ability and opportunity to perceive the event he testifies about

C. Rule 603. Oath or Affirmation

1. FRE 603: *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.*

2. Purpose of Rule:

   a. Designed to afford flexibility required in dealing with religious adults, atheists, conscientious objectors, mental defectives and children. *Izac v United States*, 2008 U.S. Dist. LEXIS 80013 (N.D. W. Va. 2008)

   b. *Izac v United States*, 2008 U.S. Dist. LEXIS 80013 (N.D. W. Va. 2008) – A habeus petitioner's claim that his rights were violated when he was compelled to swear an oath prior to testifying in a criminal case, based on his assertion that, as a practitioner of the Mennonite faith, he was precluded from making any voluntary "oaths against God" was rejected. Since Rule 603 provided the option to testify by affirmation at trial, the failure to exercise that option or otherwise object to having to swear an oath was a waiver of the affirmation option. Thus, the habeus claim was deemed unsustainable on this point.

3. Penalty of Perjury

   a. Rule does not require that a witness be subject to the penalty of perjury in order to testify, and the oath requirements of the rule are satisfied even though it is open to question whether the witness answers would be subject to prosecution for perjury in the US courts. *United States v Kuznetsov*, 2007 U.S. Dist. LEXIS 50653 (S.D.N.Y. 2007).

D. Rule 607. Who May Impeach

1. FRE 607: *The credibility of a witness may be attacked by any party, including the party calling the witness.*

2. Impeachment of One's Own Witness

   a. Generally: A party may impeach its own witness

   b. Limitations: Rule may not be employed as a mere subterfuge to introduce otherwise inadmissible evidence.

      i. Example: A party may not call a witness solely to impeach the witness with a prior inconsistent statement that would otherwise be inadmissible hearsay. *United States v Jiles*, 2009 U.S. Dist. LEXIS 120763 (W.D. Va. 2010).

      ii. Trial court must weigh the testimony's impeachment value against its tendency to prejudice the defendant unfairly or to confuse the jury. *United Stated v Libby*, 475 F. Supp. 2d 73 (D.D.C. 2007

3. Methods of Impeachment

   a. Show Bias
   b. Character Evidence (FRE 608)
   c. Conviction of a Crime (FRE 609)
   d. Prove the witness lacked the capacity to perceive correctly

      i. Drunk
      ii. Drugs/medication

iii. Poor eyesight eyesight/hearing/colorblind/concussion
iv. Preoccupied/distraction
v. Psychiatric condition

e. Contradiction

i. Evidence showing the falsity of specific testimony by introducing contradictory evidence

ii. Permitted to prevent witnesses from engaging in perjury and then using the prohibition on collateral fact testimony to conceal the perjury. *United States v Kincaid-Chauncey* 556 F.3d. 923 (9th Cir. 2009)

iii. When considering whether to permit impeachment by contradiction, trial court should consider the Rule 403 factors such as confusion of the jury or the cumulative nature of the evidence. *United States v Kincaid-Chauncey* 556 F.3d. 923 (9th Cir. 2009)

iv. Extrinsic evidence may be admitted (exception to Rule 608(b) which generally prohibits the introduction of extrinsic evidence to attack the credibility of a witness)

- Limitation: Statements at issue must have been volunteered on direct examination -- extrinsic evidence may not be admitted to impeach testimony invited by questions posed during cross examination

- *United States v Castillo*, 181 F. 3d 1129 (9th Cir 1999) – A defendants expansive and unequivocal denial of involvement with drugs on direct examination warranted the district court's decision to admit extrinsic evidence of a 1997 cocaine arrest as impeachment by contradiction.

- *United States v Zagrebin*, 2000 US App. LEXIS 8464 (9th Cir. 2000) - In a prosecution for importation and distribution of marijuana, evidence contradicting the defendants statements about her work history and reason for crossing the border was not admitted in error.

f. Prior Inconsistent Statement (FRE 613)
i. Generally: A witness may be impeached by a prior inconsistent statement; however an impeaching statement is not substantive evidence unless it meets the criteria of FRE 801(d)(1).
ii. Test for Use of Prior Inconsistent Statements
- Is the prior statement inconsistent w/ what the witness is now saying?
- Did the declarant make the prior statement under oath?

iii. Procedure: The party seeking to introduce a prior inconsistent statement must first ask the witness [to admit?]

- If they answer yes → cannot introduce extrinsic evidence
- If they answer no → may produce writings, call statements. But need an opportunity to explain the statement.

iv. Extrinsic Evidence permitted in two situations
- Witness has had a chance to explain or deny prior inconsistent statement, and the opposing party is given an opportunity to question the witness about the statement OR
- Proponent has convinced the trial judge that the interests of justice would be served by allowing the proponent to use the extrinsic evidence, even though the witness has not had

an opportunity to explain the statement and the opposing party has not had a chance to question the witness about the statement

v. If a party attempts to undermine a witness's credibility with a prior inconsistent hearsay statement under Rule 607, such a statement is admissible only for impeachment purposes and not as substantive evidence.

vi. *United States v. Ince*, 21 F.3d 576 (4th Cir. 1994) – The government may not use a prior inconsistent statement to impeach his own witness if the only apparent purpose is to circumvent the hearsay rule in order to present otherwise inadmissible portions of the defendants confession into evidence.

E. Rule 608. Evidence of Character and Conduct of Witness

1. FRE 608: *(a) Opinion and reputation evidence of character. 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. (b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning 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.*

2. Summary of FRE 608

   a. The impeaching party can present reputation testimony concerning the target witness's truthfulness or opinion testimony from the impeaching witness regarding the target witness' bad character for truthfulness
   b. On cross-examination, the impeaching party may inquire into particular misconduct that did not result in conviction and that reflects on truthfulness of the witness
   c. The impeaching party may offer evidence of a prior criminal conviction of the witness (subject to the requirements of 609) to show that the witness is untruthful.

3. Opinion and Reputation Evidence of Character

   a. 608(a) permits a witnesses credibility to be supported or attacked by *reputation or opinion* evidence that goes to truthfulness, but when attacking the witness's credibility under the rule, the evidence may refer only to character for untruthfulness.

   b. Limitation on Opinion/Reputation Evidence For Truthfulness

      i. Evidence of good (truthful) character is limited to situations where the witness's veracity has already been specifically impugned. – ie: attacked by opinion/reputation evidence or otherwise.

      ii. Cannot bolster the witness – ie: enhance an individual's credibility before it is attacked,

      iii. Once that witness' character for truthfulness has been attacked, the party for whom the witness is testifying can offer evidence of truthfulness via opinion or reputation

4. Specific Acts of Conduct

a. 608(b)(1) provides that a witness's credibility may be attacked on cross-examination through questioning on specific instances of conduct (other than a criminal conviction), which are relevant to the witnesses character for truthfulness/untruthfulness.

b. Prior acts must indicate lack of truthfulness

   i. *Reed v Tokio Marine & Nichido Fire Ins. Co*, 201 U.S. Dist. LEXIS 62723 (W.D. La 2010) – failure to file tax returns for those years in which the witness was required to file is admissible for purposes of attacking the witnesses credibility.)

   ii. *Zeigler v. Ala. Dep't of Human Res.*, 2010 U.S. Dist. LEXIS 59486 (M.D. Ala. 2010) -- False statements made by a witness on his employment application concerning past convictions, high school degree and job terminations which he certified to be true are probative of truthfulness and may be inquired into on cross examination.

   iii. Prior drug use is not relevant to a witness's character for truthfulness.

   iv. Violations of probation, conditions of release and escape do not involve dishonesty and do not bear on a witness's truthfulness. *Eng v Blood*, 2008 U.S Dist. LEXIS 54802 (N..N.Y. 2008)

   v. Evidence of debts owed to an unnamed third parties is not probative of a defendants' credibility and is not admissible. *United States v Lanza*, 790 F.2d 1015, 1020 (2d Cir. 1986)

   vi. Prior physical misconduct, such as assault with a weapon, may not bear on truth-telling tendencies of a witness.

   vii. *United States v Graham,* 856 F/2d 756 (6th Cir. 1988) – Evidence of witness's attempt to bomb a building was not proper grounds for impeachment.

   viii. *United States v Nagi,* 2010 U.S. Dist LEXIS 106547 (E.D. Mich. 2010) -- Murder generally is not a crime of dishonesty that speaks to a witness's capacity for truthfulness/untruthfulness. *United States v Nagi,* 2010 U.S. Dist LEXIS 106547 (E.D. Mich. 2010)

   ix. *Johnson v Baker*, 2009 U.S. Dist LEXIS 99475 (W.D. Ky. 2009) – Evidence that Plaintiff was alleged to have been arrested for giving a false name and address to police is admissible for impeachment purposes only under Rule 608(b).

   x. An arrest, without more, does not impeach the integrity or impair the credibility of a witness.

c. Criminal Convictions and FRE 608

   i. Evidence relating to a prior conviction is not admissible under Rule 608.

   ii. Evidence of a prior conviction of a crime that involves dishonesty may be admissible under FRE 609

d. Cross Examination Only

   i. Prior acts are admissible where defendant has put his/her character in question by his own testimony or through that of a witness presented by defendant.

ii. *United States v. Blitstein*, 626 F.2d 774 (10th Cir. 1980) – Defendant who testifies as to good reputation as member of the bar opens door to cross on suspension from the bar.

e. No Extrinsic Evidence

i. Rule 608(b) provides in part that specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's character for truthfulness, may not be proved by extrinsic evidence.

ii. Any reference to the consequences that a witness might have suffered as a result of an alleged bad act are barred.

iii. The extrinsic evidence prohibition does not apply to criminal convictions (governed by FRE 609) and other grounds of impeachment like contradiction, bias, and prior inconsistent statements.

f. Balancing Analysis: Probative Value v Unfair prejudice

i. Once Court has determined that evidence has a proper purpose, it must engage in a balancing analysis to determine whether the probative value of the prior act outweighs the unfair prejudice. *United States v. Saunders*, 166 F.2d 814 (2d Cir. 1990).

ii. In assessing probative value of evidence covered by 608(b), courts consider

- the importance of the witness's credibility to the case;
- whether the evidence is probative of other matters at issue in the parties larger dispute
- the similarity of the past specific conduct and the situation in which the witness is offering testimony and
- the remoteness of the specific act.

Russo v Ballard Med, Prod., 2006 U.S. Dist LEXIS 57130 (D. Utah 2006).

F. Rule 610. Religious Beliefs or Opinions

1. FRE 610: *Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.*

2. Rule prohibits a party from attacking the credibility of a witness because of his religious views or lack thereof.

a. *Tisdale v Fed. Express Corp.*, 415 F.3d516 (6th Cir. 2005) – In an employment discrimination suit, it was error to allow Plaintiffs counsel to read into the record a witnesses deposition testimony regarding that witness's religious beliefs. Such evidence was expressly prohibited.

3. Rule does not prevent jurors from being questioned along similar lines

a. *United States v Sandoval*, 2006 U.S. Dist. LEXIS 29130 (D.N.M. 2006) -- District Court approved the use of the following question for a jury pool questionnaire "Do you have any idea, notion, belief, attitude, or opinion, based on religion, background, ideology or otherwise, that would prevent you from being fair and impartial in a case involving a defendant who practices Native American religions?"

G. Rule 612. Writing Used to Refresh Memory

1. FRE 612: *Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh memory for the purpose of testifying, either-- (1) while testifying, or (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.*

2. Refreshing Recollection:

    a. Generally: Where a witness has a failure of memory, the witness's memory may be refreshed by showing the witness a memory aid, which is used as a stimulus to present memory without restriction as to authorship, guarantee of correctness, or time making. The witness may then testify from a refreshed or revived recollection.

        i. Memory aid need not be a document or writing – may be anything that triggers the memory (cracking of a hinge, whistling of a tune, smell).

    b. Circumstances under which a witness may use a memory aid to refresh a recollection:

        i. the witness has a failure of memory and cannot recall particular facts

        ii. the document or memory aid prepared by either the witness or someone else might help the witness recall particular facts and

        iii. after reviewing the document or memory aid the witness's memory or recollection is refreshed and the witness testifies from the refreshed recollection.

    c. It is not essential that he prosecutor first establish that the witness has exhausted his present memory

    d. No requirement that the witness and his attorney discuss the document prior to the witness being questioned. *BNSF Ry. Co. v. San Joaquin Valley R.R. Co.*, 2009 U.S. Dist. LEXIS 111569 (E.D. Cal. 2009)

    e. Witness is not required to state that he prepared the document, knew of the document when prepared or even that the document was or is correct. However, the more detailed facts that the witness can offer to demonstrate the trustworthiness of the document or memory aid, the greater the impact will be on the trier of fact.

3. Steps in refreshing a witness's memory are as follows:

    a. Establish the witness failure of memory

    b. Mark the refreshing document for identification

    c. Show the witness the refreshing document and ask him to read it to himself

    d. Ask the witness if he has read it

    e. Ask the witness if his memory is now refreshed with respect to the forgotten fact

f. Take the refreshing exhibit from the witness

g. Re-ask the question which drew he original failure of memory

4. Memory Aid Is Not Evidence

a. The testimony of the witness (and not the memory aid) is admitted into evidence – the memory aid itself is not evidence

b. If a witness uses a writing to refresh his/her memory before testifying, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross examine the witness about the writing. and to introduce into evidence the portions relating to the witness's testimony, although only if the court determines that production is necessary in the interests of justice.

c. Opposing counsel may use the memory aid to impeach the witness Since the memory aid is not evidence, use of the memory aid or cross examination relating to it is for the purpose of testing whether the witness's memory has been refreshed.

5. Present Recollection Refreshed vs. Past Recollection Recorded:

a. Generally: Both involve failed memory, but present recollection refreshed does not present a hearsay problem. Present recollection refreshed is a situation where the witness is testifying from a refreshed recollection stimulated by a document or object. Past recollection recorded refers to a document created or adopted by the witness, which contains facts to which the witness is not able to testify because of lack of recollection. This document is read to the jury.

b. Elements of Past Recollection Recorded

i. Witness must lack a present recollection to testify fully and accurately about the events contained in the document

ii. The memorandum must contain facts of which the witness testifies he once had personal knowledge.

iii. The memorandum must have been made or adopted by the witness at or near the time of the event while the witness had a clear and accurate memory of it

iv. The document accurately reflects the witnesses knowledge

v. Witness must vouch for the accuracy of the written memorandum.

c. Proponent of the past recollection recorded cannot introduce the document into evidence, although the witness is permitted to read from it.

d. Adverse party may offer the past recollection recorded as an Exhibit

e. The impeachment of a witness whose recorded recollection is introduced into evidence is easily accomplished by obtaining agreement from the witness that the witness has no recollection of the events reported and no current knowledge that the recorded recollection is accurate.

H. Rule 803(5). Hearsay Exceptions; Availability of Declarant Immaterial

I. FRE 803(5): *The following are not excluded by the hearsay rule, even though the declarant is available as a witness....(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witnesses' memory and to reflect that knowledge accurately. If admitted, the memorandum or record may be read into evidence but may itself not be received as an exhibit unless offered by an adverse party.*

1. Overview. The "recorded recollection" exception, aka the "past recollection recorded" exception, allows a memorandum or some other record(s) of the event in question to be read into evidence, where (1) the witness once had knowledge about the matters in the document; (2) the witness now has insufficient recollection to be able to testify truthfully and accurately as to the matters in question, and (3) the record was made by the witness at time when the matter was fresh in the memory of the witness. The purpose of this rule, requiring that the documents itself be *read* into evidence, rather than directly *entered* into evidence, is to prohibit the introduction of the document used to refresh the recollection of the witness, due to concern that the fact-finder will be unduly influenced by the document in question -- rather than the testimony itself. *United States v. Cuesta*, 522 F. Supp. 2d 281 (E.D. Cal. 2007).

2. Note: There is no requirement that the subject record be directly contemporaneous. In *United States v. Smith*, 197 F.3d 225 (6th Cir. 1997), a 15-month lag between the time that the event occurred and the date the record of the event was made did not preclude admissibility.

3. In order for the document to be read into evidence, the witness must be able to testify that the record accurately reflected his or her knowledge and recollection at the time of the events in question. *United States v. Jones*, 601 F.3d 1247 (11th Cir. 2010) (admitting an earlier videotaped interview where the witness testified that it was easier to remember the events in question at the time the video was made, than at trial, and that what she said at the time was true to the best of her knowledge, and that she was the one who made the statements recorded in the video.)

4. Compare *Meder v. Everest & Jnnings, Inc.*, 637 F.2d 1182 (8th Cir. 1981) (where police officer could not recall who made statements in an accident report, the report was not admissible under Rule 803(5).

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An excellent reference, from which much of the above material was derived, is KENT SINCLAIR, TRIAL HANDBOOK (3D ED. 2011), published by Practicing Law Institute.

Other good material is found in:

ANTHONY BOCCHINO & DAVID SONNENSHEIN, FEDERAL RULES OF EVIDENCE, *WITH OBJECTIONS* (2d ed. 1993) and, of course, later editions, published by the National Institute of Trial Advocacy;

ANTHONY BOCCHINO & DAVID SONNENSCHEIN, A PRACTICAL GUIDE TO FEDERAL EVIDENCE (3d ed. 1993) and, again, in later editions of the same work, published by the National Institute of Trial Advocacy'

PAUL SANDLER & JAMES ARCHIBALD, MODEL WITNESS EXAMINATIONS (1997), published by the Section of Litigation of the ABA, and later editions thereof.