

# RULE 607 SUBTERFUGE: IMPROPER IMPEACHMENT OF A PARTY'S OWN WITNESS IN ALABAMA

## I. INTRODUCTION

Alabama Rule of Evidence 607 allows any party to attack the credibility of a witness, including the party calling the witness.<sup>1</sup> The plain language of the rule suggests an absolute principle under which a witness can be impeached at any time, for any reason, and by any party.<sup>2</sup> However, Alabama cases both before and after the adoption of the Alabama Rules of Evidence support the conclusion “that the right to impeach one’s witness is not absolute and may be held inapplicable due to abuse.”<sup>3</sup> Since the adoption of the Alabama Rules of Evidence, cases involving the impermissible use of Rule 607 in Alabama have been few in number. Those courts addressing the issue have adopted the federal courts’ interpretation of the rule, and its accompanying standard of good faith, when analyzing whether an attorney has impermissibly used Rule 607 as a subterfuge to put before the trier of fact evidence that would otherwise be inadmissible under the rules of evidence.<sup>4</sup>

But what is Rule 607 subterfuge?<sup>5</sup> In what situations does Rule 607 subterfuge rear its subtle head? What is meant by “good faith” as it relates to Rule 607 and how is good faith determined under current Alabama law? Finally, what can an attorney look for before making a sustainable objection when his opponent impeaches his own witness through the use of prior inconsistent statements? These are some of the questions I have attempted to answer in this Comment through a primary focus on Alabama courts and their adoption of federal standards. This Comment also traces the origins of Alabama Rule of Evidence 607

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1. ALA. R. EVID. 607; ALA. R. EVID. 607 advisory committee’s notes.

2. See ALA. R. EVID. 607.

3. 1 CHARLES W. GAMBLE, MCELROY’S ALABAMA EVIDENCE § 165.01(6)(b) (5th ed. 1996) (citing *United States v. Kane*, 944 F.2d 1406, 1411 (7th Cir. 1991)).

4. See, e.g., *Smith v. State*, No. CR-97-1258, 2000 WL 1868419, \*34 (Ala. Crim. App. Dec. 22, 2000); *Burgin v. State*, 747 So. 2d 916, 919 (Ala. Crim. App. 1999); *Ritchie v. State*, 763 So. 2d 992, 995 (Ala. Crim. App. 2000); *Smith v. State*, 745 So. 2d 922, 935 (Ala. Crim. App. 1999).

5. Subterfuge is “[a] clever plan or idea used to escape, avoid, or conceal something.” BLACK’S LAW DICTIONARY 1444 (7th ed. 1999).

and the limitations on impeaching one's own witness through prior inconsistent statements as set forth by both Alabama and federal courts. Although all of the five methods of impeachment may be used to impeach a party's witness under Rule 607,<sup>6</sup> this Comment primarily focuses on impeachment by prior inconsistent statements because the potential for abuse is more apparent than with other impeachment methods. This Comment also focuses on recognizing how and when an attorney is using Rule 607 for impermissible purposes.

## II. HISTORICAL DEVELOPMENTS IN THE LAW ON IMPEACHMENT OF ONE'S OWN WITNESS

### A. *General Preclusion on Impeachment of a Party's Own Witness*

Historically, both Alabama and federal law precluded parties from impeaching their own witness.<sup>7</sup> This preclusion was very general, applying to all forms of impeachment including impeachment by prior conviction, character impeachment, bias impeachment, and impeachment through prior inconsistent statements.<sup>8</sup>

The general reasoning behind the rule against impeaching one's own witness was two-fold. First, the calling party vouched for that witness's credibility.<sup>9</sup> Second, the power to impeach a witness is the power to coerce a witness into testifying in the calling party's desired manner under the threat of breaking down that witness's character if the witness does not testify as desired.<sup>10</sup> However, both of these rationales are flawed.<sup>11</sup>

The primary flaw in the reasoning of the first principle, commonly known as the voucher principle, is that parties in modern trials do not vouch for the credibility of their witnesses.<sup>12</sup> Parties often have little or no choice of witnesses and therefore must call witnesses who happen to have observed certain facts in controversy.<sup>13</sup> In other words, parties

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6. The five methods of impeachment include the following: (1) showing that the witness has a bad character for truthfulness; (2) showing prior inconsistent statements of the witness which suggest that he has not been truthful in his testimony; (3) showing the witness's bias for or against either party; (4) showing defects in the witness's ability to observe, recollect, or recount; and (5) contradicting the witness through either independent evidence or cross-examination. 3 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, *FEDERAL EVIDENCE* § 298 (1979).

7. 1 GAMBLE, *supra* note 3, § 165.01(6)(a); 1 JOHN W. STRONG, *MCCORMICK ON EVIDENCE* § 38, at 139 (5th ed. 1999).

8. 1 GAMBLE, *supra* note 3, § 165.01(6)(a).

9. *Id.*; 1 STRONG, *supra* note 7, § 38, at 139-40.

10. 1 GAMBLE, *supra* note 3, § 165.01(6)(a); 1 STRONG, *supra* note 7, § 38, at 139-40.

11. 1 STRONG, *supra* note 7, § 38, at 139-40.

12. 1 GAMBLE, *supra* note 3, § 165.01(6)(a).

13. 1 STRONG, *supra* note 7, § 38, at 140.

"take them wherever they may be found."<sup>14</sup> A party does not vouch for the truthfulness of his own witnesses and, consequently should not be precluded from impeaching them.<sup>15</sup>

An often cited flaw in the reasoning of the second rationale is that, forbidding impeachment by the calling party puts that party at the mercy of the witness as well as the adversary because "when the witness tells a lie, the adversary will not attack, and the calling party, under the rule, cannot."<sup>16</sup>

### B. Historical Requirements

Prior to the adoption of the Federal Rules of Evidence in 1975, federal common law recognized exceptions to the general exclusionary rule against impeaching one's own witness. Among the exceptions was the rule requiring an attorney who sought to impeach his own witness to show that the witness's testimony at trial was both surprising and substantially harmful to his case.<sup>17</sup> Likewise, prior to the adoption of the Alabama Rules of Evidence in 1996, Alabama courts required a showing that the witness's testimony be both surprising and damaging to the calling party's case before they would allow that party to impeach its own witness.<sup>18</sup>

The adoption of Rule 607 eliminated these historical requirements.<sup>19</sup> However, "the rules of evidence do not operate in a vacuum."<sup>20</sup> Although neither rule gives any explicit requirements, courts have gradually developed specific limitations under which impeachment of a party's own witness, through prior inconsistent statements, may take place.

### C. Proper Impeachment of a Party's Own Witness

A party attempting to impeach its own witness may have a number of proper purposes for impeachment. A party who knows that its opponent may try to damage the credibility of its witness on cross examination may introduce impeachment evidence against its own witness in an

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14. 1 GAMBLE, *supra* note 3, § 165.01(6)(a).

15. 1 STRONG, *supra* note 7, § 38, at 140.

16. *Id.*

17. *United States v. Long Soldier*, 562 F.2d 601 (Cal. 1977).

18. 1 GAMBLE, *supra* note 3, § 165.01(6)(b). Although both of these requirements have been abrogated by the current rules as well as case law, recent Alabama cases suggest that these old threshold requirements should not be forgotten but may be used as a supplement to further enhance the current "good faith" standard. *See Ritchie v. State*, 763 So. 2d 992, 996 (Ala. Crim. App. 1999); *see also Burgin v. State*, 747 So. 2d 916, 919 (Ala. Crim. App. 1999) (stating that surprise is not a necessary prerequisite to impeaching one's own witness).

19. *See ALA. R. EVID. 607; see also FED. R. EVID. 607.*

20. *Smith v. State*, 745 So. 2d 922, 935 (Ala. Crim. App. 1999).

effort to reduce the damaging effect of the impeachment information. In other words, a party may also do this to diffuse its opponent's case in advance.<sup>21</sup>

### III. IMPEACHMENT THROUGH PRIOR INCONSISTENT STATEMENTS

One of the most common modes of impeachment is through a prior inconsistent statement, that is, proof that the witness made a pretrial statement inconsistent with current trial testimony.<sup>22</sup> This is especially true in civil actions where pretrial depositions are generously taken.<sup>23</sup> The Alabama and Federal Rules of Evidence both assume that impeachment through prior inconsistent statements continues to be valid although neither has authorized it in a specific rule.<sup>24</sup> In order to understand the process and limitations through which a calling party may try to impermissibly impeach the witness through prior inconsistent statements, the general process and limitations of impeaching any witness through prior inconsistent statements must first be identified.

#### A. *The Process*

A prior inconsistent statement offered during the course of a trial is inadmissible hearsay when offered as evidence of the truth of the matter asserted.<sup>25</sup> It is, however, admissible for the limited purpose of attacking the credibility of the witness (which is the primary purpose of impeachment).<sup>26</sup> Prior inconsistent statements may be introduced through either, the cross examination of the witness or the testimony of other witnesses.<sup>27</sup> Any proof offered through the second medium is commonly referred to as "extrinsic evidence."<sup>28</sup> If a witness denies having made an inconsistent out-of-court statement, then the impeaching party may introduce extrinsic evidence to prove the inconsistency.<sup>29</sup>

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21. Both of these permissible purposes would pass the good faith standard. See *infra* Part IV.

22. 1 STRONG, *supra* note 7, §§ 33-34, at 124-25.

23. *Id.*

24. 1 GAMBLE, *supra* note 3, § 155.02(1) (citing ALA. R. EVID. 613; Ethel R. Alston, Annotation, *Use of Prior Inconsistent Statements for Impeachment of Testimony of Witnesses Under Rule 613, Federal Rules of Evidence*, 40 A.L.R. FED. 629 (1978)).

25. This general proposition is the focal point of the impermissible use of Rule 607 for subterfuge purposes.

26. 1 STRONG, *supra* note 7, § 34, at 125.

27. 1 GAMBLE, *supra* note 3, § 155.02(1).

28. OLIN GUY WELLBORN III, *THE RULES OF EVIDENCE* 296-97 (2000).

29. 1 GAMBLE, *supra* note 3, § 157.01(1). Alabama Rule of Evidence 613 deviates from Federal Rule of Evidence 613 in that the Alabama rule permits the admission of extrinsic evidence only after the witness has been properly confronted with the circumstances of the statement. *Id.*; see 1 MICHAEL H. GRAHAM, *HANDBOOK OF FEDERAL EVIDENCE* § 613.3 (5th ed. 2000); see also discussion *infra* Part V.A.

### B. *Limitations: The Collateral Matter Rule*

Both Alabama and Federal Rule of Evidence 613 limit the use of extrinsic evidence to impeach a witness with a prior inconsistent statement. Specifically, Rule 613 prevents the impeaching party from introducing extrinsic evidence on a collateral matter.<sup>30</sup> This restriction is based on policy concerns including confusion of the issues, misleading the jury, the economy of time, and unfair prejudice.<sup>31</sup> A matter is generally considered to be collateral if it has no relevancy in the case other than to show the inconsistency.<sup>32</sup> In other words, as Professor Gamble states, "if a fact is admissible neither upon an issue under the pleadings of the case nor for the purpose of impeaching the witness's credibility in some means other than inconsistency, then such fact is immaterial and not subject to contradiction."<sup>33</sup> Therefore, if the prior inconsistent statement is otherwise immaterial and is only relevant to show the inconsistency, then the matter is "collateral" and Rule 613 bars introducing extrinsic evidence of the statement. Stated differently, if the statement concerns a collateral matter, then the impeaching party must accept the witness's answer as it stands.<sup>34</sup> Conversely, if the prior inconsistent statement is otherwise immaterial but, in addition to showing inconsistency, the statement also shows bias, then the matter is not "collateral" and Rule 613 does not preclude extrinsic evidence of the statement.<sup>35</sup> It is important to note the restrictions of the collateral matter rule when considering impeachment through prior inconsistent statements.<sup>36</sup>

## IV. IMPERMISSIBLE USE OF RULE 607

### A. *The Purpose Behind Rule 607 Subterfuge*

As stated earlier in this Comment, Rule 607 eliminated the historical prohibition against impeaching one's own witness.<sup>37</sup> Consequently, the common law exception requiring a showing of "surprise and damage"<sup>38</sup> was also abrogated.<sup>39</sup> Both federal and Alabama courts, however,

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30. 1 GAMBLE, *supra* note 3, § 156.01(1).

31. 1 STRONG, *supra* note 7, § 49, at 199.

32. 1 GAMBLE, *supra* note 3, § 156.01(3).

33. *Id.*

34. 1 GAMBLE, *supra* note 3, § 156.01(1).

35. See Colleen Gale Treml, *State v. Hunt: Rekindling Requirements for Impeaching One's Own Witness*, 68 N.C. L. REV. 1236, 1241 (1990).

36. See discussion *infra* Part V.B.

37. See ALA. R. EVID. 607; see also FED. R. EVID. 607.

38. See discussion *supra* Part II.B.

39. 1 GRAHAM, *supra* note 29, § 607.3, at 686 n.16 (indicating that some feel that the "sur-

have gradually imposed additional requirements to prevent abuse.<sup>40</sup> This abuse generally occurs when a party, who is aware that a witness will give unfavorable testimony, calls the witness for the primary purpose of getting inadmissible hearsay before the jury.<sup>41</sup>

For example, assume a statement is inadmissible hearsay and therefore inadmissible as substantive evidence in the case.<sup>42</sup> In addition, assume that the calling party has reasonable grounds to believe that the witness will deny having made the statement. Under Rule 607, the calling party may try to offer the prior inconsistent statement under the hearsay exception for impeachment found in Rule 801(c).<sup>43</sup>

Currently, all the circuits of the United States Courts of Appeals agree that "evidence that is inadmissible for substantive purposes may not be purposely introduced under the *pretense* of impeachment."<sup>44</sup> The rationale behind this restriction is that jurors are unable to distinguish between the permissible use of the statement as impeachment evidence<sup>45</sup> and its impermissible use as substantive evidence of the matter asserted.<sup>46</sup> Permitting admission would allow a defendant in a criminal proceeding to be potentially convicted on the basis of unsworn testimony.<sup>47</sup> Stated differently, a party who abuses the rule would do so in hope that the jury would improperly use the impeachment (or in our case, prior inconsistent statement) as substantive evidence against the adverse party.<sup>48</sup> This practice is abusive because it is not legitimate to call a witness solely for the purposes of impeaching them. If impeachment were the true purpose for calling a witness, then a party would

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prise and damage" elements should still be imposed).

40. See *United States v. Zackson*, 12 F.3d 1178, 1184-85 (2d Cir. 1993); *United States v. Eisen*, 974 F.2d 246, 262-63 (2d Cir. 1992); *Ritchie v. State*, 763 So. 2d 992, 995-96 (Ala. Crim. App. 2000); *Burgin v. State*, 747 So. 2d 916, 918 (Ala. Crim. App. 1999); *Smith v. State*, 745 So. 2d 922, 935 (Ala. Crim. App. 1999).

41. 1 GAMBLE, *supra* note 3, § 165.01(6)(b).

42. See FED. R. EVID. 801(c).

43. *Id.*

44. *United States v. Peterman*, 841 F.2d 1474, 1479 n.3 (10th Cir. 1988) (emphasis added), *cert. denied*, 488 U.S. 1004 (1989); *accord* *Trembl*, *supra* note 35, at 1243. See, e.g., *United States v. Frappier*, 807 F.2d 257, 259 (1st Cir. 1986), *cert. denied*, 481 U.S. 1006 (1987); *United States v. DeLillo*, 620 F.2d 939, 946 (2d Cir. 1980), *cert. denied*, 449 U.S. 835 (1980); *United States v. Morlang*, 531 F.2d 183, 190 (4th Cir. 1975); *United States v. Hogan*, 763 F.2d 697, 701-03 (5th Cir. 1985); *United States v. Dye*, 508 F.2d 1226, 1234 (6th Cir. 1974), *cert. denied*, 420 U.S. 974 (1975); *United States v. Webster*, 734 F.2d 1191, 1192 (7th Cir. 1984); *United States v. Fay*, 668 F.2d 375, 379 (8th Cir. 1981); *United States v. Crouch*, 731 F.2d 621, 624 (9th Cir. 1984), *cert. denied*, 469 U.S. 1105 (1985); *Balogh's of Coral Gables, Inc. v. Getz*, 798 F.2d 1356, 1358 n.2 (11th Cir. 1986) (en banc); *United States v. Johnson*, 802 F.2d 1459, 1466 (D.C. Cir. 1986).

45. Impeachment evidence may be used only to evaluate the credibility of a witness and not as substantive evidence. See generally 1 GAMBLE, *supra* note 3, § 165.01(6)(b).

46. *United States v. Morlang*, 531 F.2d 183, 190 (4th Cir. 1975).

47. *Morlang*, 531 F.2d at 190.

48. *United States v. Webster*, 734 F.2d 1191, 1192 (7th Cir. 1984).

never call the witness because the most that could ever “be accomplished is a net result of zero.”<sup>49</sup> The maximum probative effect of the inconsistent statement offered for impeachment purposes can never be greater than the mere cancellation of the witness’s denial of having made the statement.<sup>50</sup>

But how do courts in Alabama, as well as courts throughout the nation, determine if attorneys are attempting to abuse the liberal nature of Rule 607<sup>51</sup> through impeachment of their own witnesses? Although the Alabama Supreme Court has yet to address the issue since the 1996 adoption of the Alabama Rules of Evidence, numerous decisions of the Alabama Court of Criminal Appeals have analyzed the abuse of Rule 607 as it applies to prior inconsistent statements.<sup>52</sup>

### B. *Bad Faith Abuse of Rule 607 Under Alabama Law*

Speaking in *Burgin v. State*,<sup>53</sup> the Alabama Court of Criminal Appeals followed the federal lead in recognizing that the Rule 607 right to impeach one’s own witness is conditioned upon the absence of abuse.<sup>54</sup> The *Burgin* court recognized that an abuse of Rule 607 takes place when a party has “examined the witness for the primary purpose of placing before the jury substantive evidence which is otherwise inadmissible.”<sup>55</sup> A party is generally subject to a good faith standard in a court’s inquiry as to whether abuse has taken place. There are, however, vastly different approaches to both detecting and manifesting the good faith necessary to overcome an accusation of such abuse.<sup>56</sup>

In adopting this good faith standard, Alabama courts have placed particular emphasis on the “primary purpose” language when analyzing a party’s reason for calling a witness.<sup>57</sup> The *Burgin* court noted that knowledge that a witness will be hostile does not abrogate the calling

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49. 2 STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL 800 (6th ed. 1994).

50. *Id.* (citing *United States v. Crouch*, 731 F.2d 621, 623 (9th Cir. 1984)).

51. The adoption of Rule 607 now allows “a party to bring against his own witness all weapons from the arsenal of impeachment that historically were reserved generally for opposing witnesses.” 1 GAMBLE, *supra* note 3, § 165.01(6)(a).

52. See *Smith v. State*, No. CR-97-1258, 2000 WL 1868419, at \*34 (Ala. Crim. App. 2000); *Ritchie v. State*, 763 So. 2d 992 (Ala. Crim. App. 2000); *Burgin v. State*, 747 So. 2d 916 (Ala. Crim. App. 1999).

53. 747 So. 2d at 918-21.

54. *Id.*

55. *Id.* at 918-19 (citing *United States v. Gomez-Gallardo*, 915 F.2d 553, 555 (9th Cir. 1990)).

56. *Id.* (citing *United States v. Webster*, 734 F.2d 1191, 1193 (7th Cir. 1984)).

57. See generally *Smith*, 2000 WL 1868419, at \*34 (recognizing that, although the witness was reluctant to testify, she originally answered the prosecution’s questions before she completely changed her story); *Ritchie*, 763 So. 2d at 995-96; *Burgin*, 747 So. 2d at 918-21.

party's right to impeach.<sup>58</sup> A party may call a witness whom it knows may be hostile and may impeach that witness.<sup>59</sup> Furthermore, the *Burgin* court stated that just because a party may believe that a witness will be reluctant to testify, "it should not be bound by that knowledge when deciding to call a witness, because 'an attorney is entitled to assume that a witness will testify truthfully' once the witness is in a court of law and is under oath."<sup>60</sup> There is a difference between calling a witness that may be reluctant to testify and calling a witness for the sole or primary purpose of impeachment.

In *Burgin*, the prosecution called the defendant's girlfriend as its witness.<sup>61</sup> Based on her statement to police, the prosecution knew that the defendant had confided in his girlfriend that he was present at the murders for which he was being charged.<sup>62</sup> The prosecution also knew that his girlfriend was reluctant to testify against her defendant boyfriend.<sup>63</sup> The witness originally answered the prosecution's questions properly and told the jury that the defendant had confided in her that he was present at the murders for which he was charged.<sup>64</sup> She then became unwilling to answer the prosecution's questions concerning her detailed statements to the police in which she claimed that the defendant had confessed to her.<sup>65</sup> After the witness was given an ultimatum by the trial judge to answer the questions, she answered but claimed that she never had a conversation with the defendant concerning his involvement in the murders and that she lied to the police about the conversation out of anger at the defendant.<sup>66</sup> The prosecution then questioned her about the particulars of the prior inconsistent statement she had made to the police concerning the defendant's confession to her.<sup>67</sup>

According to the court, "her credibility became an issue" because she completely changed her story in court.<sup>68</sup> Consequently, the prosecution was allowed to impeach its own witness.<sup>69</sup> It is important to note that, in finding that the prosecution acted properly and in good faith in its impeachment of its own witness, the court was able to identify the

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58. *Burgin*, 747 So. 2d at 919 (citing *United States v. Palacios*, 556 F.2d 1359 (5th Cir. 1977)).

59. *Id.*

60. *Id.* (citing *United States v. Patterson*, 23 F.3d 1239, 1245 (7th Cir. 1994), *cert. denied*, 513 U.S. 1007 (1994)). Alabama's lack of legal state precedent on this issue is evident by the early constant reliance on federal case law.

61. *Id.* at 919-20.

62. *Id.*

63. *Burgin*, 747 So. 2d at 919-20.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Burgin*, 747 So. 2d at 920-21.

69. *Id.*



prosecution's effort to elicit *helpful* information and that the witness was at first willing to testify.<sup>70</sup> It was only after the witness became *hostile* and her "*credibility became an issue*," that the prosecution could permissibly impeach its own witness.<sup>71</sup> Furthermore, the trial proceedings are evidence that the prosecution did not call the witness as a subterfuge or, in other words, for the *primary purpose* of getting before the jury otherwise inadmissible hearsay.<sup>72</sup>

While the *Burgin* court explicitly noted that "surprise is not a necessary prerequisite to impeaching one's own witness"<sup>73</sup> under Rule 607, the court implicitly used surprise as a factor in determining that the prosecution permissibly impeached its own witness under Rule 607.<sup>74</sup> Although the prosecution was aware that the witness was reluctant to testify, it was still partially surprised by the witness's answers during examination at trial.<sup>75</sup> The court's analysis of the proceedings at trial suggest that surprise is not a condition precedent to good faith but is a factor that may support an allegation of good faith.<sup>76</sup>

The "primary purpose" requirement was also illustrated in *Ritchie v. State*.<sup>77</sup> However, in *Ritchie*, the Alabama Court of Criminal Appeals found that the prosecution did attempt to elicit testimony from one of its own witnesses solely for the purpose of putting before the jury otherwise impermissible hearsay evidence.<sup>78</sup> In *Ritchie*, the prosecution called the defendant's wife as its witness.<sup>79</sup> The wife testified that she had spoken with a DHR investigator and told the investigator that she did not want anybody to interview her children without her or an attorney present because she did not want her children to be misled as she had seen police do on television.<sup>80</sup> The state elicited no other helpful testimony from the defendant's wife.<sup>81</sup> The state then called the DHR investigator to whom the prior witness claimed to have made the statements.<sup>82</sup> During its examination of the DHR investigator, the prosecution brought out prior inconsistent statements by the defendant's wife

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70. *Id.*

71. *Id.* (emphasis added).

72. *Id.*

73. *Burgin*, 747 So. 2d at 919. The court's use of the phrase "is not a necessary prerequisite" implies that although surprise is not necessary, it may still be a factor in determining permissibility under Rule 607. See also discussion *supra* Part II.B (discussing the Alabama and federal Rules' old requirements).

74. See *Burgin*, 747 So. 2d at 919.

75. *Id.*

76. *Id.*

77. 763 So. 2d 992, 994-96 (Ala. Crim. App. 2000).

78. *Id.*

79. *Id.* at 993.

80. *Id.* The DHR was in the process of investigating because the witness's husband (defendant) was accused of sexually abusing their children. *Id.*

81. See *Ritchie*, 763 So. 2d at 993-95.

82. *Id.* at 993.

concerning the reason why she did not want her children to be interviewed without her or an attorney present.<sup>83</sup> The DHR investigator stated, over a hearsay objection,<sup>84</sup> that “[s]he told me that . . . in the past, allegations had been made against her husband of sexually abusing [her children]” and that “[i]n those interviews, she felt like the children had been led.”<sup>85</sup> On appeal, the defendant claimed that the trial court improperly allowed the prosecution to impeach its own witness through the use of prior inconsistent statements.<sup>86</sup> In reviewing the trial court, the court of criminal appeals properly stated that it is “an abuse of the rule . . . for the prosecution to call a witness that it knows will not give it useful evidence, just so it can introduce hearsay evidence against the defendant in the hope that the jury would miss the subtle distinction between impeachment and substantive evidence.”<sup>87</sup>

As in *Burgin*, the court looked to the federal “good faith” standard to determine whether the party had used Rule 607 in an impermissible manner.<sup>88</sup> The court determined that the prosecutor’s intent in calling the defendant’s wife to testify was an obvious attempt to introduce otherwise inadmissible hearsay through improper use of Rule 607 and did not meet the “good faith” standard.<sup>89</sup> The prosecution first introduced “setup” testimony.<sup>90</sup> In other words, the only reason for the wife’s testimony was for the purpose of setting the stage for impeachment.<sup>91</sup> The prosecution was then able to provide extrinsic evidence and impeach the witness in hope that the jury might use the prior inconsistent statements—which related to prior accusations of child abuse—as substantive evidence on which to convict the defendant, instead of strictly using the prior inconsistent statement to determine the credibility of the wife as a witness.<sup>92</sup> However, like many Alabama courts that have dealt with this issue, the court did not apply any standards but simply stated the limits

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83. *Id.* at 993-95.

84. The general hearsay objection to statements made outside the present proceedings may be overcome by the claim that the statement is not being introduced as evidence of the truth of the matter asserted, but rather for showing the credibility of the witness. CHARLES W. GAMBLE, GAMBLE’S ALABAMA RULES OF EVIDENCE: A TRIAL MANUAL FOR MAKING AND ANSWERING OBJECTIONS § 801(c), at 239 (1995).

85. *Ritchie*, 763 So. 2d at 994.

86. *Id.* at 993.

87. *Id.* at 995 (citing *Burgin v. State*, 747 So. 2d 916, 918 (Ala. Crim. App. 1999)). The prosecution was hoping that this evidence would be used by the jury to convict the defendant instead of using it to ascertain the credibility of the first witness, the defendant’s wife. *Id.* at 996.

88. *Id.* at 996.

89. *Ritchie*, 763 So. 2d at 996. The court also found that the prosecution improperly introduced extrinsic evidence pursuant to Rule 613(b). *Id.* See also discussion *infra* Part V.A.

90. *Id.* at 993-96.

91. See *id.* at 996.

92. See *id.* Alternatively, if the prosecution had simply asked the defendant’s wife about her prior inconsistent statement, it would still be an improper use of Rule 607.

and policy behind Rule 607, and concluded that the “good faith” standard had not been met.<sup>93</sup> However, the court’s reasoning is clear because the prosecution, in calling the defendant’s wife as a witness, did not attempt to present any *constructive*<sup>94</sup> or *helpful* testimony to its case but only used the witness to lay a foundation for impeachment through extrinsic evidence. The wife, along with the DHR officer, was introduced with the primary purpose of later impeaching her with prior inconsistent statements in hope of having the jury use the statements as substantive evidence as opposed to evidence of the credibility of the witness. Likewise, none of the historical elements of surprise or damage<sup>95</sup> were present during the prosecution’s examination of the defendant’s wife.<sup>96</sup>

Similarly recognizing subterfuge in the use of Rule 607, the Alabama Court of Criminal Appeals, in *Smith v. State*,<sup>97</sup> held that the limitations on the prosecution’s ability to impeach its own witnesses are equally applicable to the defense.<sup>98</sup> In *Smith*, the defendant was accused of shooting the victim in a drive-by shooting while he was standing in a group of people on a street corner.<sup>99</sup> The defense’s theory was that an individual in the group on the street corner, namely Mr. Cottrell, mistakenly shot the victim in his effort to actually shoot the defendant as he was driving by in his car.<sup>100</sup> Defense counsel called Cottrell and questioned him solely about his alleged possession of a gun on the night of the shooting and his alleged statement to another, Atchison, that he did have a gun on that particular night.<sup>101</sup> After Cottrell denied having any conversation with Atchison, the defense then attempted to call Atchison in an effort to impeach Cottrell with prior inconsistent statements.<sup>102</sup> The state properly objected and the court sustained the objection.<sup>103</sup> The court looked closely at the record to try to determine whether the defense had attempted to impeach its own witness *solely* for the purpose of placing before the jury otherwise inadmissible hearsay evidence.<sup>104</sup> It was clear from the record that the defense knew that Cottrell would deny making any statements to Atchison and would deny possessing a

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93. *Id.*

94. *See infra* text accompanying notes 126-28.

95. *See* discussion *supra* Part II.B.

96. *Ritchie*, 763 So. 2d at 993-95.

97. 745 So. 2d 922 (Ala. Crim. App. 1999).

98. *Smith*, 745 So. 2d at 935.

99. *Id.* at 927-28.

100. *Id.* at 933-34.

101. *Id.* at 934.

102. *Id.*

103. *Smith*, 745 So. 2d at 934.

104. *Id.* at 934-36.

gun on the night of the shooting.<sup>105</sup> Cottrell never mentioned having a gun in his statement to the police.<sup>106</sup> Furthermore, over twenty-five witness statements were taken, none of which ever mentioned that Cottrell had a gun on the night of the shooting.<sup>107</sup> Thus, the only evidence the defense had to prove its theory was Cottrell's alleged statement to Atchison.<sup>108</sup> Consequently, the defense's entire theory rested on its ability to put Atchison's statements before the jury.<sup>109</sup> The only way to accomplish that was to use impeachment under Rule 607 as a subterfuge to put before the jury otherwise inadmissible hearsay in hopes that the jury would use it as substantive evidence rather than for the permissible purpose of assessing Cottrell's credibility as a witness.<sup>110</sup> The court concluded that this was in fact the defense's *sole* reason for calling Cottrell, therefore negating the right to use Rule 607.<sup>111</sup>

### C. Federal Law

Because Alabama has adopted numerous federal circuits' interpretations and limitations of Rule 607,<sup>112</sup> it is helpful to look at federal courts' discussions and analysis of the "subterfuge" cases to determine whether impeachment of one's own witness has been properly or improperly executed.<sup>113</sup> Although the Eleventh Circuit recognizes that a party may not call a witness solely for the purpose of impeaching him in an effort to obtain otherwise inadmissible testimony,<sup>114</sup> the case law analyzing this general rule and its elements is limited. Thus, decisions by other circuits are persuasive authority in interpreting and analyzing the general Alabama rule against improper use of Rule 607.<sup>115</sup>

In *United States v. Kane*, a case cited by the Alabama Court of Criminal Appeals, the Seventh Circuit adopted language that may be

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105. *Id.* at 935.

106. *Id.*

107. *Id.*

108. *Smith*, 745 So. 2d at 935.

109. *Id.*

110. *See id.* at 935-36.

111. *Id.* at 936.

112. *See, e.g.*, *Burgin v State*, 747 So. 2d 916, 918-19 (Ala. Crim. App. 1999) (citing *United States v. Kane*, 944 F.2d 1406, 1411 (7th Cir. 1991); *United States v. Gomez-Gallardo*, 915 F.2d 553, 555 (9th Cir. 1990); *United States v. Gilbert*, 57 F.3d 709, 711 (9th Cir.), *cert. denied*, 515 U.S. 1110 (1995); *United States v. Webster*, 734 F.2d 1191, 1192 (7th Cir. 1984); *United States v. Palacios*, 556 F.2d 1359 (5th Cir. 1977); *United States v. Patterson*, 23 F.3d 1239, 1245 (7th Cir.), *cert. denied*, 513 U.S. 1007 (1994)).

113. This is also important because those decisions, particularly if they arose prior to January 1, 1996, are persuasive authority in the courts of Alabama.

114. *Balogh's of Coral Gables, Inc. v. Getz*, 798 F.2d 1356, 1358 n.2 (11th Cir. 1986).

115. This necessity is evidenced by Alabama courts' adoption of several federal circuit opinions. *See sources cited supra* note 112.

beneficial to Alabama courts in their Rule 607 abuse analysis.<sup>116</sup> In *Kane*, the defendant claimed that the government improperly called a witness solely for the purpose of introducing hearsay evidence against him in hope that the jury would miss the “subtle distinction between impeachment and substantive evidence—or, if it [does not] miss it, [will] ignore it.”<sup>117</sup> The Seventh Circuit noted that, although the witness’s testimony did give the prosecution the opportunity to impeach her with hearsay unfavorable to the defendant, she was not improperly called to testify.<sup>118</sup> The court further observed that the prosecution had no reason to believe the witness in question would be hostile or even allow an opportunity for impeachment.<sup>119</sup> It was only at the end of her testimony that the prosecution’s need to impeach the witness through prior inconsistent statements arose.<sup>120</sup> The court held that, if a witness provides both helpful and harmful evidence, then “the government should not be forced to choose between the Scylla of foregoing impeachment and the Charybdis of not calling the witness at all.”<sup>121</sup>

The Second Circuit has also adopted language in determining when “subterfuge” has taken place that could be beneficial to Alabama courts when making a determination as to whether the good faith standard has been met. In *United States v. Eisen*,<sup>122</sup> the court addressed the issue of a party impeaching its own witness with prior inconsistent statements.<sup>123</sup> The appellant claimed that the government had impermissibly called a witness it knew to be hostile in an effort to put otherwise inadmissible hearsay before the jury.<sup>124</sup> However, the court concluded that the record did not show any impermissible motive by the government.<sup>125</sup> The court stated that when the government calls a witness “whose corroborating testimony is instrumental to constructing the Government’s case, the Government has the right to question the witness, and to attempt to impeach him, about those aspects of his testimony that conflict with the government’s account of the same events.”<sup>126</sup> The court concluded that, in the case at hand, the witnesses provided “affirmative proof that was necessary to construct the Government’s case,” which then allowed the Government to question the witnesses and “to invite the jury to disbe-

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116. 944 F.2d 1406, 1412 (7th Cir. 1991).

117. *Kane*, 944 F.2d at 1411 (citing *United States v. Webster*, 734 F.2d 1191, 1192 (7th Cir. 1984)).

118. *Id.* at 1412.

119. *Id.*

120. *Id.*

121. *Id.*

122. 974 F.2d 246, 262 (2d Cir. 1992).

123. *Eisen*, 974 F.2d at 262.

124. *Id.*

125. *See id.*

126. *Id.* at 262-63.

lieve that portion of their accounts that contradicted the prosecution's theory."<sup>127</sup> In other words, evidence of good faith on the part of the calling party may be found when that party anticipates that the witness will give both *helpful and harmful* or both *favorable and unfavorable* testimony but thinks that the harmful or unfavorable aspect could be nullified by impeaching the witness through prior inconsistent statements.<sup>128</sup> This is evidence of what can be a difficult differentiation between calling a witness with knowledge that he will provide both helpful and damaging testimony and calling a witness for the primary purpose of introducing hearsay evidence through prior inconsistent statement impeachment.

In *United States v. Zackson*,<sup>129</sup> the Second Circuit affirmed the general limitations on Rule 607 impeachment by stating that "the law generally gives prosecutors broad latitude when questioning hostile and recalcitrant witnesses, [but] that latitude is not unbounded."<sup>130</sup> In *Zackson*, the prosecution called a co-defendant for the obvious purpose of subsequently putting before the jury otherwise impermissible hearsay, evidenced by the prosecution's statement at trial that the government's case would benefit by the witness's testimony regardless of what he did say or did not say while on the stand.<sup>131</sup> Thus, the government basically conceded that its only purpose in calling the witness was for the purpose of putting his prior inconsistent statements before the jury under the guise of "refreshing recollection."<sup>132</sup> However, the government did not stop at mere recollection of the witness's memory but attempted to call witnesses who would testify to things that were inconsistent with the witness's testimony.<sup>133</sup> The court distinguished the case at issue from *United States v. Eisen*,<sup>134</sup> when it stated that in *Zackson*, the witness's testimony was "instrumental to constructing the Government's case" and provided "affirmative proof that was necessary to construct the Government's case."<sup>135</sup> Although the court's final holding turned on presenting impermissible testimony in the form of refreshing recollec-

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127. *Id.* at 263 (emphasis added).

128. See *Eisen*, 974 F.2d at 262-63.

129. 12 F.3d 1178 (2d Cir. 1993).

130. *Zackson*, 12 F.3d at 1184.

131. *Id.* at 1184.

132. *Id.* at 1181. If a witness has a weakened recollection, a writing may be used to refresh her recollection. FED. R. EVID. 607. This example could present a problem separate from the improper use of prior inconsistent statements. A party could possibly avoid the Rule 607 issue of impermissible impeachment of its own witness through the refreshing recollection process while still trying to "plant the seed" with the jury in the same manner as it would with actual impeachment evidence.

133. *Zackson*, 12 F.3d at 1184 n.2.

134. 974 F.2d 246 (2d Cir. 1992).

135. *Zackson*, 12 F.3d at 1184 (quoting *Eisen*, 974 F.2d at 262-63).

tion,<sup>136</sup> the Second Circuit reiterated in dicta the important language from *Eisen* that may help in identifying Rule 607 subterfuge.

#### D. *The Non-Hearsay Option*

It is important to note that just because a statement is not admissible under one of the Rules of Evidence does not mean that it is not admissible under an alternative Rule of Evidence.<sup>137</sup> An attorney should be aware that there are other alternatives to admitting the prior inconsistent statements under the Rules of Evidence. The general preclusion discussed thus far only arises when the witness is called solely for the purpose of impeaching him with prior inconsistent statements that would be otherwise inadmissible hearsay.<sup>138</sup> Consequently, if the prior inconsistent statement was otherwise admissible as substantive evidence of the truth of the matter asserted, then the impeachment would be entirely proper.<sup>139</sup> This could be accomplished if the prior inconsistent statement were introduced under Rule 801. Under Rule 801(d)(1)(A), a statement is not hearsay if it 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."<sup>140</sup> Statements admitted under this rule are definitional non-hearsay and can be used as substantive truth of the matter asserted. Thus, such prior inconsistent statements would not be subject to the general rule against abusing Rule 607.

### V. ALTERNATIVE OBJECTIONS TO IMPEACHMENT OF ONE'S OWN WITNESS THROUGH PRIOR INCONSISTENT STATEMENTS

#### A. *Prerequisites to the Admission of Extrinsic Proof*

An attorney should be aware of the limitations set forth in Alabama Rule of Evidence 613<sup>141</sup> as an alternative objection when an opponent impeaches its own witness extrinsically through prior inconsistent statements. In *Ritchie v. State*,<sup>142</sup> the court recognized that the prosecu-

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136. *Id.* at 1185.

137. *Contra Ex parte Lawrence*, 776 So. 2d 50, 51 (Ala. 2000).

138. 1 GAMBLE, *supra* note 3, § 165.01(6)(b).

139. *Id.* If the statement is admissible as either definitional nonhearsay or under some other exception to hearsay, then the present dilemma would not apply. *Id.* at n.4 (citing ALA. R. EVID. 801(d)(1)(A)).

140. ALA. R. EVID. 801(d)(1)(a).

141. Alabama Rule of Evidence 613(b) permits the admission of extrinsic evidence only after the witness has been properly confronted with the circumstances of the statement. 1 GAMBLE, *supra* note 3, § 157.01(1).

142. 763 So. 2d 992, 996 (Ala. Crim. App. 2000).

tion's intent in calling the witness was for an impermissible purpose under Rule 607 and alternatively recognized that impeachment through prior inconsistent statements may be further limited by Alabama Rule of Evidence 613(b).<sup>143</sup> The court stated that extrinsic evidence in the form of a prior inconsistent statement is inadmissible "unless the witness has been confronted with the circumstances of the statement with sufficient particularity to enable the witness to identify the statement and is afforded an opportunity to admit or to deny having made it."<sup>144</sup> The court noted that before calling the DHR worker as an impeachment witness, the defendant's wife was never asked about the inconsistent statement she made to the witness concerning her reason for telling her children to refrain from speaking to anybody when she was not present.<sup>145</sup> Thus, the defendant's wife had not been properly confronted with the circumstances of her statement to the DHR worker before the prosecution used extrinsic evidence to impeach her.

### B. Extrinsic Limitations

Earlier, this Comment dealt with the general rule against introducing extrinsic evidence to impeach a witness with prior inconsistent statements on a collateral matter.<sup>146</sup> The "collateral matter rule" is yet another objection that may be made in regard to a party who has attempted to use impeachment of its own witness as a subterfuge to get before the jury otherwise impermissible hearsay. The "collateral matter rule" logically fits in the cupboard of weapons that may be used to combat such impermissible use of Rule 607 because of the general nature of most situations involving improper use of 607. As discussed earlier, one of the telltale signs of 607 subterfuge is when a party calls a witness that gives no helpful testimony but instead only gives testimony solely for "set-up" purposes so that the calling party may impeach that witness.<sup>147</sup> Although the Alabama Court of Criminal Appeals did not recognize it in *Ritchie v. State*, the collateral matter rule would probably apply to the impeachment situation that occurred during that case.<sup>148</sup> The defendant's wife testified that the reason she told the DHR worker that she did not want her children to be questioned without her present was because she had observed similar cases on television where

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143. *Ritchie*, 763 So. 2d at 996.

144. *Id.* at 996 (quoting Ala. R. Evid. 613(b)). Alabama Rule of Evidence 613(b) is distinguishable from the corresponding Federal Rule of Evidence 613(b) in that the federal rule does not require that the witness be confronted with the circumstances of the statement before admitting extrinsic evidence of the prior inconsistent statement. 1 GAMBLE, *supra* note 3, § 157.01(1).

145. *Ritchie*, 763 So. 2d at 996; *see supra* text accompanying notes 77-85.

146. *See supra* Part III.B.

147. *See supra* text accompanying notes 89-91.

148. 763 So. 2d 992, 994 (Ala. Crim. App. 2000).



the police misled children while questioning them.<sup>149</sup> It appears from the opinion that the reason for the wife's instruction to the DHR worker had no relevance or materiality whatsoever other than to set up the contradiction by calling the DHR worker to impeach the witness.<sup>150</sup> Thus, under the collateral matter limitation on impeachment through extrinsic evidence, the prosecution should not have been permitted to impeach the defendant's wife extrinsically by offering the DHR worker to present prior inconsistent statements.<sup>151</sup> The collateral matter rule may apply to many subterfuge cases because if the sole purpose for calling a witness is to put otherwise impermissible hearsay in front of the jury, then it is likely that the testimony is irrelevant or immaterial in the case and is consequently collateral by nature.

## VI. OTHER TACTICS IN REMEDYING THE EFFECTS OF 607 SUBTERFUGE

### A. Alabama Rule of Evidence 403

Alabama courts have further emphasized that other objections or requests should be made when an opposing party impermissibly uses Rule 607.<sup>152</sup> The Alabama Court of Criminal Appeals in *Ritchie v. State* acknowledged that while a party's decision to call a witness is subject to a good faith standard under Rule 607, an opponent may always argue that the probative value of the evidence offered to impeach the witness is substantially outweighed by its prejudicial impact.<sup>153</sup> The underlying reason for objecting under Rule 403 is because the inconsistent statements may have the effect of misleading the jury in that they may have difficulty in confining the use of the statements to impeachment or credibility purposes only.<sup>154</sup>

### B. Alabama Rule of Evidence 105

When evidence is admissible for one purpose but is not admissible for another, the court, upon request in most cases, shall instruct the jury as to the limited scope for which the evidence is to be considered.<sup>155</sup> If an attorney objects to the impeachment of a party for subterfuge reasons and is overruled, the proper course of action is to request a Rule 105 limiting instruction so that the jury may be instructed that

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149. *Ritchie*, 763 So. 2d at 993.

150. *See id.*

151. *See id.*; see also 1 GAMBLE, *supra* note 3, § 156.01(1).

152. *Ritchie*, 763 So. 2d at 996.

153. *Id.* (citing ALA. R. EVID. 403).

154. *Id.* (citing *United States v. Webster*, 734 F.2d 1191, 1193 (1984)).

155. ALA. R. EVID. 105.

the prior inconsistent statements are only to be used for the purpose of assessing the witness's credibility and not for substantive purposes.<sup>156</sup> "A proper limiting instruction is deemed to cure the effects of a prejudicial remark made before a jury."<sup>157</sup>

## VII. CONCLUSION

On its face, Alabama Rule of Evidence 607 appears to be a rule of evidence with endless boundaries.<sup>158</sup> Although Rule 607 has no express limitations, both Alabama and federal courts have developed boundaries for the rule.<sup>159</sup> The Alabama Court of Criminal Appeals, in its few decisions addressing the issue of Rule 607 abuse, has relied heavily upon the federal good faith standard in determining whether a party may impeach its own witness.<sup>160</sup> Both Alabama and federal courts have provided us with factors to consider in making a determination as to whether a party has exercised good faith in impeaching its own witness.

Alabama courts, in adopting the federal standard of good faith, focus on the primary purpose of the party calling the witness. Although not expressed with this particular term, an underlying factor in making a good faith determination under Rule 607 in Alabama is a party's knowledge of the testimony they intend to elicit from a witness. In determining a party's "primary" purpose for calling a witness, courts may look to the prior knowledge of the calling party and how they intend to use the witness. A party's primary purpose may be evidenced by other factors as well. Most of these factors will be evidenced during the examination of the witness. One must determine whether a witness has been called in order to elicit helpful or constructive testimony for the party's case. Similarly, when a witness has "provided affirmative proof that [is] necessary to construct [a party's] case," courts have found evidence of good faith.<sup>161</sup> If a party calls a witness and knows that the witness will not provide any helpful testimony but instead was called solely for subterfuge purposes, then that party has not exercised good faith. This occurs when a party calls a witness merely to set up the sub-

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156. See *Burgin v. State*, 747 So. 2d 916, 921 (Ala. Crim. App. 1999). In *Burgin*, after the court repeatedly sustained objections to the prosecution's attempts to argue as substantive evidence of the defendant's guilt facts elicited in the impeachment of the witness, the trial court properly gave the jury a limiting instruction regarding the impeachment evidence. *Id.* at 921.

157. *Id.* (citing *Soriano v. State*, 527 So. 2d 1367 (Ala. Crim. App. 1988)).

158. 1 GAMBLE, *supra* note 3, § 165.01(a).

159. See *United States v. Zackson*, 12 F.3d 1178, 1184 (2d Cir. 1993); *United States v. Eisen*, 974 F.2d 246 (2d Cir. 1992); *Ritchie v. State*, 763 So. 2d 992 (Ala. Crim. App. 2000); *Smith v. State*, 745 So. 2d 922 (Ala. Crim. App. 1999); *Burgin v. State*, 747 So. 2d 916 (Ala. Crim. App. 1999).

160. See *Ritchie*, 763 So. 2d at 995-96; *Smith*, 745 So. 2d at 935-36; *Burgin*, 747 So. 2d at 918-21.

161. *Eisen*, 974 F.2d at 263.

terfuge and subsequently brings on an inconsistent statement in hope that the jury will confuse the difference between substantive evidence and impeachment evidence.

However, knowledge that a witness is merely reluctant to testify is not in itself evidence of lack of good faith.<sup>162</sup> If a party knows that a witness is reluctant to testify but still calls the witness to testify, this alone is not deemed to be in breach of the good faith duty. Many times, an attorney may be examining a witness with the intention of presenting helpful testimony for his case. If the witness then becomes hostile or the witness's credibility becomes an issue, impeachment is generally deemed permissible and the good faith standard is met because the primary purpose was not to introduce otherwise inadmissible evidence under the guise of impeachment. Similarly, in following this good faith standard, if a party knows that a witness will provide both favorable and unfavorable testimony, then they may impeach that portion of the testimony that is unfavorable to its case.<sup>163</sup>

A lawyer should not discount the historical elements of surprise and damage. Although such elements are no longer required after the adoption of Alabama Rule of Evidence 607, both may still be used as evidence in conjunction with the other factors discussed above, to make a good faith determination as to whether a party has either permissibly or impermissibly impeached its own witness under Rule 607.<sup>164</sup> For example, if a party has no knowledge that a witness will not provide helpful testimony on the stand, the surprise element would be met and the good faith standard would likewise be met.

Finally, in the event that one is unable to show that his opponent has impermissibly impeached his own witness, a lawyer should be cognizant of both the prerequisites and limitations of using extrinsic evidence to impeach a witness.<sup>165</sup> Likewise, Rules 403 and 105 are also available to remedy the effects of impermissible impeachment under Rule 607.<sup>166</sup>

*Lee Loftin Sheppard*

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162. *Burgin*, 747 So. 2d at 918-21.

163. *Eisen*, 974 F.2d at 262.

164. See generally *Ritchie*, 763 So. 2d at 995-96; *Smith*, 745 So. 2d at 935-36; *Burgin*, 747 So. 2d at 918-21.

165. See *supra* discussion Parts V.A and V.B.

166. See *supra* discussion Parts VI.A and VI.B.

