Appendix 1

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To: April Southwick

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Re: Supreme Court's Questions about the Judicial Council's Proposed Amendments to the Rules of Evidence

The memorandum responds to many of the questions raised by the Wisconsin Supreme Court regarding the proposed amendments to the Wisconsin Rules of Evidence, particularly those relating to impeachment. The meaning of "credibility" in evidence law is complicated, but I tried to keep the explanation succinct and focused on the court's questions. My hope is that this background may make the Judicial Council's and the court's task somewhat more straightforward.

What is "credibility"?

The term "credibility" is at the heart of the law of evidence, yet is nowhere defined in the Federal Rules of Evidence or the Wisconsin rules. The case law seldom discusses "credibility" because appellate review standards relegate it to "weight," a matter entrusted to the factfinder's discretion.

Credibility refers to whether we believe a witness. Witnesses are either correct (accurate) or incorrect (inaccurate). Often the concern is whether the witness is lying (a deliberate falsehood). A great deal of evidence law is consumed by fears of perjury. Nonetheless, accurate fact-finding is also jeopardized by a sincerely mistaken witness, which is likely more of a problem than false testimony.

When we believe testimony, we assume that the witness is sincerely describing a fact she accurately recalls and accurately perceived, using words (testimony) that accurately describe the memory. McCormick describes credibility's "components" in this way:

> Credibility depends on the witness's willingness to tell the truth and his ability to do so. In turn, his ability to tell the truth as to an event of which he purports to possess personal knowledge is the product of his physical and mental capacity, actual employment of the capacity to perceive, record and recollect, and his ability to narrate. Impeachment of a witness may be directed to one or more components of credibility. Thus the objective being pursued in any given situation may be to draw into question the accuracy of the witness's perception, recordation, recollection, narration, or sincerity.[1]

[1] McCormick on Evidence § 33 at 205, n. 5 (7th ed.). Prior editions used the same language.

Another leading evidence authority explains that "[a]ll testimonial evidence takes the form of an assertion that facts are as the witness claims them to be." The accuracy of testimony is a function of "four 'testimonial assumptions'" that are drawn when we believe a witness:

> These are (1) that the witness perceived the fact, (2) that she accurately recalls her perception, (3) that she truthfully states her recollection, and (4) that she expresses her testimony in a way that permits it to be understood by the jury in the manner intended by the witness. Impeachment evidence calls into question the validity of one or more of these assumptions.[2]

In sum, we may reject testimony for two reasons. First, we may find that the witness is lying -- insincere. Second, we also reject testimony when we are unconvinced that a witness accurately perceived an event, accurately remembers it, and is accurately describing that memory in her testimony, despite her sincerity (the honestly mistaken witness).

Both authorities quoted above link impeachment to the four testimonial assumptions. Put differently, impeachment is how we evaluate whether the testimony passes all four testimonial assumptions. Wisconsin follows the federal and common law of evidence by recognizing five modes of impeachment. These "five main lines of attack on the credibility of a witness," drawn from McCormick, are described in *Rogers v. State*:

> 1. Proof that the witness made prior statements inconsistent with his present testimony;
> 2. An "attack" showing the witness is biased;
> 3. An "attack upon the character of the witness" [see below];
> 4. A showing that the witness has a defect in his capacity to observe, remember, or recount [narrate] the matters testified about; and
> 5. Impeachment by contradiction, that is, "proof by other witnesses that the material facts are otherwise than as testified to by the witness under attack."[3]

The third line of impeaching attack focuses on the witness's "truthful character." It is not a broad license to impeach based on other kinds of character defects. *See Rogers*, 93 Wis.2d at 690-91 (construing Wis. Stats. § 906.08, held that a witness's failure to appear at several earlier trial dates had no bearing on his "truthful character" or any other form of credibility impeachment; thus, the trial court properly excluded it).

To be sure the concept of "truthful character" and the four testimonial assumptions rest on a peculiar epistemology that is hotly contested by modern social and psychological science, yet they have formed the core of evidence law since the nineteenth century. They are also

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[2] 27 Wright & Gold, Federal Practice and Procedure: Evidence § 6092 at 593. For more of this from a different co-author of the same treatise, see 22 Wright and K. Graham, Federal Practice and Procedure § 5177 at 894 and 898 (2012).

[3] Rogers v. State, 93, Wis.2d 682, 689, 287 N.W.2d 774 (1979), quoting McCormick on Evidence § 33 (2d ed. 1972). The current edition is the same. McCormick on Evidence § 33 at 205 (7th ed.) (reviewing the "five main modes of attack on a witness's credibility").

broadly consistent with popular notions about how the "mind" works.[4] People observe, people remember, and people describe what they recall; and sometimes people lie about it.

The "five main lines of attack" on credibility focus on the testimonial assumptions. Some impeaching attacks, depending on the facts, may be used to show that a witness is either lying or mistaken – in either event, the testimony is wrong. The ambidextrous forms of impeachment are:

- Prior inconsistent statements: when a witness's testimony is at "material variance" with his prior statements, we may conclude his testimony is a lie because "he changed his story" or that he is sincere yet mistaken (e.g., he's unsure of what happened, as evidenced by his shifting accounts).

- Contradiction: when Witness #1 is flatly contradicted by a more credible (believable) Witness #2, we may conclude that Witness #1 is either lying or that he is honest yet mistaken. In either event, Witness #1 is wrong about what happened.

- Bias and interest: when a witness has a bias or interest, it may motivate her to lie (parents protecting their children) or may act on a subconscious level, affecting the accuracy of her perceptions, memories, or word choice when testifying. "We see what we want to see."

The other two forms of impeachment are more focused. A defect in a witness's testimonial capacity (e.g., bad eyesight, poor hearing, limited verbal skills, cognitive deficits), whether organic or induced by alcohol or drugs, is relevant to show that an honest witness is nonetheless mistaken. Defects in testimonial capacity center on mistakes in perception, memory, and narration. Such attacks have no bearing on a witness's sincerity.

Conversely, an attack on a witness's truthful character is narrowly focused on sincerity; it is irrelevant to the accuracy of a witness's perception, memory, or narration. Proof that a witness has an untruthful character is relevant to show that the witness is lying. Put baldly, Witness #1 is a liar and his testimony is a lie. Although propensity inferences drawn from character are generally forbidden, Wis. Stat. § 904.04(1)(c) explicitly permits "[e]vidence of the character of a witness" as provided by § 906.06 and 906.09. Federal law is in accord.

Proposed amendment to Wis. Stat. § 906.08

This is an excellent revision that conforms to current Fed. R. Evid. 608(b). It clarifies that the "specific instances" contemplated by § 906.08(2) must be relevant to a witness's character for truthfulness, as this court held in *Rogers v. State, supra*. Put differently, it does not permit more broadly based "bad character" attacks that invite unfair prejudice, confusion, and waste a court's time. The specific instances are prior acts of deceit and dishonesty. Case law requires that lawyers have a good faith basis for asking such questions and give trial judges discretion to exclude deceitful acts that are remote in time or of marginal probative value.

[4] For more than you need to know on this, see Blinka, *Why Modern Evidence Law Lacks Credibility*, 58 Buffalo L. Rev. 357 (2010).

Regardless, extrinsic evidence (i.e., testimony by other witness) of the specific instance is not admissible under § 906.08(2).

Proposed amendment to Wis. Stat. § 906.09

Every jurisdiction permits the use of prior criminal convictions to impeach a witness's character for truthfulness. The procedures, however, vary dramatically. Wisconsin law wisely permits only the "fact" and "number" of prior convictions for impeachment purposes. The proposed rule helpfully describes the procedures required by case law interpreting Wis. Stat. § 906.09.

The rationale, never empirically tested but colorfully explained by Oliver Wendell Holmes, is that a criminal record reveals a "general readiness to do evil" from which one infers both a "readiness to lie" and, finally, that "he has lied in fact."[5] Put differently, convicted criminals lack respect for law and are less likely to take their oath as witnesses seriously. The prior convictions are only relevant to their character for truthfulness under § 906.09. The same holds for juvenile adjudications.

It is suggested that the proposed amendment substitute the phrase "character for truthfulness" for the term "credibility" in proposed § 906.09(1) in both instances where it appears. It is also suggested that in proposed § 906.09(2) the phrase "for impeachment purposes" be replaced by "for purpose of attacking a witness's truthful character." Several reasons support the changes. First, § 906.09 is limited to a witness's truthful character; the prior convictions may not be used for any other inference regardless. Second, the changes would helpfully harmonize § 906.09 with proposed § 906.08. Third, the language would conform to current Fed. R. Evid. 609(a), which also helpfully substituted the phrase "character for truthfulness" for the term "credibility." The federal amendment has been in effect since 2006.[6]

To be sure, a witness's prior criminal convictions may be relevant for *other* purposes. They may be admissible as "other act" evidence, as provided by § 904.04(2). Or they could be relevant to credibility under a different theory of admissibility. For example, the defense might contend that a prosecution witness with a long criminal record is biased because he fears revocation, additional charges, etc. The burden is on the proponent to convince the trial judge that the prior convictions are admissible under these other theories. The present point is that § 906.09 is narrowly limited to the witness's truthful character.[7] It should say so.

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[5] Gertz v. Ritchburg RR Co., 137 Mass 77, 78 (1884) (Holmes, J.)

[6] Oddly, Fed. R. Evid. 609(d) retained the term "credibility" for purposes of its approach to juvenile adjudications.

[7] See Fed. R. Evid. 609 advisory committee's note (2006 amendment) ("The amendment also substitutes the term "character for truthfulness" for the term "credibility" in the first sentence of the Rule. The limitations of Rule 609 are not applicable if a conviction is admitted for a purpose other than to prove the witness's character for untruthfulness. The use of the term "credibility" in subdivision (d) is retained, however, as that subdivision is intended to govern the use of a juvenile adjudication for any type of impeachment.") (citation omitted).

Proposed bias impeachment rule

The proposed rule has the virtue of brevity. It is identical to Uniform Rule of Evidence 616. Minnesota adopted this rule in 1989 along with a comment that is very similar in content to the proposed Judicial Council Committee Note, which is excellent. Candidly, my instincts are to plug in rule language reaffirming that bias may be explored on cross-examination and proven by extrinsic evidence, subject to § 904.03 and § 906.11, but why over-engineer an otherwise good rule? Minnesota has had no apparent difficulties. The Judicial Council Committee Note accurately explains that bias is not a "collateral" issue and may be established by extrinsic evidence.

The proposed bias rule appropriately uses the term "credibility." The bias or interest of a witness may be relevant to prove the witness is lying or mistaken. Bias is not narrowly focused on truthful character, unlike § 906.08 and § 906.09. A witness's bias may induce mistakes as well as lies. For example, experts who earn substantial income by testifying may well be induced to shade their opinions to earn a fee. Whether the shaded testimony is a fabricated opinion (lie) or a subconscious overstatement (honest but mistaken), the witness's financial stake is relevant to his or her credibility. The same holds for personal relationships and emotions. Juries are well-positioned to sort out these issues.

Nothing in the proposed rule rolls back the case law giving parties wide latitude to explore a witness's bias or interest on cross-examination and to introduce extrinsic evidence to prove the bias or interest. The proposed rule is consistent with *State v. Williamson,* 84 Wis.2d 370, 383, 267 N.W.2d 337 (1978) and dozens of other cases. Yet wide latitude has never been equated to free rein. A trial judge has authority to curb cross-examinations and regulate extrinsic evidence to avoid witness harassment, confusion, and "waste of time." Wisconsin case law has long held that "[r]elevant evidence of the issue of bias must also satisfy § 904.03." *Williamson*, 84 Wis.2d at 384. Minnesota and Indiana, which have similar rules, follow the same tack.[8]

Finally, and while the subject is before the Judicial Council and the court, some jurisdictions permit the use of extrinsic evidence to prove bias or interest only when the "target" witness was given an opportunity to explain or deny it. This parallels the procedure for introducing extrinsic evidence of a witness's prior statements, as provided by Wis. Stat. § 906.13. Nothing in Wisconsin case law suggests that such a change is needed or even desirable for bias impeachment. Indeed, problems raised by § 906.13 strongly weigh against imposing it here, absent some compelling reason. *State v. Nelis*, 2007 WI 58, ¶34, 300 Wis.2d 415, 733 N.W.2d 691; *State v. Morales-Pedrosa*, 2016 WI App 38, ¶33, ¶38, __ Wis.2d __, 879 N.W.2d 772 (relying on *Nelis* and grappling with whether the record showed that the witness could have been "fairly readily" recalled to the stand). Neither the Indiana nor the Minnesota bias rules require such a procedure.

Other changes involving "credibility"?

The court asked whether there may by other places in the rules where the term "credibility" needs to be reassessed. Here are my thoughts:

[8] See Miller, Indiana Evidence § 616.01 at 1052 (4th ed.).

- Wis. Stat. § 906.08(3): Consistent with the recommended changes to § 906.08(1) and (2), as well as § 906.09, the term "credibility" should be replaced by the phrase "character for truthfulness."

- Wis. Stats. § 906.07 and 906.10: the term "credibility" is used appropriately.