

Impeachment Cobbler

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Impeach *v.*—1. to charge with wrongdoing; 2. accuse; 3. to cast doubt on; 4. call in question

Cobbler *n.*—1. A fruit pie baked in a deep dish, usually with a crust only on the top; 2. a clumsy, bungling workman

One of my absolute favorite things in the whole wide world is a well-made cobbler. But, anyone who has ever made a cobbler will tell you that it is not particularly easy. The art of making a good cobbler depends on ingredients and proper baking. The fruit mix has to be perfect for baking. The baking has to be perfect or the crust is underdone. But, if you are trying to make the crust crispy you run the risk of overcooking the filling and rubber ensues. These are the things that keep me up at nights.

So, good impeachment is much like a fruit cobbler. It can be really good if done right. Or, it can suck to no end if it isn't steeped well enough. Like a badly cooked cobbler, you might get a taste but it won't satisfy your dessert needs. There are various forms of impeachment that not only get your point across relating to a witness's penchant for lying. But, if done with the right amount of histrionics and vitriol, it can become a *coup de grace*¹ in the middle of the government's case.

PRELIMINARIAS²

I. 'Restyled' Federal Rules of Evidence

Effective December 1, 2011, the Federal Rules of Evidence have been 'restyled.' Somewhere along the way someone must have thought that the FRE looked a little dated and needed a stylist. So, over the course of many meetings the FRE went through a reconnoitering

¹I just now realized that I have used three SAT words in this one sentence. It's only because I am getting really excited. If you don't get excited at the prospect of impeaching a cop or cooperating witness, you might not be alive.

²My exotic word for 'Preliminaries.' I just thought it sounded cooler.

and what emerged from that examination was that the Rules needed some sort of simplification.

And, simplification was the order of the day. So, while nothing really substantive has changed regarding the rules and their numbers, some of the wording and outlining of the rules has changed. The bottom line: Re-check all of your boilerplate motions and briefs to make sure that you have the correct citation.

WOSSAMOTTA U?

BIAS, DEFECTS IN CAPACITY, AND CONTRADICTION

FRE 607. WHO MAY IMPEACH

Anyone can impeach any witness. There are three techniques that are not specifically addressed by the Rules that are generally considered worthy impeachment: bias, defects in capacity, and contradiction.

BIAS

Bias is probably one of the easiest impeachment modes available. Witnesses often have different biases: plea agreements, 5ks, job concerns, lovers, etc.

DEFECTS IN CAPACITY

Drug or alcohol use might impair a person's ability to recall or relate events properly. Try to make sure that the use of the intoxicant is at or near the time that the events were allegedly perceived. This has the ability to further besmirch the government's case by introducing evidence that a star witness is full of shit because he was so high on drugs that he couldn't possibly know who was in the conspiracy and who wasn't. And, only now, only after being presented with the opportunity to cooperate does his memory seem so fresh and crisp.

CONTRADICTION

Only in law school did I ever hear the objection "Impeachment on a collateral matter." I have yet to hear that objection while in practice. But, the thinking goes like this: If a person gives a statement in testimony different from what someone else has said / will say, this contradiction *if it relates to a matter that is relevant to a part of the case*, can be substantive evidence.

For example, you can introduce evidence from a teller that will testify that the bank robber was not your client versus the one the government called to say that the robber was your client. This would be substantive evidence of the identification of the robber. Not only is it impeachment, but it is also substantive evidence.

If, however, the main teller mis-testifies that she was wearing a red dress versus what her co-worker will say (that she was wearing a blue dress) this is likely impeachment on a collateral matter which will likely be disallowed. However, as a litigator you should tie everything back to either a bias or an ability to perceive. In a bank robbery, for example, the difference in testimony could be because of the fear that the teller felt which could have affected the teller's ability to perceive. That is, if the teller was so scared that they couldn't remember what they were wearing (a fact that they had tons of time to experience) how could they make such a quick identification under the same circumstances (e.g., fright)?

‘IT IS WHAT IT IS’ ISN’T WHAT IT IS.

Why the heck did I include Federal Rule of Evidence 404 in a paper dealing with impeachment. Isn't FRE 404 a tool that the government uses to shaft our clients?

True, but there is way more to FRE 404 than just the government's use of FRE 404. Only by understanding FRE 404 do we truly realize that the rule can be used by BOTH sides. And, by using it offensively, FRE 404 can become an incredibly forceful tool in your arsenal. So how does FRE 404 work?

FRE 404 (a), (b). Character evidence. Character evidence is not admissible for the purpose of proving action in conformity with that character.

Example: Johnny has been known to do drugs. At his trial for distribution of drugs, the government wants to elicit testimony of his drug use.
OBJECTION. Improper character evidence.

FRE 404(b). Other crimes, wrongs, or acts can be used for some other purpose (e.g., motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, provided that advance, reasonable notice is given by the prosecution, after requested by the accused of the general nature of any such evidence.

Example: Same as above, except this time the prosecution seeks to admit evidence of drug use to show motive for the current offense. Johnny has a drug habit to support. He needs to sell to keep on buying. This is probably admissible, provided advance notice was given in due order. Damn.

1. Preserving the character evidence objection.
 - a. If you believe one of your cases is going to trial, request notice of the government's potential use of 404(b) evidence.
 - b. File a motion in limine to keep the evidence out.
 - c. Assuming your motion in limine is denied or taken under advisement, ask that the prosecution approach the bench before it intends to pursue this line of questioning.³

³Your justification for the request is well-founded. Even the mere asking of other wrongs evidence will hurt your client. And, you will compound the problem by having to object to the

- d. Object when the line of questioning begins.
- e. Request of the Court (probably best outside the hearing of the jury) an explanation from the proponent of the purpose for the introduction of such evidence.
- f. If the explanation isn't very good, object to the evidence on the grounds that the proponent did not give sufficient specificity under which the judge can undertake its mandated balancing test. Remember, in the Fifth Circuit, the other bad act must be relevant to an issue other than the defendant's character AND the evidence must possess probative value which is not outweighed by undue prejudice. *United States v. Beechum*, 582 F.2d 898, 911 (5th Cir. 1978)(en banc); *United States v. Duffaut*, 314 F.3d 203 (5th Cir. 2002).
- g. If the judge still allows the evidence, ask for a limiting instruction. If you don't believe that the limiting instruction is good enough, ask for a mistrial, stating that the instruction has not cured the inference of improper character evidence and conforming behavior.

2. OFFENSIVE USE OF FRE 404(b).

- a. Anyone who has ever fallen victim to FRE 404b knows that really raw feeling of injustice. It is not unlike a shank to the stomach. But, FRE 404(b) isn't intended to only give the defense a headache. We have the potential to use 404(b) in an offensive way. That is, there may be evidence we have of government witnesses that could be helpful in the presentation of our defense.

This is not a hypothetical: A police officer posing to be a 14-year-old girl was found to have acted outside of the department boundaries with regard to contact of men, both minors and adults. In any case involving that government agent, you could use his disregard for department policy and potential illegal acts to show that he may have been too coercive or sought out the meeting when your client perhaps did not.

I PROPOSE THAT WE AS DEFENSE COUNSEL START A FILE FILLED WITH EACH BAD ACT OF EVERY AGENT WE COME IN CONTACT WITH. NO MATTER HOW INCONSEQUENTIAL IT MAY SOUND, BUILDING UP A FILE LIKE THIS MIGHT HELP ACHIEVE BETTER RESULTS IN OUR CASES.

question. It will look like you have something to hide.

- b. If you have developed what I call a ‘crap’ file on a certain government witness or agent, remember that you still need to come up with a purpose why the evidence you have is important to the case other than to show character evidence.

Example: A government cooperating witness is known to have attempted to bribe an officer with sex to avoid a DUI. While the DUI may not be an admissible 609 conviction, the bribe attempt might be admissible to show the person’s intent in attempting to avoid jail and the acts they would attempt to avoid it.

Example: A government agent is known to ‘party’ abundantly on weekends. That is, he loves the juice—alcohol. If he was drinking at or near the time of arrest, even if it was more remote than normal, this might be 404b evidence to show its affect on his ability to perceive, depending on the binge.⁴

What these examples highlight is that you have to do some investigative legwork. This information is not going to come to you in the discovery packet. Just as someone has at least one person in the world that truly loves them, they MUST also have someone in the world who truly hates them. Find that person and you unlock the mystery!

Remember that F.R.E. 404(b) is ripe for potential error. In a recent case, the Fifth Circuit put the reigns on the judge’s ability to allow other bad acts evidence. *United States v. Jones*, 484 F.3d 783 (5th Cir. 2007). The 404(b) process is slightly different from circuit to circuit. However, the process is remarkably similar, with mostly different language. *United States v. Varoudakis*, 233 F.3d 113 (1st Cir. 2000); *United States v. Downing*, 297 F.3d 52 (2nd Cir. 2002); *Becker v. ARCO Chemical Co.*, 207 F.3d 176 (3rd Cir. 2000); *Westfield Ins. Co. v. Harris*, 134 F.3d 608 (4th Cir. 1998); *United States v. Jenkins*, 345 F.3d 928 (6th Cir. 2003); *United States v. Knox*, 301 F.3d 616 (7th Cir. 2002); *United States v. Betterton*, 417 F.3d 826 (8th Cir. 2005); *United States v. Beckman*, 298 F.3d 788 (9th Cir. 2002); *United*

⁴As one who has been acquainted with the night (a Robert Frost reference), I know that a night-long party often results in effects long after the booze wears off. The key is, is your cop one who is acquainted with the night?

States v. Morris, 287 F.3d 985 (10th Cir. 2002), cert. denied, 536 U.S. 933, 122 S.Ct. 2612 (2002); *United States v. Lecroy*, 441 F.3d 914 (11th Cir. 2006).

SO YOU CAN'T SHOW CHARACTER IN CONFORMITY THEREWITH, HOW ABOUT CONDUCT IN CONFORMITY THEREWITH?

Character evidence can be one tool for impeaching any witness. But, their own patterns and behaviors can be modes of impeaching as well. If you have evidence of the regular habit of a person or an organization, that might be used to attack testimony already given.

FRE 406. Habit; Routine

- A. Evidence of the habit of a person/routine of an organization...is relevant to prove that the conduct on a particular occasion was in conformity with the habit or routine practice.

Example: Let's say that it is the routine of a drug organization to find individuals to act as drug mules who unwittingly move drugs for the organization. Introduction of this evidence would certainly help to show that your client was used by the organization to unwittingly move drugs this time.

The mode of presentation of evidence would be via specific instances of conduct or opinion, but there is no precise way that must be used to establish that pattern. Think: show the frequency of the behavior and the regularity of the behavior. Could a case agent help you establish this? Maybe. How about a cooperator who is now testifying? You need someone deep on the inside or someone who knows the inside.

Example: Let's say that the government wants to make hay out of certain of your client's behaviors. Like, for example, that he rented a posh hotel room while waiting to take a load of merchandise to its intended location. If you have a witness who can testify that the behavior witnessed is routine, it might break the government's stranglehold over its 'version' of the truth.

IT'S NOT WHO YOU KNOW, IT'S WHO KNOWS YOU. REALLY.

I like to call this rule reverse-impeachment. In a case in which truthfulness of your client is not an essential argument, you can put the matter in issue by calling a flock of witnesses that can either attest to your clients truthful or law-abiding character. Oftentimes the government's case turns on circumstantial evidence of guilt through obviously incorrect, misleading, or changed statements given by your clients. So, I've included FRE 405 to teeter the balance of power back towards your client in an effort to rehabilitate without your client hitting the stand.

FRE 405. CHARACTER EVIDENCE THAT MIGHT HELP YOU

- A. A side can put their client's character in issue by proving evidence of good character, law abidingness, truthfulness/veracity, or honesty or integrity. Where character is not an element of a charge, claim, or defense, a side can still present evidence of these aspects of a person's character by reputation or opinion evidence only and not specific acts of conduct. FRE 404(a), 405(a), (b).
 - 1. Let's say you have that rare circumstance where your client has no criminal history and is otherwise law-abiding. It would not kill you to present a witness to testify to that. First, it helps in front of the jury. Second, you get an instruction on it. See Fifth Circuit Pattern Jury Instruction No. 1.09. Moreover, if you have a client who is testifying, bring in a character witness to talk about their honesty and truthfulness. Remember you can only prove this by reputation or opinion where that character trait is not in issue.
 - A. Where character is an essential element of the offense, claim, or defense, specific instances of conduct can be elicited.
 - 2. REPUTATION. Witness must have sufficient familiarity with the defendant to be able to express an be able to address the person's reputation. For example, the witness should know the community where he lives and works, and the circles in which he has moved to be able to speak with authority about that person's reputation.
 - 3. OPINION. As long as the person has sufficient familiarity with the defendant, they can testify to their known traits.
- B. Specific instances of conduct can be relied upon on cross examination to test a person's opinion and/or reputation evidence.

1. For example, Johnny's lawyer calls Johnny's mother to the stand. She testifies that she has known Johnny all of his life, knows the circles he runs in, and knows the community in which he has lived and/or worked. She testifies that he has a good reputation for law-abidingness. On cross-examination, the prosecutor asks, "Mam, did you know that Johnny was arrested for rape?" Since Johnny is on trial for drug running, the rape has little or nothing to do with drug running, your objection should so state. And, incidently, you should move for a mistrial.
 - a. There are two important limitations upon judicial discretion in terms of cross-examination in terms of reputation and opinion testimony: there must be a good faith basis for the question and the incidents inquired about have to be relevant to the character traits involved at trial.

FRE 608. CHARACTER AND CONDUCT OF A WITNESS THAT CAN BE A BITCH FOR THE GOVERNMENT....

1. Opinion and reputation evidence of a witness's character for truthfulness. Let's say you have snitch on the stand and he gives damaging testimony. The beauty of snitches is that they usually aren't really clean characters. They have baggage and many, many skeletons in the closet. Chances are, there is somebody this snitch has double-crossed, lied to, bamboozled, etc. Find that person and have them testify as to the snitch's character for truthfulness (READ: LACK OF TRUTHFULNESS.) Lay the foundation for the basis of the person knowing either the reputation of the snitch or where the opinion comes from. In either regard, the person should have sufficient background information on the snitch, as well as familiarity with him and the community he runs in to give reputation and/or opinion testimony.
2. Specific Instances of Conduct. Instead, let's say that you have information that the snitch used to use an alias. You can inquire about that specific instance of conduct but CANNOT present extrinsic evidence of that conduct. But, through the pace and detail of your cross-examination, you can make the specific instance seem undeniable.

COUNSEL: Isn't it true, Mr. Snitch, that on at least twelve (whatever #) of occasions you used a fake name?

Are you saying that in 1998 you didn't use the name John Doe when you applied for a unemployment benefits?

Are you telling this jury that the year following that incident you didn't use the name James Roe to get a car loan?

You didn't use the name John Loe in 1999?

You didn't use the name Larry Schmo in 2000?

[At this point, counsel should appear to have a stack of documents all purporting to be witness's aliases]

Didn't you use those names to appear as someone else?

To avoid using your true identity?

On one such occasion in 1998, you used that false name to avoid trouble with the police?

The only downside of this type of inquiry (ie, into specific acts of conduct) is that you are stuck with the answer. So if a person consistently answers in the negative, you can't prove up the opposite through extrinsic evidence. BUT, what if there exists in the world a person familiar with the aliases that this person has used. Can this person testify to either the reputation of the person for using false names? Can this person give their opinion about the truthfulness of the witness? Hell followed by yes.

Now, a powerful weapon in your arsenal would be a combination of the two approaches. That is, get a witness to testify to the snitch's reputation and a specific instance of conduct. Make sure the witness is squeaky clean and otherwise untouchable.

...OR SOMETIMES A WITNESS IS HIS VERY OWN WORST CHARACTER WITNESS

FRE 609. Impeachment by Evidence of a Criminal Conviction.

- A. For the purpose of attacking the truthfulness of a witness other than the accused for conviction for a crime punishable by death or imprisonment in excess of one year subject to FRE 403. Or, if the person was convicted of a crime with cognizable elements involving dishonesty or false statements. There is a ten year time limit on this type of evidence (from the date of conviction or the date of release from imprisonment, whichever is later).

However, even if the conviction is too old, a court can still consider admitting evidence of it if the offering party gives sufficient advance notice of use of the evidence.

FOR COOPERATORS: GET THEIR OLD PSRs FROM THE PROSECUTOR, IF NEED BE. REMEMBER THAT THEIR STATEMENTS ABOUT THE PRE-SENTENCE REPORT BEING ERROR-FREE IS AN ADMISSION THAT YOU CAN USE IN THE EVENT THAT THEY TRY TO WEASEL OUT.

...OH WHAT A TANGLED WEB WE WEAVE WHEN FIRST WE WE PRACTICE TO DECEIVE....

FRE 613. PRIOR STATEMENTS OF WITNESSES

1. Sometimes you hear a government witness is testifying different than other previous statements that they have made. The best case scenario involves sworn testimony given by a witness which is different from sworn testimony given in a different proceeding, deposition, etc. Under FRE 801(d)(1)(a) this prior statement, since it meets the burden for allowable hearsay, is substantive evidence. If, on the other hand, a person makes a prior inconsistent statement which is not sworn, that inconsistency is not considered substantive evidence (ie, it is not admitted to prove the truth of the matter asserted), it is considered merely impeachment.
2. Requirements for impeaching a witness with a prior inconsistent statement
 - A. The witness must be afforded an opportunity to explain or deny the inconsistency; and
 - B. The opposing party must be afforded the opportunity to question about the statement.

For example: Louie, Johnny's co-defendant, testifies at trial that Johnny was involved in this conspiracy. Unfortunately for the government, at the time of Louie's arrest, Louie said Johnny was not involved.

LOUIE: Johnny was involved.

AUSA: Pass the witness.

COUNSEL: Louie, didn't you tell the DEA on the day you were arrested that Johnny wasn't involved?

LOUIE: No.

- C. Since the witness was afforded an opportunity to explain or deny, evidence that he made statements inconsistent with his trial testimony can be admitted for the purpose of impeachment. It can be introduced through the person who heard the statement.
- D. Let's say that one of your witnesses has been impeached in the manner listed above, but you are aware of prior consistent statements that corroborate the statement he/she made in court oryou can rehabilitate.

1. On re-direct, bring out the other prior consistent statements to rebut the claim of recent fabrication or undue influence. The only caveat: The prior consistent statements need to have been made before the recent fabrication made or the undue influence exerted.

EXPERTS—N. PEOPLE WHO KNOW MORE AND MORE ABOUT LESS AND LESS

One of the most fruitful areas for impeachment can be in the areas of expert, specialized, or technical testimony. While it is truly best to try to keep the information out, ultimately a court will probably allow the testimony. This means that this testimony **MUST** be challenged either on cross examination or in your presentation of the case with your own expert.

FRE 702. SCIENTIFIC EVIDENCE

1. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify in the form of an opinion, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.
2. FRE 702 was amended in 2000 to codify the principles discussed in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 US 579 (1993).
3. If the testimony's factual basis, data, principles, methods, or application are called sufficiently into question, the trial judge must act as gatekeeper to determine whether the testimony has a reliable basis in the knowledge and experience of the discipline. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).
4. Practically speaking, we run into several uses of so-called expert testimony in our cases:
 - A. Opinion about whether a quantity of drugs was for distribution or personal use;
 - B. Opinion about the value of drugs as they make their travel from outside of the United States to the interior of the United States; and
 - C. Opinion about common drug courier conduct.
5. Consider a distinction between opinions made about general criminal practices and knowledge of the particular defendant's mental processes. If an opinion is based on what the "expert" knows about how the defendant thinks or has said this might be prohibited. *See United States v. Mendoza-Medina*, 346 F.3d 121, 125 (5th Cir. 2003)(condemning expert testimony that comes too close to the use of evidentiary profiling).

6. An expert may not testify with respect to mental state or condition that a certain person did or did not have the requisite mental state constituting an element of the offense. FRE 704(b). This might come up in drug courier cases where an ‘expert’ opinion is given about someone’s knowledge of the presence of drugs, for example.
7. If the government’s expert is testifying to a matter that requires your cross-examination of that witness with a learned treatise in the area and the witness will not hold it out as a learned treatise AND YOUR EXPERT WILL, you can ask the judge to interrupt the flow of the testimony, allow you to call your expert, introduce the learned treatise, then recall the government’s witness and question them with the treatise now that it is in evidence. FRE 803(18), FRE 106, FRE 611(a).

PRACTICE TIP: For some reason agents of the government (ie, ICE, DEA, Border Patrol, etc.) have this belief that they are God’s gift to the world and that they are omniscient. For example, in large-scale drug operations involving tractor trailers, they will attempt to opine that certain trucking practices are irregular, uncommon, or out of the ordinary. Of course, this is in an attempt to cast a devilish eye on your client’s trucking behaviors. However, as one political strategist once said, “The higher a monkey climbs on the pole, the more you can see his butt.” This means that each time they try to take a walk down a path they don’t know, you have a great opportunity to knock ‘em down.

Example:

AUSA: Is driving without a driver log unusual?

DEFENSE: Objection. Foundation.

COURT: Overruled.

AGENT: Yes. It is very unusual.

AUSA: Pass the witness.

DEFENSE: Sir, you have never worked as a truck driver, right?
You work as an agent for the government
Your experience is not in truck driving
You have never filled out a driver log
You have never been audited for having to fill out a driver log
You have never had experience in driver log training

You have never filled out a driver log, right?

You can't cite a rule which tells drivers when to keep logs, right?

By engaging this cross-examination, it will show that the witness really doesn't have much expertise at all from which to speak. In fact, it might be that the only person with such expertise would be your client. Your closing might go like this:

Folks, you heard the agent say that he thought it was unusual for drivers to drive without driver logs. But then we learn that he hasn't spent one second as a truck driver. He doesn't know, but he did stay at a Holiday Inn Express last night. You and I would never rely on this type of so-called testimony. Would you consider going to have surgery from someone who claims expertise because he watches the Discovery Channel? Of course not. That would be crazy. You wouldn't get your car fixed by someone who is not a mechanic. That would be crazy. Just as crazy as it is to believe the testimony of the agent here.

YOU DON'T HAVE TO BE A STAR, BABY, TO GET CLOBBERED ABOUT THE HEAD!

FRE 806. Attacking and Supporting the Credibility of a Declarant

1. When a hearsay statement (or a statement defined in FRE 801(d)(2)(C), (D), or (E)) is admitted in evidence, the declarant's credibility can be attacked as if the declarant had testified in court.
 - A. In cases where co-conspirators have made statements that are admitted in evidence, you can use FRE 806 to attack that declarant's credibility, even if they never hit the stand. This might come in very handy where you need to attack damaging statements made by non-testifying people.

BUT (and a very big but...) the same thing can be done against your client if you ask questions about statements that your client made. So, the moral of the story is, make sure your client is clean before getting into evidence of any of his hearsay.

DON'T DO ALL THAT HARD WORK ONLY TO SCREW IT UP LATER!

VIII. OPENING THE DOOR

- A. Opening the door to bad evidence is one of the mortal sins⁵ of criminal defense practice. It is the type of sin that will earn you the disgrace of the legal community. But, if your opponent begins any request for introduction of evidence by saying, "He opened the door" I would start tracing my footsteps. Often times we do things as lawyers because it makes sense in the scheme of our defense, but we unwittingly open the door to hell.

For example (real life story):

COUNSEL: Did you run any records checks on the defendant?

AGENT: Yes

COUNSEL: Did he have any criminal history?

AGENT: He had been arrested for burglary.

Now, the defense attorney knew that her client had never been convicted of anything. And, short of him taking the stand or her introduction of FRE 806-impeachable material, the arrest for burglary wasn't coming in. However, she did ask about criminal history. An arrest is criminal history. A good antidote to this is the practice of writing out your questions and checking them carefully for areas where you might have inadvertently opened the door. I have seen "opening the door" problems most often when an attorney is shooting from the hip or is conducting an examination off the cuff. This type of examination should be kept to a minimum since an open door is very hurtful.

- B. If a prosecutor begins to argue that you have opened the door, get ready for a fight.
1. Suggest that you have not opened the door to the prosecutor's inquiry.
 2. To the extent that you have opened the door, argue that there will be a great amount of prejudice to the defendant (FRE 403) in allowing the evidence.

⁵A mortal sin was thought to be of such a grave nature that to commit one would separate one from the grace of God. A venial sin, on the other hand, is one of a temporary nature, a temporary separation from the grace of God. According to Marina-Thais Douenat, an AFPD in my office, the highest sin is a cardinal sin, which is a violation of the Seven Deadly Sins. However, Douenat says, "Don't quote me on that...I am a fallen Catholic."

3. A risky way to help stem the tide of crap that is about to befall you is to request a limiting instruction that “(whatever the issue and evidence provided) be given no weight”
4. If the judge rules that you have opened the door, and is going to allow the prosecutor to make his inquiries, you should definitely re-direct to help rehabilitate your client/witness. Don't let them have the last word, take the sting out.

WHY MUST IT END THIS WAY?....

PROSECUTOR CLOSING ARGUMENTS THAT SUCK....AND ARE IMPROPER BECAUSE THEY ATTEMPT TO REHABILITATE YOUR IMPEACHMENT AT CLOSING.

“The United States Attorney ... is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.”

Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935).

A. During a trial we tend to relax when it comes to closing arguments. We figure that all the bad stuff that could happen has already happened. We figure as long as there are no other witnesses we can't possibly be hurt. WRONG! Perhaps the most dangerous actor is still in the courtroom and still very much ready and willing to cause your case harm. So, just when we want to relax that's when we should be the most vigilant. It usually happens on the rebuttal of the prosecutor's closing argument. Look at these examples of bad, and reversible, prosecutorial closing arguments:

1. Is there any point in them lying? Why would the agents do that? Why? They don't know him. They've got nothing to gain. They're risking their careers. They risk going to jail. For what? A person they don't even know? With a medium-sized load of drugs? What's the point in that?

The Defense attorney talks about this is a sad deal, a sad deal for Mr. Aguilar. Well, I agree with him it's a sad deal, but it's not a sad deal for Mr. Aguilar. It's a sad deal for this man right here and Ms. Minnick, people who go out there every day and do their job, that strive to be ethical. They strive to protect people like you and me. They put their life on the line, protecting us and our kids. And what do they get for it? They get to come into the courtroom and be called a liar. That's what they get for it. Big pat on the back, huh?

REVERSED FOR BOLSTERING

2. [There was a need] “to apologize to NOPD officers who wear bulletproof vests because they have to worry about getting shot at on the street and then they come in here in court and they get shot at again ... they get call[ed] liars.

**REVERSED FOR BEING AN EMOTIONAL APPEAL TO
BOLSTER OFFICERS' CREDIBILITY**

3. Talk about motive to lie, ladies and gentlemen. Who has the motive to lie here? The driver? No. He's working all around. Mr. Vasquez. No. He's in Laredo. He's not a permanent snitch. He's not one of those individuals that makes his living off providing information. He's provided it twice in the past. The agents? You're going to blame the agents for all this? Whose [*sic*] got the motive to lie here? It's the defendant, *and she's done so. She did so to these agents.*

**REVERSED FOR BEING A PROSECUTOR'S PERSONAL
OPINION WHERE DEFENDANT DID NOT TESTIFY**

These arguments illustrate a number of points:

1. We have to OBJECT! Plain error analysis is not usually on our side.
2. We have to pay very close attention!
3. The problems will usually arise in the prosecutor's rebuttal.