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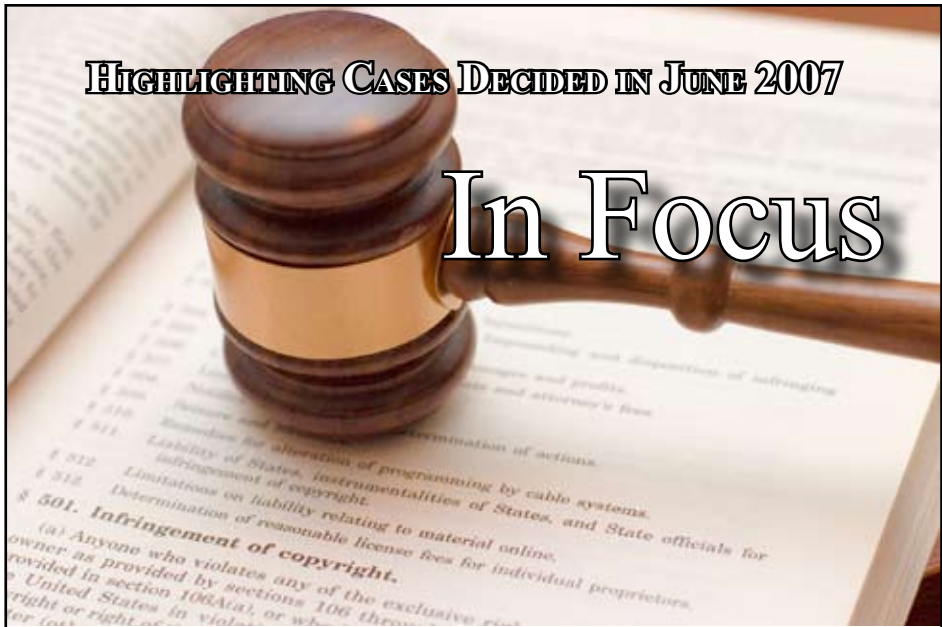
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• Cases reviewed	1041
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Material from the FEDERAL EVIDENCE REVIEW should be cited:

[Volume] FED. EVID. REV. [page number]
(Month Year)

Thus, 4 FED. EVID. REV. 40 (Jan. 2007) indicates volume three of the FEDERAL EVIDENCE REVIEW at page 40.

Page numbers in any volume of the REVIEW are consecutive from the first issue of that volume.

FEDERAL EVIDENCE REVIEW

(ISSN: 1556-5645)

Volume 4, Number 7 (July 2007)

Published monthly by FederalEvidence.com

P.O. Box 6883, Arlington, VA 22206-0883

Fax: (571) 312-5642

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Lead Story: The General Bar Against Using Guilt-Assuming Hypothetical Questions And Other Avenues To Question Character Witnesses

Guilt-assuming hypothetical questions of character witnesses, which query whether the witness's opinion would change if he or she learned that the defendant had committed the charged conduct, are prohibited in virtually every circuit. In *United States v. Jennings*, 487 F.3d 564 (8th Cir. 2007) (considered at p. 1010), the Eighth Circuit rejected a claim in an honest services fraud scheme trial that questions whether disclosure of a state legislator's financial interest in funding proposal would have affected commission approval constituted impermissible guilt-assuming hypothetical questions of a defense character witness. In other cases, the use of guilt-assuming hypothetical questions can result in reversal. This *Lead Story* explores the boundaries and bases for the rule prohibiting guilt-assuming hypothetical questions as well as other avenues that may be considered in cross-examining character witnesses.



wrong to distribute drugs.

Q: You are not in favor of distributing drugs, are you?

A: No, I'm not."

During cross-examination of the second character witness, the following exchange occurred:

Q: W]ould your opinion of Mr. Mason change if you knew he distributed drugs? [I]f you did, if that were, in fact, true, and this jury thought it was true, would your opinion of him change?

A: No, it wouldn't.

Q: Okay, you would still think he was an honest and good guy?

A: Yeah, I would."

United States v. Mason, 993 F.2d 406, 407-08 (4th Cir. 1993). On appeal, the Fourth Circuit held the guilt-assuming hypothetical questions were improper and reversed. What were the reasons for prohibiting this questioning in *Mason*? The *Mason* court noted that the questioning was not permitted under the rules of evidence and was inconsistent with "adherence to a basic concept of our justice system" and "the presumption of innocence." *Mason*, 993 F.2d at 409. For counsel seeking to avoid potential error, what alternative avenues may be pursued to challenge and test a character witness? These and other issues are explored below:

I. Overview

The scope of the bar against guilt-assuming hypothetical questions can be illustrated by considering the questions challenged in *United States v. Mason*, 993 F.2d 406, 407-08 (4th Cir. 1993). Defendant Mason was prosecuted for distributing cocaine base and for distributing cocaine base within 1,000 feet of a school. During his defense, he called a couple of character witnesses who testified that the defendant had a reputation in the community as "an honest and reliable person" and "enjoyed a good reputation." During cross-examination, the prosecutor asked one character witness:

Q: Would your opinion of Mr. Mason change if you knew that he distributed drugs?

A: My opinion would change.

Q: And in what way would it change?

A: Well, you know, I believe, you know, it is

II. Bases For Error

Initially, it is useful to understand why guilt-assuming hypothetical questions of character witnesses are prohibited. Four principal problems have been noted.

First, these questions assume factual guilt and undermine the presumption of innocence. See *United States v. Candelaria-Gonzalez*, 547 F.2d 291, 294 (5th Cir. 1977) ("Rather, the questions posed sought speculative



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<i>Wilburn v. Robinson</i> , 480 F.3d 1140, 1148 (D.C. Cir. 2007)	1040
<i>Williams v. Pharmacia, Inc.</i> , 137 F.3d 944, 950-51 (7th Cir. 1998)	1040
<i>Wilson v. Bradlees Of New England</i> , 250 F.3d 10, 20 (1st Cir. 2001)	991
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<i>Yates v. Rexton, Inc.</i> , 267 F.3d 793, 802 (8th Cir. 2001)	1040