

## IMPEACHMENT

### I. Typical Strategies:

#### A. General:

1. Attack the witness on the grounds that he has made a statement inconsistent with his present testimony or prior testimony;
2. Demonstrate the witness is biased in some respect;
  - a. family relationship;
  - b. hostility towards another party;
  - c. financial interest;
3. Attack the character of the witness;
4. Attack the capacity of the witness to appropriately observe, recollect, narrate;
5. Attack the witness through other witness testimony that the facts the witness is testifying to are incorrect;
6. Focus on certain factors that could consciously or unconsciously affect his testimony.
7. There are certain circumstances which, regardless of their relevance on the issue of credibility, are deemed relevant, by the Rules of Evidence. Prior Convictions.
8. Rule 806 allows the impeachment of a hearsay declarant.

#### B. Prior Bad Acts:

1. Rule 608(b)
2. Specific instances of conduct may be used to attack the credibility;

- a. At the discretion of the court, if probative of either truthfulness or untruthfulness, be inquired into during cross-examination of the witness.
  1. The character for truthfulness or untruthfulness,
  2. The character for truthfulness or untruthfulness of another witness.
  3. Rationale: If the witness has been untruthful, or has committed deceitful and bad acts in the past, the witness may now be willing also to lie on the witness stand.
  4. The facts are limited to those which have an adverse effect on the witness truthfulness.
  5. Those acts which bear on witness truthfulness are allowed under Federal Rule 608(b)

3. Elements:

- a. Demonstrate the witness committed the act;
- b. Demonstrate when the act was committed;
- c. Demonstrate where the act was committed;
- d. Demonstrate that the nature of the act reflects on the witness's credibility.

B. Character trait for Untruthfulness:

1. Purpose: If the witness has a character trait of untruthfulness, that increases the probability he is lying on the witness stand as he is merely conforming to his character trait.

2. Not limited to prior testimony, but extrinsic evidence can be used – prior witness, evidence, etc.

3. Look at the jurisdiction: the character of the witness can only describe the witness reputation for untruthfulness.

4. Elements:

a. Reputation Foundation:

1. The character witness is a member of the community as the witness being impeached;
2. The witness has resided in the community for a substantial period of time;
3. The witness being impeached has a reputation for untruthfulness;
4. The character witness knows the witness reputation for untruthfulness;
5. Some jurisdictions allow the character witness to add that knowing the witness reputation for untruthfulness

b. Opinion Foundation:

1. The character witness is acquired with the witness being impeached;
2. The character witness knows the witness being impeached well enough to form an opinion as to the witness testimony;
3. The character witness has formed an opinion as to the witness truthfulness;

4. The character witness has the opinion that the witness being impeached is an untruthful person;
5. Some jurisdictions allow the character witness, having rendered his opinion, to state whether he would believe the witness being impeached testifying under oath.

C. Tactics

1. 608(a)(1) allows the witness to be attacked or supported by evidence in the form of reputation;
2. To support truthfulness, the witness must first be attacked.
3. The rule expands the exception to 404(A). Character evidence can be introduced when bearing upon a party's credibility.
4. Character evidence – strictly used towards credibility;
5. If sought on any other issue, raise the following:
  - a. Object on the grounds that the evidence is inadmissible and not covered by Rule 608;
  - b. If evidence comes in, move to strike;
  - c. When you prepare a witness for direct exam, warn him not to raise the question of credibility inadvertently.
  - d. Have the witness introduce evidence on his own behalf from someone who can attest to his truthfulness and character.
6. REMEMBER:
  - a. 608(b) is a character impeachment rule – it does not deal with specific contradiction evidence.

b. Rule 608 (b) is not applicable in determining the admissibility of evidence introduced to impeach a witness testimony as to a material issue.

II. BIAS:

A. Bias affects a witness either consciously or unconsciously.

B. Before introducing evidence, you must introduce the foundation;

C. Extrinsic Evidence:

1. Foundational Questions:

a. An event occurred;

b. Where the event occurred;

c. When the event occurred;

d. Which persons were present;

e. What events occurred;

f. The fact, event relationship, will tend to bias the witness;

g. If the witness denies the claim or facts of bias, extrinsic evidence may be introduced to prove bias.

III. PRIOR INCONSISTENT STATEMENT:

A. Any prior inconsistency on the part of a witness is relevant to impeach credibility.

B. The inconsistency may impeach the witness sincerity, memory or both.

C. Rule 613 (a) – witness's statement.

D. Rule 613 (b) – extrinsic evidence- new approach and now do not allow such an introduction;

E. Elements:

a. Commit the witness to the inconsistent statement;

b. Demonstrate that the witness made the statement in a certain place;

- c. Demonstrate that the witness made the statement at a certain time;
- d. Identify any persons present;
- e. Demonstrate the substance and tenor of the statement;
- f. Demonstrate that the prior statement is more likely to be reliable than the present statement because the closeness in time to the incident at issue.
- g. If the statement is written:
  - i. Show the writing to the witness if the jurisdiction requires it;
  - ii. Demonstrate that the writing is authentic;
- h. Extrinsic evidence of the prior inconsistent statement will be admissible to impeach the credibility of the witness.

C. UNCALLED WITNESS RULE:

- 1. “Empty Chair Defense:” the inference is the uncalled witness would have give testimony unfavorable to the party that would be expected to call him.
- 2. As a result, the uncalled witness in a way, impeaches that party’s case by allowing the trier of fact to draw an inference that had the witness testified, the testimony would be unfavorable.
- 3. Rule 302. Empty chair defense is not a true presumption.

D. IMPEACHMENT THROUGH OTHER WITNESS CONTRADICTION:

- 1. Two witnesses testify to separate acts separately.
- 2. 402/403 must be satisfied: