

§ 22:4 Impeaching the witness--Checklist

1. Impeachment is a special type of cross-examination that arises often, yet is often mishandled.
2. Impeachment is a destructive cross-examination technique, so it should follow constructive cross-examination.
3. Impeachment is the process of undermining the credibility of the witness, usually through several techniques:
 - (a) showing a prior inconsistent statement,
 - (b) showing bias for the opposing party, prejudice against counsel's party, or a personal or financial interest in the case,
 - (c) showing that the witness has been convicted of a crime, usually a felony,
 - (d) showing the witness' inability to observe, remember, or relate the facts testified to on direct,
 - (e) showing the witness has a poor reputation for truthfulness or that another witness has a negative opinion of the witness' truthfulness,
 - (f) showing the witness has committed specific acts tending to show a lack of truthfulness.
4. Some of these modes of impeachment are raised during cross-examination, and perhaps only then, while others may be raised through testimony by other witnesses or through other exhibits.
5. Any party may impeach a witness, including the party calling the witness.
6. Prior inconsistent statements:
 - (a) consult Fed. R. Evid. 613 (impeachment with a prior statement) and 801(d)(1) (admission of prior statements),
 - (b) in the context of impeaching a witness, the goal is to prove the witness has made an inconsistent statement, not to refresh the witness' recollection under Fed. R. Evid. 612,
 - (c) it is an inconsistent statement of this witness, not of someone else, that may form the basis for impeachment,
 - (d) if the inconsistency concerns a minor issue or the inconsistency between two positions would not be obvious or would be easily explained, consider foregoing the impeachment because it may have no effect,
 - (e) taking an inconsistent statement out of context is also dangerous,
 - (1) the impeachment will backfire if the context shows the inconsistency to be nonexistent or minor,
 - (2) the opponent is entitled to require counsel to introduce other parts of a writing, including a deposition, at the time of the impeachment, Fed. R. Evid. 106 (all writings and recorded statements) and Fed. R. Civ. P. 32(a)(4) (depositions),
 - (f) besides inconsistent statements, counsel may also impeach with:
 - (1) conduct, either action or inaction, contrary to a statement made in court,
 - (2) omissions, i.e., that if the testimony were correct, it would have been included in the prior statement,
 - (g) if the inconsistent statement has been made by a party, there is actually no need to raise it during cross-examination,
 - (1) this would only give the party a chance to explain the statement,
 - (2) the statement may be admitted as the admission of a party-opponent, Fed. R. Evid. 801(d)(2),
 - (3) the party must then explain the statement in its case,
 - (h) procedure:
 - (1) confirm the statement the witness is now testifying to, to show a clear contrast,

(2) consider asking the witness to deny the truth of facts contained in or the elements of the inconsistent statement, without revealing the inconsistent statement:

(aa) the object of this is to heighten the contrast between the witness' two positions, for example, if the witness has testified that he or she had a very good position from which to view the events, have the witness elaborate on this by confirming that the sky was clear and the sun not in the witness' eyes, then confront the witness with a statement in which he or she admitted to being far away and looking into the sun,

(3) ask the witness foundational questions to show that the prior statement was made or adopted by the witness:

(aa) with a document, have the witness authenticate the document or admit that a document fitting a certain description was created, seen, or received by the witness,

(bb) with an oral statement, have the witness admit making or adopting the statement,

(cc) some elaboration of the foundational facts should heighten the drama and convince the witness that there is no denying the inconsistent statement,

(4) after authenticating the inconsistent statement, counsel should request permission to read the statement aloud and into the record,

(5) unless admissible for other reasons, a prior inconsistent statement is not itself admitted, but is merely read aloud,

(6) have the witness admit to making the prior statement,

(7) once the inconsistent statement has been read aloud to the jury, do not give the witness an opportunity to explain the inconsistency,

(aa) this is the function of re-direct or re-cross,

(bb) some judges will nevertheless insist that the witness be given a chance to explain,

(8) counsel need not reveal the statement to the witness before impeachment,

(9) if opposing counsel requests, however, counsel must show the statement to all counsel,

(10) extrinsic evidence of a prior inconsistent statement, e.g., by an exhibit or other testimony, is not admissible unless:

(aa) the witness has an opportunity to explain or deny the statement, and

(bb) opposing counsel is given a chance to examine the witness about the statement, or

(cc) the judge determines that the extrinsic evidence may be used in the interest of justice,

(i) prior inconsistent statements are not in evidence, unless separately offered and admitted, but are simply admitted for the limited purpose of impeachment:

(1) a separate foundation may need to be established to admit the statement into evidence,

(2) if the statement was by a party-opponent, it is an admission, Fed. R. Evid. 801(d)(2),

(3) Rule 801(d)(1) allows admission of prior statements:

(aa) the declarant must testify and be subject to cross-examination, and

(i) the statement was given under oath, e.g., by affidavit, at a hearing, or in a deposition, or

(ii) the statement is a consistent statement offered to rebut an express or implied allegation of recent fabrication or improper influence or motive, or

(iii) the statement identified a person after seeing him or her,

(bb) this permits admission of the most common type of prior inconsistent statement of a non-party witness, the inconsistent affidavit or deposition statement,

(4) if the witness claims to have forgotten the events, consider using the exception to the hearsay rule for recorded recollection, Fed. R. Evid. 803(5),

(5) counsel should examine other techniques for admitting the inconsistent statement, as appropriate.

7. Bias, prejudice, and interest:

- (a) bias and prejudice are predispositions in favor of the opponent (bias) or against the client (prejudice),
- (b) interest includes a financial interest,
- (c) bias, prejudice, and interest imply that the witness is not impartial,
- (d) sources of bias, prejudice, and interest may include:
 - (1) relationship by blood or marriage,
 - (2) business relationships,
 - (3) social relationships,
 - (4) a prejudice based on the race, religion, national origin, or other characteristic of a party, e.g., that the party is a corporation or government agency,
 - (5) a monetary interest in the outcome of the case, e.g., in stock value or a contingent fee,
 - (6) prior expressions prejudging the case, such as news reports, articles, or statements to other witnesses,
 - (7) particularly with experts, a track record of always being on one side of the case, indicating a lack of independent judgment,
 - (8) any other motive for wishing one side to prevail, regardless of the merits.

8. Conviction of a crime:

- (a) counsel must comply with Fed. R. Evid. 609; not just any criminal conviction may be used,
- (b) arrests, trials, and so forth are not admissible for impeachment,
- (c) because of the technical requirements for impeachment with convictions, counsel should consider making a preliminary motion or motion in limine to let the court rule in advance, see §25:6 (motion in limine),
- (d) this evidence must be produced during the cross-examination, either by:
 - (1) admission of the witness, or
 - (2) by extrinsic proof through a public record tendered during the cross-examination, see §25:4 (discussion of public records),
- (e) the only crimes that are relevant are either:
 - (1) felonies, punishable by death or imprisonment for more than a year,
 - (aa) the court must first determine that the probative value of this evidence outweighs its prejudicial effect, or
 - (2) crimes involving dishonesty or a false statement, regardless of the punishment,
- (f) there is also a time limit:
 - (1) if more than ten years have passed since the conviction or the confinement, whichever is later, then it is presumed inadmissible, unless,
 - (2) the judge determines that its probative value "substantially outweighs" its prejudicial effect,
 - (3) to use a conviction more than ten years old, and besides meeting the substantiality test, the proponent of the conviction must give adequate, written notice of the intention to offer the conviction,
- (g) the conviction may not be used:
 - (1) if it was later pardoned, annulled, or the prisoner declared rehabilitated, but
 - (aa) this is not true if there is a subsequent felony conviction, or
 - (2) if the conviction is pardoned or annulled due to innocence, in which case there is no caveat for subsequent convictions,
- (h) juvenile convictions are not admissible in civil proceedings,
- (i) a pending appeal does not prevent impeachment with a conviction, but the pendency of the appeal may be admitted.

9. Inability to observe, remember, or relate facts:

(a) under Fed. R. Evid. 602, a lay witness must have personal knowledge of facts to testify to them,

(b) if impeachment reveals the witness lacked personal knowledge, counsel may move to strike the direct testimony as incompetent,

(c) this form of impeachment is designed to undermine direct testimony to show that the witness has overstated the accuracy or quality of the information:

(1) by showing a witness could not have seen or could not have clearly seen the events, the testimony may be discredited,

(2) the ability to relate facts comes into play if the witness is inarticulate, has difficulty with the language, or has difficulty explaining the direct testimony,

(d) common topics for interrogation:

(1) location of the witness and events and lighting,

(2) details observed, to show selective memory probably aided by opposing counsel's preparation of the witness,

(3) deficiencies of the witness' senses, particularly sight or hearing,

(4) the length of time since the events,

(5) deficiencies in the witness' memory or mental capacity,

(6) educational level,

(7) age,

(8) problems with the English language,

(9) reading deficiencies.

10. Reputation and opinion evidence regarding character for truthfulness (or untruthfulness):

(a) the object of this technique is to use extrinsic evidence, i.e., another witness, to prove that the witness being impeached has a poor (or good) reputation for truthfulness or that the added witness has a low (or high) opinion of the witness's truthfulness,

(b) this technique is most likely to be useful for a crucial witness and is not necessary with routine witnesses,

(c) this mode of impeachment is somewhat weak, because the jury is often likely to conclude that any witness offered to show a poor reputation is biased,

(d) once credibility is attacked in this manner, opposing testimony, i.e., to support credibility, may also be offered, Fed. R. Evid. 608(a),

(e) this is character evidence and, for purposes of impeachment, must be limited to character for truthfulness or untruthfulness,

(f) for specific impeaching conduct, see the subsection that follows,

(g) the method of proving character for truthfulness is governed by Fed. R. Evid. 405:

(1) reputation for truthfulness or untruthfulness:

(aa) establish the foundation:

(i) the witness is familiar with the person whose reputation is in issue,

(ii) the witness is also acquainted with the community in which the person lives, works, socializes, or with some other relevant community,

(iii) the witness is familiar with the reputation of the person for truthfulness in that community,

(bb) ask what the person's reputation for truthfulness is in that community,

(cc) opposing counsel may:

(i) voir dire the witness to determine whether the witness is really from a relevant community or knows the person's reputation,

(ii) object to the reputation evidence, e.g., on the ground that the community is not germane,

(2) opinion of the person's truthfulness:

- (aa) this is lay opinion testimony, governed as well by Fed. R. Evid. 701,
- (bb) establish the foundation:
 - (i) the impeaching witness is familiar with the person to be impeached,
 - (ii) the witness had an opportunity to perceive or observe the person's character for truthfulness,
 - (iii) the witness has an opinion of the person's character for truthfulness,
- (cc) the witness testifies to his or her opinion of the person's truthfulness,
- (dd) opposing counsel may:
 - (i) object that the foundation or opinion are not in accordance with the rules,
 - (ii) voir dire the witness on the basis for the opinion,
 - (iii) cross-examine on the basis, e.g., that the impeaching witness is biased, had a limited opportunity to observe the person, and so forth,
- (3) cross-examination of either reputation or opinion on character may include specific conduct, i.e., acts inconsistent with the testimony,
 - (aa) this is an opportunity to throw all sorts of character information into evidence, in both directions,
 - (bb) because the character evidence opens this door, counsel considering using this type of impeachment should,
 - (i) think this through before committing to character impeachment,
 - (ii) prepare the impeaching witness for questions about specific conduct.

11. Prior bad acts:

- (a) with the exception of criminal conduct, specific instances of a witness's conduct, offered to undermine credibility, cannot be proved except through cross-examination of the witness,
- (b) for impeachment with a criminal conviction, see the foregoing subsection on the subject,
- (c) in contrast with reputation or character impeachment, extrinsic evidence, either through testimony or exhibits, cannot be used to prove instances of conduct,
- (d) the court may also deny permission to allow cross-examination on specific acts,
- (e) the conduct must be probative of truthfulness or untruthfulness,
- (f) Rule 608(b) confirms the provision in Rule 405(a) for cross-examination of a character witness with specific instances of conduct by the witness whose character the character witness has testified to on direct.

12. The credibility of the declarant of a hearsay statement may also be attacked in any of the foregoing manners, Fed. R. Evid. 806:

- (a) this may include declarants of statements technically defined as being other than hearsay under Fed. R. Evid. 801(d)(2), (C), (D), or (E),
- (b) there is no requirement that the declarant be confronted with the inconsistent prior statements or conduct,
- (c) if the declarant testifies, the party against whom the hearsay was admitted may cross-examine the declarant on the statement.