

IMPEACHMENT

I. Definition of Impeaching Information: Any information which might undercut the reliability of a witness' testimony, whether developed during cross-examination, or during direct examination to blunt the sword of cross-exam.

II. Five Permissible Areas.

- A. Untruthful Character (FRE 608 and 609)
- B. Bias/Motive/Interest (FRE 401)
- C. Prior Inconsistent Statements (FRE 613)
- D. Capacity Defects (FRE 401)
- E. Contradiction (FRE 401)

III. Untruthful Character.

A. Prior convictions.

- 1. All felonies (POTENTIAL sentence greater than one year) generally within 10 years (date of sentencing or date of release, whichever is later).
- 2. All felonies or misdemeanors if crimes of dishonesty.
- 3. Sources: criminal records checks, supporting police reports, charging documents, judgments, etc.

B. Opinion or reputation testimony regarding character for untruthfulness.

- 1. Witness testimony from witnesses who personally know the witness about whom they are testifying (opinion witnesses) or who know of the witness about whom they are testifying (reputation witnesses).
- 2. Sources: neighborhood and workplace interviews, business colleagues, family members, etc.

C. Dishonest Acts.

- 1. Examples and sources: perjury convictions, bribery, using nominees to hide identity, lies on forms (tax, immigration, loan

applications, job applications, credit card applications, drivers' license or ID applications, etc.), workplace lies (time cards, inflating bills/invoices, etc.), lies to probation/parole officers, lies in licensing processes, resumes, civil suits based on dishonesty (fraud in business transactions), lies in land/mortgage transactions, lies in bank account applications, etc.

2. Need not be connected to the case under prosecution; need not be crimes themselves; need not be formal/under oath lies.

IV. Bias/Motive/Interest

A. Definitions:

1. Relationship between a party (the defendant or the U.S.) and the witness.
2. Relationship between the witness and issues in the case (e.g., the hired gun expert).

B. Examples and Sources:

1. Personal or business relationship with defendant (good or bad).
2. Financial (hired gun payment depending on outcome) or professional (promotion/demotion depending on outcome) interest in the case.
3. Self-interest in the case (shorter sentence, fear of defendant, etc.).

V. Prior Inconsistent Statements

A. Theory: establish possibility of fabrication by showing inconsistent statements made previously on the same subjects relevant to this case.

B. Need not be sworn or any sort of "formal" written or signed statement.

C. Sources:

1. Prior interviews by law enforcement or defense investigators.

2. Statements or depositions in related civil or administrative proceedings.
3. Written correspondence with others regarding the case.
4. Recorded conversations (don't forget the jail tapes) regarding the case.
5. Oral statements made to friends, work associates, neighbors, etc., regarding the case.
6. Prior silence (i.e., other occasions where the witness spoke or wrote about the case and did not reveal facts now revealed in trial testimony).

VI. Capacity Defects

- A. Theory: Establish any infirmity (mental or physical illness, alcohol/drug use, eyesight, hearing, memory, etc.) that might have affected the witness' ability to perceive the events now at issue at the time the events occurred, or that might effect the witness' ability to accurately recall and relate the facts now at trial.
- B. Sources: Background investigations, reviewing both records and other witnesses, regarding the witness you seek to impeach (defendant or defendant's witnesses) or protect (government witnesses)

VII. Contradiction

- A. Theory: Establish through witness testimony or physical evidence (photos, phone/hotel records, etc.) that testimony is suspect because contradictory evidence exists.
- B. Sources: Analyze each key fact set out by the witness you seek to contradict; locate any witnesses who might have contradictory knowledge of the same events, or any records which might contradict the witness. [The key here is to take each statement by witnesses you hope to impeach and assume those statements are not true, then seek evidence which will establish contrary facts]

VII. Conclusion

- A. While it is obviously important to develop all impeaching information on the defendant and the defendant's witnesses, it is equally important to develop all impeaching information on government witnesses. Only by this complete knowledge of our own witnesses can we accurately assess their credibility and the strength of their testimony and our case. Further, only by having complete knowledge of our own witnesses will we be in a position to prepare them for cross-examination and to attempt to blunt the cross-exam sword by raising the impeachment subjects during direct examination.