10. CROSS-EXAMINATION AND IMPEACHMENT

A. CROSS-EXAMINATION

Cross-examination of witnesses called by the opposing party is an absolute right in both civil and criminal cases. It usually consists of two kinds of questions -- (1) those designed to bring out additional facts and details about the events that were not brought out during the direct examination, and (2) those intended to raise questions about the credibility of the witness. Admissibility of the first kind is governed by ordinary rules of relevancy. The second category is known as "impeachment," and has its own set of rules.

The cross-examining attorney is bound by the same rules of evidence as the attorney who conducted the direct examination, with a couple of differences. The cross-examiner has license to use repetition (despite Rule 403) to probe the testimony, and may use leading and suggestive questions, and demand a responsive non-evasive answer, but may not unnecessarily harass or embarrass the witness.

One typical issue involves drawing a line between permissible leading, suggestion and repetition used when witnesses are hostile, evasive or lying, and impermissible badgering a witness who is trying to be cooperative but you just don't like the answer. In the following example, some judges would allow it, others would not, depending on their opinion whether the witness genuinely did not remember or was being evasive.

Q: Was Joe drunk? A: I don't know.
Q: You don't know if Joe was drunk? A: That's right, I don't know.
Q: Well, did he appear drunk? A: I don't know.
Q: You were with Joe in a bar, right? A: Yes.
Q: Drinking? A: Yes
Q: For several hours? A: Yes.
Q: And Joe got drunk, didn't he? A: I don't know.
Q: Was that because you were also drunk? A. No.
Q. Tell the truth. Weren't you both drunk?

B. IMPEACHMENT

1. General Rule

Any party may impeach the credibility of any witness with evidence suggesting that the witness's direct testimony is unworthy of belief. A witness's testimony may be unreliable for three quite different reasons:

a) The witness may be deliberately lying and therefore knowingly committing the crime of perjury -- it happens, but people willing to commit crimes in front of judges are rare.
b) More likely, the witness is trying to tell the truth, but happens to be mistaken because he or she saw the event incorrectly, has forgotten parts, misinterpreted what the witness saw, etc.
c) The witness may be telling half-truths, exaggerating parts, or omitting details out of embarrassment, love, anger, political beliefs, or other emotions.

Impeachment does not consist of asking the witness directly to admit to being a cold-blooded liar or to admit that the witness has remembered something incorrectly. The liar will not admit being a liar, and the honest but mistaken witness will not know s/he is mistaken, so neither will admit to being wrong if asked. Impeachment is the process of introducing circumstantial evidence that suggests to the jury a likelihood that the witness does not understand the need to tell the truth, is mistaken, is incomplete, or is lying. Impeachment evidence is subject to the basic principles of relevance, and may be excluded if its probative value on the issue of credibility is substantially outweighed by its prejudicial effect.

2. Impeachment Usually Involves the Use of Otherwise Inadmissible Evidence

The impeachment rules concern the use of otherwise inadmissible evidence, such as hearsay and acts of bad character, for the limited purpose of impeachment. For example:

- Evidence that the defendant has a criminal record may be admissible solely to impeach.
- A statement obtained in violation of *Miranda* may nevertheless be used as prior inconsistent statements to impeach.
- A hearsay statement that a witness disliked the defendant may be admitted to show the witness's bias.
- Evidence that the defendant is covered by liability insurance is admissible to show the bias of a witness who works for that insurance company.

If the evidence is independently admissible because it fits a hearsay exception or is relevant to resolving the main issues, then the rules of impeachment do not apply.

This means the rules of impeachment are usually invoked in response to an objection, e.g.,
Q: Were you convicted of armed robbery in 2012?
Defense: Objection, prior criminal acts are irrelevant character evidence under Rule 404.
Prosecutor: We are offering this as impeachment evidence under Rule 609.

3. Bad Character

Rule 608 permits the impeachment of witnesses by proving their poor character for

truthfulness (tendency to fabricate), but only by reputation or opinion testimony. Evidence of specific acts of untruthfulness are not permitted. A criminal defendant who testifies is treated no differently -- his bad character may not be proved by specific acts of dishonesty.

4. Prior Criminal Convictions

Rule 609 provides that, with certain restrictions, a witness may be impeached witrh evidence of two kids of criminal convictions: (1) felonies, regardless of their nature; and (2) misdemeanors involving crimes of dishonesty and false statement, such as check deception and perjury. Misdemeanor theft may or may not involve the kind of dishonesty that impeaches veracity -- one can steal openly by grabbing something and running, or by deception by concealing it under one's shirt. Crimes of violence such as battery, and crimes of immorality like drugs and prostitution, are not crimes of dishonesty and not admissible to impeach.

Rule 609(b) imposes a ten-year limit on using old convictions. If more than ten years has elapsed from both the witness's conviction and his release from prison, the conviction is presumptively inadmissible. The judge has some discretion to depart from this rule in the interests of justice when there is something especially probative about the conviction, but only upon notice and a hearing at which the judge makes on-the-record findings to support the need to use an older conviction.

Since only certain crimes may be used, witnesses may not be asked if they have "ever been convicted" of any crimes. Rather, the following foundation is required:

(1) The witness's attention must be directed to a particular date within the last ten years -- either the date of the conviction or release from incarceration, whichever is more recent.
(2) The attorney must then ask whether the witness was convicted of a specific crime, supplying the name of the offense. Neither an arrest by itself nor an adjudication of juvenile delinquency is a conviction. If admissibility is premised on the release date being within ten years, the attorney should ask whether on that date the witness was released from prison after serving a sentence for a specific crime, naming the offense.
(3) If the witness denies or does not remember the conviction, counsel may offer into evidence a certified copy of the judgment of conviction. The copy is not shown to the witness to refresh recollection.

Details of the crime are usually inadmissible; the witness may only be asked if she or he was convicted of it. If details are necessary to demonstrate that a particular conviction was for a crime involving untruthfulness, they should be presented in an offer of proof outside the hearing of the jury. The sentence received or the fact that the witness went to prison is not admissible.

5. Mental and Physical Defects

Under common law, if a witness has any mental or physical defect that reduces the ability to perceive or remember events correctly, that defect may be proved. This rule does not permit general proof of a witness's mental problems, but allows only evidence that a witness was suffering mental problems at the time of the event that could have interfered with her ability to perceive or remember it. Similarly, proof that a witness has poor eyesight or hearing is admissible. There is no federal rule on this subject, but some states have adopted them.

6. Poor Opportunity to Observe

Under common law, the testimony of eyewitnesses may be impeached by evidence regarding their poor opportunity to observe the events from their particular locations. Extrinsic evidence such as a photograph is admissible to establish what the viewing conditions were like, as long as a foundation is laid that the physical condition of the scene has not changed in a material way, e.g., changes in trees, foliage, or other obstructions. There is no federal rule on this subject, but some states have adopted them.

7. Drug and Alcohol Use

Under common law, drug or alcohol use by a witness on the day of the crime or event is usually admissible because it affects the witness's ability to perceive events correctly. Drug use at other times is not generally relevant. Similarly, evidence that a witness is an addict, an alcoholic, or has a habit of drug usage is not admissible absent some preliminary showing that long term use of that particular drug affects a person's ability to observe or recall even on days when he or she did not take the drug.

8. Bias, Interest, and Motive

Perhaps the most common form of impeachment is evidence showing that a witness has a bias for or against a party, an interest in the outcome, a financial stake, or any other motive to testify falsely. Oddly, no Federal Rule addresses this, although many states have enacted a rule like Ohio's Rule 616 that includes this provision.

The credibility of crucial witnesses is an important issue, so evidence that they are biased is of significant probative value that will almost always outweigh prejudicial effects. *See Robinson v. State*, 682 N.E.2d 806 (Ind. Ct. App. 1997) (witness's gang membership admissible to show bias in favor of fellow gang member). In criminal cases, the defendant may impeach state's witnesses by showing they have gotten a favorable plea bargain, are on parole and afraid it will be revoked if they do not cooperate, or are facing criminal charges and hoping to curry favor with the state.

9. Prior Inconsistent Statements and Acts

Under common law, a witness may be impeached by proof the witness has contradicted him- or herself through evidence of prior acts or statements that are inconsistent with testimony given on direct examination. It is important to remember that the relevance of inconsistencies is that it undermines the credibility of all statements, not that the earlier statement is likely to be the more reliable. We will come back to this when we cover hearsay. There is no federal rule about self-contradiction, but many states have adopted rules about it. The usual foundation is:

(1) The cross-examiner must direct the witness's attention to a specific assertion made on direct examination that will be the subject of the impeachment, e.g., "Now on direct, you said the traffic light was red, is that right?" One cannot use a prior statement to impeach a witness's omission, uncertainty or lack of memory, because those are not inconsistencies.
(2) The attention of the witness is directed to the time and place where, and the person to whom, the inconsistent statement was made, e.g., "Do you remember giving a deposition at my office on July 8, 2015?".
(3) The content of the prior statement is disclosed to the witness in any reasonable manner, and the witness is asked if she or he made the statement. Commonly, it is quoted by the attorney, e.g., "In that deposition, at page 25, didn't you say the light was green?"
(4) If the witness admits making the statement the questioning can go no further. Extrinsic evidence of the inconsistent statement is not admissible. The cross-examiner may not "double-prove" it by also introducing (or having the witness read) the writing containing the inconsistent statement.
(5) If the witness denies or does not remember making the statement, and if the statement is on a material issue, then the cross-examiner may introduce extrinsic evidence of it (a written statement, a deposition, or a person claiming to have heard an oral statement). Extrinsic evidence is not permitted if the matter is collateral.

10. A Witnesses May Not Be Called for Sole Purpose of Impeachment

It is improper to call a witness for the sole purpose of getting otherwise inadmissible evidence before the jury in the guise of impeachment. Impeachment evidence is only relevant if the witness gave meaningful substantive testimony, the credibility of which is at issue. This commonly arises in domestic violence cases in which the victim has recanted an accusation. The prosecution may not call the victim, ask her whether he husband beat her, and when she says "No," impeach her with her prior inconsistent statement accusing his of assault.

11. Use of Extrinsic Evidence to Impeach

A witness always may be impeached through cross-examination questions. However, Rule 403's limitation on time wasting imposes limits on the extent to which extrinsic testimony and

documents can be used for this purpose. The general rule is that extrinsic evidence may not be produced on a collateral matter, but may be used if the subject matter is directly material to the issues. There is a lot of discretion. Bias, interest or other motives to testify falsely are not considered collateral and may usually be proved by extrinsic evidence.