



## IMPEACHMENT

By: Michele LaVigne and Craig Mastantuono\*

**IMPEACH** - 1. to challenge or discredit (a person's honor, reputation, etc.) 2. to challenge the practices or honesty of; to accuse. -*New World Dictionary*

**IMPEACHMENT OF WITNESS** - To call into question the veracity of a witness, by means of evidence adduced for such purpose. A witness may be impeached with respect to prior inconsistent statements, contradiction of facts, bias, or character. -*Black's Law Dictionary*

The credibility of a witness may be attacked by any party, including the party calling the witness. sec. 906.07 Wis.Stats.

Basic impeachment areas:

- a. bias and interest
- b. prior convictions sec. 906.09 Wis.Stats.
- c. prior instances of untruthfulness sec. 906.08(2) Wis.Stats.  
(not to be confused with testimony under 904.04)
- d. prior inconsistent statements sec. 906.13 Wis.Stats
- e. prior inconsistent actions  
(didn't call the police for a week)
- f. impaired perception or recall  
- witness is "mistaken"
- g. reputation or opinion for untruthfulness sec. 906.08(1) Wis.Stats.
- h. treatises (for experts)  
i.e. - other really smart people disagree with you

## PRIOR INCONSISTENT STATEMENTS

**Michele LaVigne** is a member of the clinical faculty at the University of Wisconsin Law School where she directs the Public Defender Internship Program and teaches trial advocacy and substantive criminal law. For the past five years she has directed a mock trial project at the Wisconsin School for the Deaf. Ms. LaVigne is on the faculty of the National Criminal Defense College. She also serves as faculty for the Wisconsin State Public Defender's annual Trial Skills Academy.

**Craig Mastantuono** is a former staff lawyer with the Wisconsin State Public Defender and is now in private practice in Milwaukee. He holds a law degree from DePaul/Chicago, and teaches undergraduate courses at Carroll College. He also serves as faculty for the Wisconsin State Public Defender's annual Trial Skills Academy.

This is the most frequent area of impeachment.. When a witness testifies inconsistently with what he has said previously in an interview, report, or other prior statement, he is usually trying to 'help' his case from the witness stand. Alas, this happens all the time and opposing counsel cannot tolerate it. The witness is trying to embellish, or change, what he said earlier. Fortunately, this is something we have all dealt with before – and your judges and juries have dealt with it before as well. No one likes someone who changes his story about something important.

Upon hearing testimony that the lawyer believes is inconsistent with a prior statement, the smart lawyer takes following three steps. (Sometimes these steps are known as the 3 Cs: Commit, Credit, Confront. It's easy to remember that way, but strains the English language a little too much for our taste.)

**1. Recommit** - Link the witness to the bad testimony - that way he won't be able to say he didn't mean it later. This also refreshes the judge or jury's memory of the testimony if it was said during direct and the opponent lawyer is now crossing the witness. This first step is easy, simply repeat the testimony: "Officer W. today you have testified that Mr. Client struggled with you when you arrested him?". Don't make too big a deal out of this step: it's not time for drama yet, and you don't want to put the witness too much on the defensive.

**"Today you are saying..."** – when you recommit, be sure that you make it clear that the testimony is today's version. This will help create the inference that today's version is simply that – today's version, not the truth.

**WARNING:** Get it right. Use the witness's exact words. You don't want to start off your impeachment with the witness saying "That's not what I said."

**2. Accredit** - Build up the source of the prior statement. Give the source of the prior statement as much credibility as possible. This is usually easy, since the witness is the one responsible for the source of the prior statement. Accredit through importance, duty, and/or proximity in time. Impeachment by prior statement is a war between the two statements, and **you generally want the prior statement to win.**

**Police reports** - If the source of the prior statement is a police report, go through all the reasons police reports are important and how cops are trained to write them well, why they are necessary, and how in this case the report was written just after the incident occurred, when recollection was immediate and the officer was getting the information first hand. Make sure that you mark the prior source if it is the witness' own report, and show it to him. We want him to authenticate the report and tell the jury that it is indeed his report of this incident. Be careful here - it is easy to fall into the trap where we impeach the heck out of the officer and end up making him look like he wrote a crappy report. Remember – the report is good; the testimony is bad.

**Testimony** - If the prior source is testimony, go through the oath given prior to testifying, the importance that the witness assigned to testifying in court, and the nearness in time of the testimony to the incident. Again, be careful. We don't want the jury to think the witness lied the first time she testified; we want them to think she's lying now.

The second step, accrediting, is the most important of the three steps. If this second step is done well, the witness will not have credibility when he tries to say that his current statement is the real truth. Accredit or build up the prior statement well, and it will win every time.



**TAKE YOUR TIME:** Don't get anxious to get to the exposure, which will be less explosive and anticlimactic unless proper attention is given during the second step. Let drama build slowly as you go through this step - the smart witness will eventually realize where you're going, but it won't matter now because you already committed him to the bad testimony in step one.

3. **Expose** - Expose the prior inconsistent statement. This is the payoff for the hard work in step two. The fun step. Tell the witness what he said in the prior statement. The inconsistency will speak for itself at this point. Pause for drama, and move on to a whole different area. Don't ask another question on this or the witness will wiggle. Don't ask if he lied, or why he didn't feel it necessary to put it in the report, or anything cute. If the prior source has an omission rather than a statement, state the omission: "Officer, your report doesn't say anything about a struggle during arrest, does it?"

#### **Added dance steps:**

**What is the intervening event that caused the change in testimony?** Very often it's meeting with the DA to discuss the case prior to trial. It could be something that has created bias or motive to lie (this is way cool because you get to use two types of impeachment at one time). It could be something as simple as the passage of time and the human tendency to fill in the blanks. Though we never ask the ultimate question, we want the jury to see the relationship between the intervening event and the "new and improved" testimony. These question(s) can be placed before the confronting question or after. This question must be carefully crafted to ask only about objectively verifiable or obvious facts. "You made the first statement in March, 2004?" "Today is May 14, 2005?"

**A series of smaller inconsistencies** - Sometimes witness's testimony is filled with a number of minor inconsistencies that standing alone would be not worth impeaching about. But when taken together, these inconsistencies can be powerful evidence that TODAY'S testimony is, uh, in error.

To be effective, these inconsistencies must be showcased together. One technique is to start with the Accrediting portion - A year ago you spoke with Officer W./ You told him what you saw/ You wanted to be helpful etc.etc. Then go through the inconsistencies one at a time First, Commit ("Today you say") then Confront. (a year ago you said). Do it with each inconsistency. "Today you say X." "A year ago you said Y." "Today you say X." "A year ago you said Y." This can be a fun riff.

**Use visuals** - Visuals aids can be very effective when you are impeaching about prior inconsistent statements (Actually, visual aids can be effective all the time) A relatively simple visual aid can show the evolution of a statement and the intervening event. Power Point works well here (especially with the fly in feature), but you can use paper, marker, and velcro IF you plan ahead and make the exhibit look like some thought went into it. By the way, courts like visuals, if they are done well. "Increased flexibility in the use of educational devices will probably result in courtroom findings more consonant with truth and law." *Verizon Directories Corp. v. Yellow Book USA, Inc.* 2004 WL 1855075. If you don't believe this, go watch a civil trial.

#### **Some additional things to remember:**

**LISTEN** to the witnesses testify - quit writing down everything. You cannot spot inconsistencies when you are trying to be a court reporter.

Know your audience – in a bench trial or motion hearing, you may want to cut down on step two – judges know this stuff better than juries. But you should also know your judge and play to his or her personality. Is this a judge who really rewards preparation? Play to that. Is this judge new to the criminal bench? Then don't shorten the steps – train the judge on the importance of inconsistencies.

Anticipate the inconsistencies and prepare for them. This preparation flows from your theory of defense, which of course anticipates the theory of prosecution. When you understand the theory of prosecution, you can figure out the weaknesses of their case, and where their witnesses will have to lie, cheat, embellish, and 'weasel up' their testimony. Record all the prior reports, transcripts and other sources in your cross exam notes for each witness. Be ready to have the prior source in hand in a flash.

Prior inconsistent statements are admissible as substantive evidence. *see* sec. 908.01(4)(a)(1) Stats., & *Vogel v. State*, 96 Wis.2d 372 (1980). This means that you can move the prior source into evidence in front of the jury, show it to the jury, call a witness to prove it up, or whatever other fun things you can think of. It also means that if the witness denies the prior statement, finish your cross, excuse the witness, get the prior inconsistent statement admitted as evidence, and show it to the jury. For proper reminder to the jury and also just for yuks, try looping the prior inconsistent statement into subsequent questions after the impeachment.

Pick your battles. Decide which inconsistencies call for impeachment – you may choose to avoid inconsistencies on minor or collateral stuff. Always be sure that the prior statement is indeed inconsistent with the testimony. With all this drama and build-up going on, you must deliver the goods in step three.

### ***Another big one: IMPAIRED PERCEPTION OR RECALL***

For a long time, we have known that a witness who is dead certain that your client was assailant can also be dead wrong. Luckily, the rest of the world is starting to figure it out too. It is imperative that you be able to impeach about factors that could have impaired the witness's ability to see, hear, recall, or identify.

Break these down and present them one at a time. Keep them objective. Don't ask whether it was dark (she'll say "I could see"); ask whether it was 11 p.m. Don't ask whether the street was lit; ask about the nearest street light being 75 feet away (you know this because you measured). TAKE YOUR TIME.

Don't even think about asking the witness whether any of these factors could have impaired her perception. We guarantee you that she will say they didn't, she saw clearly, she's certain.

If you have an expert, you will also have to elicit testimony from the "eyewitness" about how the identification was made. Make sure that the testimony about the identification is clear so that the jury can connect it up when the expert testifies.

Impaired perception or recall perception impeachment should be prepared before jury selection even begins.

### **A FEW BASIC RULES FOR ALL IMPEACHMENT**

Have some fun.

Remember your audience. The jury needs to understand what you're talking about.

Look forward to opportunities to impeach - overcome the fear factor involved with a lying witness or changed testimony.

And take your time. ■

