EVIDENCE FOR TRIAL LAWYERS: IMPEACHING, OBJECTING, & STAYING TRUE TO ETHICAL OBLIGATIONS

IMPEACHMENT

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. Wis. Stat. § 906.07

There are seven basic impeachment techniques:

a.	bias and interest	
b.	prior convictions	Wis. Stat. § 906.09
c.	prior acts – not remote in time & relevant to (un)truthfulness	Wis. Stat. § 906.08(2)
d.	prior inconsistent statements	Wis. Stat. § 906.13
e.	contradictory facts	
f	reputation or opinion for untruthfulness	Wis. Stat. § 906.08(1)
g.	treatises	

IMPEACHMENT THROUGH PRIOR INCONSISTENT STATEMENT
(*in three easy steps*)

Evidence – Hearsay Wis. Stat. § 908.01 Definitions. …
(4) Statements which are not hearsay. A statement is not hearsay if:
(a) *Prior statement by witness*. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is: 1. Inconsistent with the declarant's testimony[.]

This is one of the most frequently used impeachment methods, and one that is frequently applied ineffectively, even by experienced trial lawyers. Impeaching a witness through prior inconsistent statement requires precise to accomplish it effectively. 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/her case from the witness stand. This happens all the time and opposing counsel should not tolerate it. The witness is trying to embellish, or change, what he said earlier. Fortunately, no one likes someone who changes his story about something important, and this can be exposed quite easily.

Upon hearing testimony that is inconsistent with a prior statement, the smart lawyer takes the following three steps:

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, you just testified that Mr. Client resisted 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 immediately on the defensive. You're simply recommitting him to the current testimony.

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. If the source of the prior statement is a police report, go through all the reasons police reports are important and how police are trained to write them well, why they are necessary, and how the report is written just after the incident occurred, when recollection is immediate. If the prior source is testimony, go through the oath given prior to testifying, the importance that the witness assigns to testifying in court, and the nearness in time of the testimony to the incident. Make sure that you mark the prior source if it is a report, and show it to the witness. Make him authenticate the report and tell the judge/jury that it is indeed his report of the particular incident. The second step, accrediting, is the most important of the three steps. Impeachment by prior statement is a war between the two statements, and typically you want the prior statement to win. 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. 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. 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. Tell the witness what he said in the prior statement: *Officer, on page two, your report states that Mr. Client was arrested without incident, correct?* The inconsistency will speak for itself at this point. Pause for a small bit of dramatic emphasis, and move on. Don't ask another question on this subject 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 is an omission rather than a statement, state the omission: *"Officer, your report doesn't say anything about a resisting during arrest, does it?."*

Some additional things to remember:
> LISTEN to the witnesses testify – do not engage in writing everything down while the witness testifies on direct. 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? Is this judge new to the criminal bench?

For seminar discussion: how does defense counsel sufficiently impress the judge with impeachment of an incomplete, deceitful, or "conveniently forgetful" police officer?

At what point does prosecution counsel approach the ethical line prohibiting attorneys from offering evidence that the lawyer knows to be false, or permitting lawyers to refuse to offer evidence that the lawyer reasonably believes is false? WI SCR 20:3.3 Candor toward the tribunal.

> Know what the inconsistencies will be – prepare for them. This preparation flows from your theory of the case, which of course anticipates the theory of opposing counsel's case. Formulating trial strategy necessitates anticipating the other side's case, including where their witnesses will have to lie, cheat, or embellish 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 if the witness is given a chance during testimony to explain the prior statement, if the witness has not been excused from testimony in the

case, or if the the interests of justice otherwise require. *See* Wis. Stat. § 906.13(2)(a); *State v. Smith*, 2002 WI App 118, 254 Wis. 2d 654.

> Any prosecution witness called during the government's case-in-chief or rebuttal is subject to impeachment. The U.S. Constitution also guarantees the defense's right to impeach its own witness when that witness in fact "accuses" the defendant. *Chambers v. Mississsippi,* 410 U.S. 284 (1973).

> Pick your battles. Decide which inconsistencies call for impeachment – you may choose to avoid inconsistencies on minor or collateral issues.

> Always be sure that the prior statement is indeed inconsistent with the testimony. Given the commitment to accrediting the prior source statement all this process, you must deliver the goods in step three.

> Be aware of the difference between refreshing recollection pursuant to Wis. Stat. § 908.03(5) and impeachment by prior inconsistent statement. Lawyers often conflate these two distinct rules, reducing the impact of a proper impeachment. Refreshing recollection with a prior record made while the matter was fresh in the witness's memory *assists* the witness to recall and accurately provide testimony, typically during direct examination. Impeachment by prior inconsistent statement *attacks* the credibility of the witness's testimony.

> Have fun with this. Welcome it. When a witness testifies inconsistently and you have a prior source, give thanks - you're about to show the judge and jury that the witness is fudging. This is easy confrontation; using these three steps, there's no way to mess up.

OBECTIONS

Evidence in Criminal Cases: **Objection** Practice Pointers

Witnesses/Competency
Remember that while every person is generally competent to testify, Wis. Stat. § 906.01, Fed. R. Evid. 601, witnesses can only testify as to matters about which they have personal knowledge. Avoid and limit objections by: a) laying a good foundation as to personal knowledge; b) considering the order in which witnesses are called and exhibits are introduced; and c) recognizing the limitations of a witness, especially in regard to opinion testimony Wis. Stat. § 907.01/Fed. R. Evid. 701 (lay opinion); Wis. Stat. § 907.02/Fed. R. Evid. 702 (expert opinions); Wis. Stat. § 907.08/Fed. R. Evid. 608 (opinion and reputation evidence of character).

Hearsay
Following the general rule of hearsay inadmissibility, Wis. Stat. § 908.02/Fed. R. Evid. 802, there are 40+ hearsay exceptions in Wis. Stat. Ch. 908. If a hearsay objection is anticipated, search for the exception that best fits the situation and you will find the foundation questions within the exception. As a general proposition, a judge is likely to admit the statement if there are "circumstantial guarantees of trustworthiness", Wis. Stat. § 908.03(24)/Fed. R. Evid. 809(A)(1).

When Not to Object:
- It's coming in anyway/avoid highlighting the evidence or inviting further speculation about it
- Legitimate concerns about annoying the jury
- Avoid perception that you're hiding something
- Avoid petty battles; the other side will start objecting regularly

How to Object:
- Object and state grounds
- Say all grounds for objection/exclusion
- Preserve evidentiary & constitutional issues
  - Note, *e.g.* hearsay <u>with confrontation</u> objection required for habeas (Blinka)
- Ask for sidebar – put full objection on record
- Get a ruling
- Don't withdraw
- Renew objection
- Continuing objections
  - Note: *State v. Lomprey,* 173 Wis. 2d 209 (Ct. App. 1992) (continuing objections must be clear form the record and specific as to evidence objected to).

Damage Control:
- Move to strike
- Limiting instructions
- Offer of proof if your testimony is subject of objection and excluded
- Mistrial – if ruling affected fairness of trial – <u>must</u> be renewed at close of case

Common Objections at Trial

Objections to Questions

- Leading
- Asked and answered (repetitive)
- Beyond the scope of direct/cross/redirect (§906.11(2);FRE 611b)
- Witness lacks personal knowledge
- Assumes facts not in evidence
- Confusing/Misleading/Ambiguous/ Vague/Unintelligible
- Speculative/Asking Witness to Guess
- Compound question
- Argumentative
- Improper Characterization
- Misstates the Evidence/Witness
- Calls for an opinion (witness has not been qualified)
- Calls for an irrelevant answer
- Calls for a privileged communication
- Calls for a conclusion
- Calls for a narrative answer
- Cumulative
- Improper Impeachment
- Violates the best evidence rule

Objections to Answers

- Irrelevant
- Privileged
- Conclusion for the Jury
- Opinion (not qualified as an expert)
- Hearsay
- Giving a narrative Answer
- Improper Characterization
- Unresponsive/Volunteered

Objections to Exhibits

- Lacks proper foundation
- No authentication
- Violates original documents (best evidence) rule
- Contains Hearsay (Double Hearsay)
- Irrelevant
- Prejudice to Defendant outweighs its Probative Value
- Contains Inadmissible Information
-

Jury Selection

- Discussing law (agree/disagree)
- Discussing facts

Opening Statements

(what lawyer anticipates evidence will be)

- Mentioning Inadmissible Evidence (suppressed, privileged)
- Mentioning Unprovable Evidence (missing witness, etc.)
- Giving Personal Opinions (I think/I believe)
- Arguing the law or instructions
- Argumentative (credibility of witnesses, inferences/deductions)

Closing Argument

- Misstating Evidence
- Misstating law and quoting instructions
- Giving Personal Opinions
- Appealing to Jury's Bias, prejudice
- Personal attacks on party/counsel
- Unduly Prejudicial Arguments

Jury Instructions

- Misstating the facts of the case
- Misstatement of the law
- Unduly placing weight on certain legal issues or evidence
- Failing to give instructions consistent with the theory of the case
- Failing to give requested instructions
- Confusing/Ambiguous

Offer of Proof

- Use when Judge excludes evidence
- Explain what witness would testify to/what evidence would be at sidebar
- If denied, write down the explanation & file

Avoiding Objections:
Laying Proper Foundation for Exhibits

Make sure you lay the proper foundation for each item you intend to introduce into evidence. While discussed at length in evidence books, foundation requirements actually consist of several simple questions. Below is a summary compilation of foundation questions for different types of evidence:

Photographs:

- Is the witness familiar with scene in photographs?
- Is the witness familiar with scene on that date?
- Does the photograph truly and accurately display the scene as it appeared on the relevant date?
- Who took the photograph?

Tangible Objects:

- Does the witness recognize the exhibit?
- Does the witness know what the exhibit looked like on the relevant date?
- Does the exhibit appear in the same or substantially same condition as when the witness saw it on the relevant date?

Diagrams:

- Is the witness familiar with the scene presented by the diagram?
- Is the diagram similar to the scene on the relevant date?
- Is the diagram helpful to a witness in explaining information to the jury?
- Is the diagram relevantly accurate?

Sound and video recordings:

- Did the witness see or hear what was recorded?
- After the recording was made did the witness hear/see the tape and verify it was accurately recorded? Confirm that no alterations or deletions were made to the sound or images after verification.
- Does the witness recognize sounds and images on the tapes?

Illustrations:

- Does the probative value of the demonstration outweigh any prejudicial effect?
- Does the witness display a physical act to the jury?

ETHICS

Discussion: Lawyer's duty when reason to doubt exists that testimony offered is false.

ABA Model Rules of Professional Conduct Rule 3.3; WI SCR 20:3.3

Rule 3.3 Candor Toward The Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Discussion: Deciding whether to object and how/when to object. Foregoing objections, or engaging in objections to intimidate, disrupt, or distract.

ABA Model Rules of Professional Conduct Rule 3.4; WI SCR 20:3.4

Rule 3.4 Fairness To Opposing Party And Counsel

A lawyer shall not:

(a) unlawfully obstruct another party' s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

ABA Model Rules of Professional Conduct Rule 3.5; WI SCR 20:3.5

Rule 3.5: Impartiality & Decorum of the Tribunal

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, duress or harassment; or

(d) engage in conduct intended to disrupt a tribunal.