

# 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:

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|----|--|------------------------|
| 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. Accredited** - 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. Accredited 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 Mr. Client 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?

- > 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 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. Mississippi*, 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.