

## "Were You Lying Then, or Are You Lying Now?"

### Tips for Effective Impeachment

Pamela Pepper

Lou Jones Breakfast Club

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#### I. *What is "impeachment?"*

To "impeach" a witness is "[t]o call in question the veracity of a witness, by means of evidence adduced for that purpose." Black's Law Dictionary.

Not every discrepancy in testimony or evidence "calls in question the veracity of a witness." Just because a witness said or did something differently in the past than they are saying or doing now does not necessarily mean that they are being untruthful, or that it was worth impeaching them.

*Ask yourself:* Is this discrepancy significant enough, in the context of the facts of this case, to warrant an attempt to impeach?

#### II. *Who may impeach?*

Rule 607 of the Federal Rules of Evidence: "Any party, including the party that called the witness, may attack the witness's credibility."

If things are going very badly, you may impeach your own witness.

#### III. *Can you impeach a witness using evidence of his or her character?*

Federal Rule of Evidence 608 says:

(a) Reputation or Opinion Evidence. A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. ***But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.***

(b) Specific Instances of Conduct. Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

- (1) the witness; or
- (2) another witness whose character the witness being cross-examined has testified about.

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

SO--

--You can't put on extrinsic testimony to attack the witness's character for truthfulness, except under specific circumstances.

--You can't rehabilitate a witness's character for truthfulness unless it has first been attacked.

#### **IV. *Can you impeach a witness by demonstrating that he or she has a criminal conviction?***

The governing rule is Federal Rule of Evidence 609. The short answer is yes, but only under limited circumstances that likely rarely apply in bankruptcy situations. If you think you want to do this, review Rule 609 very carefully.

#### **V. *How do you impeach a witness using the witness's prior inconsistent statements?***

A. The applicable rule is Federal Rule of Evidence 613, "Witness's Prior Statement."

B. It is often confused with Rule 612, "Writing Used to Refresh a Witness's Memory."

C. You use Rule 613 when a witness (usually the other side's witness) is saying something on the stand today that is materially different than what he/she said in prior testimony or statements. Rule 613 is an impeachment tool.

D. You use Rule 612 when a witness (usually your witness) states that he/she can't remember something, and you want to give them an aid to help them remember.

E. Rule 613:

1. When you are impeaching a witness using his or her prior testimony, you *do not* have to show the witness that testimony. If, however, the opposing counsel asks, you must show it to opposing counsel.

2. You may use extrinsic evidence to prove that the witness made a prior inconsistent statement *only* if you (a) give the witness an opportunity to explain or deny the statement, and (b) give the other side an opportunity to examine the witness about it.

F. Key points:

1. Before you wade into these waters, make sure that the prior statement actually was materially inconsistent. If today the witness tells you that he was 15 minutes late, and at the deposition she told you that she was 10 minutes late, ask yourself whether that five-minute discrepancy is truly material to what you are trying to do. If not, don't bother.

2. Before you begin the impeachment, find the exact page and lines of the deposition (or other prior statement) which contain the inconsistency. Mark it so that you can easily find it when it's time to use it.

3. Set up the inconsistency. First, ask the witness to repeat what he/she just told you: "So, Ms. Jones, did I understand you correctly--you just said that you did not list the car on your schedules because you thought your mother owned it?" Commit the witness to the statement as clearly as possible.

Next, set up the prior statement, by reminding the witness of the circumstances surrounding the previous statement. "Ms. Jones, you and I met in my office on June 3, along with your lawyer, for a deposition, correct? There was a court reporter there? We talked for about an hour? I asked you questions, and you answered them?" Etc.

Once you've thoroughly established the circumstances surrounding the prior statement, go right to the critical language in the deposition. Do not read in any more than is absolutely necessary--that is how this process becomes mushy and ineffective. Read just the contradictory language--no more. "At that deposition, Ms. Jones, I asked you the following question, and you gave me the following answer: Question: 'But you didn't put the car on your schedules, correct?' Answer: "Right, because I had just borrowed the car for a year or so from my cousin until I could get back on my feet--it wasn't mine.' Do you recall giving that answer?" The only acceptable responses from the defendant are "yes, I recall," or "no, I don't remember."

Now--LEAVE IT! Don't ruin what you just did by saying, "So, today you are telling me that it was your mother's car, but at the deposition you told me you borrowed it from your cousin. Which is the truth?" The witness will happily use this opportunity to explain away the inconsistency. Don't give the witness that opportunity. Establish that she remembers the question and answer, then move on.

## **VI. *Final Thoughts***

Use impeachment sparingly and carefully. It is rare in today's world of discovery and disclosure that you get a true, Perry Mason, "smoking gun" type of impeachment opportunity. Choose your battles, and impeach only in those instances in which you really do have a significant, material discrepancy.

Think surgical strikes, not carpet bombs. Hone in on three or four clear discrepancies, hit the witness with the precise language or action that is different, and then move on.

Some of the most effective impeachments last five minutes. But they hang in the air for much longer. End your cross with the best one you've got, the most powerful discrepancy.