Q. During those three days, you never went to work?
A. No.
Q. You never returned home?
A. No.
Q. And the only person who saw you at your friend's house was your friend, isn't that so?
A. Yes.

§7.7. *Impeachment*

Impeachment is the most dramatic trial technique in the lawyer's arsenal. Selectively used and effectively employed, it can have a devastating effect at trial. Jurors appreciate effective impeachment. They enjoy seeing a witness get "caught" changing his story. Impeachment, however, should be selectively used because, like any dramatic weapon, its impact is diluted with overuse. Impeachment must be effectively employed because it must be dramatically executed using a persuasive technique. Consequently, learning when and how to use impeachment is an essential skill for any trial lawyer.

Impeachment is a cross-examination technique that discredits the witness or his testimony. Its purpose is simple: show the jury that this witness, or this part of his testimony, cannot be believed. Many lawyers mistakenly attempt the same thing through the refreshing recollection technique. Remember that refreshing recollection is a direct examination technique that steers a favorable but forgetful witness back on the beaten path. It is an accrediting technique and should usually not be used during cross-examination.

Impeachment is governed by a series of technical rules from the Federal Rules of Evidence, case law, and custom. Under FRE 607 any party can impeach any witness. This permits a party to "volunteer" impeaching facts on direct examination, an approach usually called "drawing the sting."

There are seven basic impeachment techniques:

a. bias, interest, and motive
b. prior convictions
c. prior bad acts
d. prior inconsistent statements
e. contradictory facts
f. bad character for truthfulness
g. treatises

Each of these will be discussed later in detail. Treatises will be discussed in Chapter VIII.

1. Impeachment requirements

Impeachment procedures are governed by statutes, case law, local custom, and rules of persuasion. These rules for the most part apply regardless of the particular impeachment technique used. While the Federal Rules of

Evidence are largely silent on impeachment procedure, the common law developed certain procedural requirements to ensure that impeachment would be both fair and efficiently done, and most courts continue to follow them.

a. Must have good faith

Central to impeachment is the requirement of good faith. You must have a good faith basis for believing that the impeaching fact you are disclosing is in fact true. Unless you have such a good faith belief, you cannot inquire into it. The judge may require you to disclose to him your good faith basis for going into a particular matter. In addition, case law ordinarily requires that you prove up an important impeaching matter if the witness denies its existence. If you cannot prove up something that you may be required to, you cannot ask about it. This requirement protects a witness from being attacked with unsupportable impeachment. The good faith requirement is also an ethical rule. (See Model Rule 3.4.)

b. Must raise on cross-examination

If you intend to raise an impeaching matter, most jurisdictions require you to do so during cross-examination of the witness you are impeaching. (Of course, the direct examiner can impeach her own witness under FRE 607, but most impeachment occurs during cross-examination.) The reasons are fairness and judicial economy. Fairness requires that a witness be asked about an impeaching fact, so that he can admit, deny, or explain it. Judicial economy requires that an impeaching fact be brought out on cross because if the witness admits the impeachment, there is no need to prove it up with extrinsic evidence. In addition, an impeached witness can explain away, or reduce the effect of, impeachment on redirect examination, an efficient way of dealing with this situation.

c. Must prove up if required

Whether you must prove up an impeaching matter depends on two questions. First, did the witness admit the impeachment? If the witness unequivocally admits the impeachment, there is nothing left to do. If the witness denies or equivocates, however, you may be required to prove up the impeaching matter. Equivocations such as "I'm not sure," "I don't remember," or "I might have" are treated like denials.

Second, whether the impeaching matter is "collateral" or "noncollateral" determines whether you will be required to prove up a denial or equivocation. The reason is again based on judicial economy. Only noncollateral matters that are denied must be proved up with extrinsic evidence. If a collateral matter is denied, you must "take the witness' answer" and cannot prove up a denial. Whether a matter is noncollateral or collateral is really a practical question addressed to the judge's discretion. Is the matter that was denied by the witness important enough, given the issues of the case and significance of the witness, that we should use court

time to prove up the denied matter with extrinsic evidence? If the answer is "yes," it is noncollateral. For instance, if an important eyewitness says he was 20 feet away when he saw an accident, and denies saying previously that he was 200 feet away, this fact is obviously important, or noncollateral. On the other hand, if the witness says that he was 20 feet away, and denies saying previously that he was 30 feet away, this inconsistency is relatively unimportant, or collateral. Some categories of impeachment are viewed as always noncollateral, others are always collateral, while some may fall in either category.

d. When to prove up

If a witness denies or equivocates on a noncollateral matter, you must "prove up the denial" or "complete the impeachment" with "extrinsic evidence" when you next have the opportunity to call witnessess or introduce exhibits. For example, if a plaintiff witness denies a noncollateral matter during cross-examination, defendant's lawyer must wait until the plaintiff rests and it is the defense's turn to call witnesses in the defense's case in chief. Only then can the defense call the prove-up witness. If a defense witness denies a noncollateral matter during cross-examination, plaintiff's attorney must wait until the defense rests and it is plaintiff's turn to call rebuttal witnesses. Only then can plaintiff call a prove-up witness. How this is done is discussed later in this section.

Once the basic procedure regulating impeachment is understood, the persuasive impeachment techniques can be learned. The techniques depend in large part on the particular impeachment method being used.

2. Bias, interest, and motive

This category includes bias, interest, and motive. While there is no federal rule on this category, bias, interest, and motive are always considered noncollateral. If the witness does anything other than admit the matter, you must prove it up with extrinsic evidence.

Regardless of the particular area, the approach is the same. Your cross-examination must, bit by bit, carefully suggest the impeaching facts, then stop. An overly zealous cross-examination runs the considerable danger of offending the jury. Accordingly, subtlety is essential. The jury will respect your good taste and reach the proper conclusion on its own.

a. Bias and prejudice

Bias and prejudice are particular tendencies or inclinations that a person has that prevent him from being impartial. A person is biased in favor of, or prejudiced against, some person or position. This usually involves exposing a family, personal, or employment relationship that renders the witness incapable of being impartial and objective.

Example:

The defense in a criminal case is alibi. The defendant's mother has testified that the defendant was at home when the crime was committed. The cross-examination will develop the mother's obvious bias for her son.

Q. Mrs. Jones, your son was living with you on the date this robbery was committed, wasn't he?
A. Yes.
Q. In fact, he's still living with you now?
A. Yes.
Q. So you see him just about every day?
A. Yes.
Q. You talk to him?
A. Yes.
Q. He talks to you when he has problems?
A. Yes.
Q. Mrs. Jones, you've probably talked with your son about this case many times, haven't you?
A. Yes.
Q. Would it be fair to say you talk about it with him almost every day?
A. Probably.
Q. You weren't subpoenaed to come to court today, were you?
A. No.
Q. Your son and his lawyer asked you to come?
A. Yes.

Notice that the cross-examination was fairly gentle. In such a situation the jury can easily sympathize with the poor woman whose son obviously put her up to testifying for him. In this kind of cross-examination, being gentle and brief is being safe. For this reason, lawyers frequently choose not to raise obvious bias on cross-examination, preferring instead to discuss it during the closing arguments. This is an effective alternative if the facts establishing bias are already in evidence.

b. Interest

Interest refers to the witness' possible benefit in, or detriment from, the outcome of a particular case. Most commonly, though not always, the witness' interest is financial. Since human greed is one of the most common motivations, demonstrating it can a powerful adverse effect on the witness' credibility.

Example:

In a will contest suit, the heirs at law who were excluded by the will have challenged the testator's mental capacity to execute the will. The witness is an heir who would receive part of the estate under intestacy should the will be barred.

Q. Mr. Jones, you are one of the late William Jones' children, aren't you?
A. Yes.
Q. You're one of three surviving children?
A. Yes.
Q. You knew your father had substantial property and other assets, didn't you?
A. Yes.
Q. When you learned that his estate was valued at over $300,000, that didn't surprise you, did it?
A. No.
Q. But when you learned that he had willed his entire estate to three different charities, that did surprise you, didn't it?
A. Yes.
Q. You knew that this meant that the three charities would get all your father's money, right?
A. Yes.
Q. Shortly after you learned the contents of your father's will, you consulted a lawyer?
A. Yes.
Q. You learned that if the will were invalid, the state laws of intestacy would apply, correct?
A. Yes.
Q. Those laws would provide that you, as one of three surviving children, would get one-third of his estate?
A. Yes.
Q. So, you knew that if the will were declared invalid, you would get about $100,000 from the estate, isn't that true?
A. Yes.
Q. But you also knew that if the will were upheld, you wouldn't get one dime, isn't that also true?
A. Yes.

c. Motive

Motive is the urge that prompts a person to think and act in a certain way. Common examples are greed, love, hate, and revenge. Each, in the right circumstances, can be a compelling emotion. Where such a motive can be effectively suggested, it is a powerful weapon because, like bias and interest, it taints the credibility of the witness, regardless of how plausible his testimony might appear to be.

Example:

Defendant is charged in a criminal case with forging endorsements on stolen checks and then cashing them. The cross-examination is designed to show his financial plight and obvious need for money as the motive for committing the crime.

Q. Mr. Jones, over the past two years you've invested in the stock market?
A. Yes.
Q. You bought over $100,000 worth of commodities stock?
A. Yes.
Q. Commodities are high-risk investments, aren't they?
A. Yes.
Q. It would then be fair to say you were speculating in the commodities market, wouldn't it?
A. I suppose so.
Q. You bought the stock on a 10 percent margin?
A. Yes.
Q. This meant you had to put up only 10 percent, or $10,000, of your own money to buy all the stock, isn't that true?
A. Yes.
Q. However, because of this, if the market value dropped by 10 percent, you'd lose your entire investment unless you put up more money, isn't that also true?
A. Yes.
Q. That's what's known as a margin call?
A. Yes.
Q. On December 13, 1995, you got a margin call from your brokerage firm, didn't you?
A. Yes.
Q. And it was the day after the margin call that you deposited these checks in your savings account, wasn't it?
A. Yes.
Q. The same day you used that money to meet the margin call, didn't you?
A. Yes.

3. Prior convictions

Prior convictions are governed by FRE 609, a highly technical rule that has two basic provisions. First, any felony conviction, and any conviction involving dishonesty or false statements, can be used to impeach the credibility of any witness who has testified. However, the conviction, or release from confinement, must have been within ten years of the present date. Second, a balancing test is applied in two situations: where the witness is a defendant in a criminal case and the prior conviction is a felony, and where the conviction is more than ten years old. In these situations the court must determine whether the probative value of the conviction outweighs its prejudicial effect. If so, the conviction can be used to impeach.

Prior convictions must be raised on cross (unless the witness has already "volunteered" it on direct examination, a situation that frequently occurs). This can be quickly done.