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Cross-examination to impair witness credibility

Challenging a witness's credibility requires careful strategy. Examine the avenues of prior inconsistency, character evidence or case-specific impeachment



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Cross-examination goals essentially boil down to developing facts which support your case; harm the defense case; and impair credibility. You must carefully analyze the first two goals before you decide to impair the credibility of a witness.

When the witness has not harmed your case, there should be no reason to cross-examine, let alone challenge credibility. Although the jury anticipates a thorough cross and looks forward to it, you must quickly resist the temptation. Unnecessary cross-examination opens the door to a witness suddenly surprising you with something harmful. It also opens up further re-direct and the chance for something harmful to develop.

When the witness has harmed your case on direct examination, you should first consider cross-examination to elicit some helpful facts. This would entail a series of simple, short statements that the witness must agree upon. Such cross-examination may address corroboration of a timeline, the weather at the time of the occurrence, persons present at the scene, laying foundation for documentary evidence, etc. While you do not want to give the harmful witness any more importance to the case than necessary, you may have to when the witness is the only source for the evidence.

If you determine that you can successfully challenge a harmful witness's credibility (impeachment) you must first understand that the impeachment does not necessarily mean that all of the witness's testimony will be determined to be unreliable. Rather, as stated in CACI 107, the jury remains the sole judge of witness believability:

> Sometimes a witness may say something that is not consistent with something else he or she said. Sometimes different witnesses will give different versions of what happened. People often forget things or make mistakes in what they remember. Also, two people may see the same event but remember it differently. You may consider these differences, but do not decide that testimony is untrue just because it differs from other testimony.
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> However, if you decide that a witness has deliberately testified untruthfully about something important, you may choose not to believe anything that witness said. On the other hand, if you think the witness testified untruthfully about some things but told the truth about others, you may accept the part you think is true and ignore the rest.

The three most often used methods to impair witness credibility include prior inconsistent statements, character evidence and case-specific impeachment.

Prior inconsistent statements/conduct

Perhaps the most effective and most frequently used form of impairing credibility is proof of a statement or conduct by the witness that is inconsistent with the trial testimony. (Evid. Code, § 780(h)) The inconsistency need not be a complete contradiction. The test is whether the prior statement is inconsistent *in effect* with the trial testimony. *People v. Spencer* (1969) 71 Cal.2d 933, 941.

A primary consideration of whether you should impeach with a prior inconsistent statement is the degree of the inconsistency. Was the prior statement of any material significance? If not, *you* may lose

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credibility by being petty. Of course, if your case needs all the help it can get and there are several "small" inconsistencies that you can spin into a pattern, you may have no other choice but to go there.

Prior inconsistent statements

The first step in impeachment by prior inconsistent statements is to ensure that the witness has committed to the new statement. Leave no escape. This can be achieved by doubling back and having the witness reiterate the new statement by your use of specific leading questions – do not paraphrase the witness's new testimony. This precludes the witness from claiming that they misunderstood the question that led to the new statement or that they simply misspoke. Next, lay foundation for the prior inconsistent statement being the most believable: have the witness confirm that they gave a prior statement, they may have written/signed a statement, they were trying to be accurate, their recollection of events was better back then, they were trying to be truthful, it was a sworn statement, etc. Then you must confront the witness with the prior statement – have them confirm that they gave the prior statement and their signature appears on it. Now is the time to bring it all together. Show the reasons that the witness has changed the testimony (e.g., they were contacted by an attorney, they spoke to a party, they became a party, etc.) Do not ask the witness for an explanation for the change. You have reached your goal.

Inconsistent conduct

A witness's conduct may also be shown to impeach. If a witness states that they have never acted in a certain manner and there is evidence that they have, their credibility will be impeached. An example in an auto case is a plaintiff testifying that they habitually wear a seatbelt and did so in the subject collision, but subsequent subrosa surveillance shows that the witness was driving without being belted.

Character evidence

Impeachment by character evidence is the use of a personal trait to impair credibility. There are essentially four methods to impeach using character evidence: defects in perception, defects in recollection, felony convictions and past misconduct.

Defects in perception

Defects in perception are based upon personal impressions of an occurrence. The witness should be examined on their opportunity and capacity to perceive. (See Evid. Code, § 780(c), (d).) Because perception varies among every one of us, it is important to establish that with the witness. The reasons for the variance in perception should be established. For example, variance comes from physical location during the relevant event, the quick and unexpected nature of the event, visual acuity, attentiveness and effects of medication. Other factors affecting perception can be influences imparted on the witness by others such as an attorney, investigator or a party.

Impressions may vary from the witness's desire for a particular outcome. Over time, the desire turns into belief, and the belief becomes misguided perception. Unconscious partisanship affects perceptions as does a desire to please the court, a party or the police. Exposing these tendencies may be very difficult, but you should at least accept that they may be present. The cross-examiner must search for and expose these tendencies while balancing the risk of being perceived as a bully.

Defects in recollection

The witness should also be examined on their capacity to recollect. (See Evid. Code, § 780(c).) Defects in recollection do not go to perception of the original events, but on events that have impacted the ability to recollect.

Effective cross-examination will show that the witness cannot recall sufficient details of the event, thus harming their credibility. Questioning along these lines is most often seen as exposing the passage of time since the occurrence. Also, points of importance include the witness's failure to make contemporaneous notes, there was no particular reason to commit the occurrence to memory, and there may be confusion of the occurrence with another similar incident.

Felony convictions

Felony convictions are admissible to attack credibility pursuant to Evidence Code section 788. Generally, the length of the sentence is not admissible. To get as much mileage out of the conviction as possible, have the witness agree that a felony is a crime punishable with death or by imprisonment in the State prison (Pen. Code, § 17(a)) and obtain testimony of the reason for the conviction, date of conviction and the court location. The more time spent on the felony conviction, the better. Be prepared to argue against an Evidence Code section 352 objection as to the probative value versus its prejudicial effect.

Past misconduct

Evidence of specific instances of a witness's conduct to prove a trait of character is inadmissible to attack the witness's credibility. (Evid. Code, § 787) However, past misconduct is admissible to show the witness has motive, bias or other interest that might induce false testimony. (Evid. Code, § 780(f))

Be sure to review the CACI instruction 107 before your deposition and cross-examination of the witness. You'll be using that instruction during your closing, so be sure you are tailoring your cross to it.

Case-specific impeachment

The case specifics may provide an opportunity to impeach a witness. This usually arises when a witness (expert or lay witness) has a financial interest in an aspect of the case or in the outcome.

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The financial interest may go beyond the obvious financial benefit of being retained in the case or being paid to travel first class to the trial. Financial benefit may even go to the opportunity to be retained in other similar cases.

Forensic compensation of defense experts – Stony Brook

Evidence Code section 722(b) makes admissible income earned by forensic experts on the specific case being tried. The expert's annual income, or percentage of income, earned over the years doing forensic work is also relevant and admissible to question the credibility of the particular expert by showing bias. (Evid. Code, § 780(f); CACI 5003) In the recurring instance where a retained expert will not produce documents in deposition that evidence past and present income earned in testifying, counsel should refer to *Stony Brook I Homeowner's Assoc. v. Sup. Ct*. (2000) 84 Cal.App.4th 691. While *Stony Brook* does not permit unfettered access to an expert's potential bias, it does support discovery into numerical estimates of defense and plaintiff-related work (e.g., including exams, reports and deposition and court testimony) and a numerical estimate of the amount of income generated from that defense and plaintiff-related litigation. In *Stony Brook*, the Appellate Court commanded the doctor to produce such records for the previous three years even if it took a third party to assist in compiling the information. (*Id*. at pp. 698-700.)

Consider when to impeach

The final tactical decision in preparing to impeach a witness is when to do it. The witness will be on the defensive and likely after you have successfully attacked credibility, so consider eliciting facts supporting your case beforehand. However, because impeachment is such a powerful tool, you may want to consider it early on in cross-examination to place the witness into your control.

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