

Attacking and supporting witness credibility

Many attorneys have difficulties rehabilitating their witnesses and tearing down the credibility of adverse witnesses

By Hon. James P. Cooper III

In any trial in which witnesses are a necessary part of the proceeding, attorneys have two principal objectives: (1) present credible witnesses who will support their case, and (2) destroy the credibility of adverse witnesses. Many attorneys have won trials because they have effectively and wisely used the rules of evidence to support the credibility of their witnesses and attack the credibility of adverse witnesses. Conversely, many attorneys have lost trials because, among other things, they are simply unfamiliar with the rules of evidence about supporting or attacking the credibility of witnesses. In this discussion, I endeavor to provide a refresher on the general principles of law about supporting and attacking the credibility of witnesses. Please note that this discussion is limited to the topic of supporting or attacking the credibility of witnesses. This discussion does not specifically address issues such as the competency of witnesses, privileges, opinion testimony, and hearsay, which also affect the credibility of a witness's testimony.

Basic working principles [in no particular order]

Rule No. 1 – Any party may attack or support the credibility of a witness, including the party who called the witness. (Evid. Code, § 785; *People v. Ross* (1979) 92 Cal.App.3d 391, 400; *People v. Osorio* (2008) 165 Cal.App.4th 603, 616.)

Rule No. 2 – Credibility and reliability are two different concepts. A credible person might appear to speak the truth. Reliability relates to the accuracy of the witness's testimony. A credible witness is not necessarily a reliable witness. On the other hand, a reliable witness may not appear credible. Therefore, a witness who appears credible may nevertheless give unreliable testimony. On the other hand, a witness who appears to lack credibility may give reliable testimony.

Rule No. 3 – Evidence Code section 355 provides that evidence inadmissible for one purpose or one theory may be admissible for a different purpose or theory.

Rule No. 4 – If one does not timely and specifically object to, or move for, the admission of evidence on the proper ground, any associated judicial error is waived on appeal. (Evid. Code, § 353; *People v. Keo* (2019) 40 Cal.App.5th 169, 187-188; *Conservatorship of S.A.* (2020) 57 Cal.App.5th 48, 57.)

Rule No. 5 – Know your forum. The rules of admissibility for a criminal case differ from the rules of admissibility for a civil case. Generally, Proposition 8 – The Victims' Bill of Rights (1982) (Cal. Const., art. I, § 28, subd. (f)(2)) expanded the admissibility of evidence in criminal cases, but it did not affect the admissibility of evidence in civil cases.

Rule No. 6 – Do not forget about Evidence Code section 352, which allows a court to exclude evidence if the dangers of undue prejudice, undue consumption of time, or possible issue confusion substantially outweigh the probative value of the evidence. (*People v. Doolin* (2009) 45 Cal.4th 390, 439.) However, evidence is not unduly prejudicial simply because it weakens the opponent's case or strengthens the case of the proponent. (*People v. Cudjo* (1993) 6 Cal.4th 585, 609.)

The conundrum of character evidence

Character evidence is evidence about a person's propensity or disposition to engage in a certain type of conduct, and that evidence is offered to show that the person acted in conformity with that character on a particular occasion. Character evidence comes in three forms: opinion, reputation, and specific instances of conduct. (Evid. Code, § 1100.) Opinion evidence consists of a witness's personal observation of the defendant's relevant course of behavior. (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1305-1311.)

Reputation evidence consists of the regard in which someone is held in the community rather than what is actually known of the party by either the witness or others. (The comment to Evid. Code, § 1101 describes reputation evidence as "little more than accumulated hearsay.") (Also, see *People v. Felix* (1999) 70 Cal.App.4th 426, 430.)

The purpose of specific act evidence is to show that the person acted in conformity with his or her behavioral history. (E.g., Evid. Code, §§ 1108 (sex crimes) and 1109 (domestic violence).)

Character evidence tends to be problematic for several reasons. First, character evidence may have slight, if any, probative value because it usually does not convey relevant information and it may distract the trier of fact from the main issue of what actually happened on the occasion at issue. Second, if the character evidence is highly emotive, it may cause the trier of fact to decide an issue based on their feelings about who was "good" or "bad." Third, proving up character evidence could result in a

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"mini-trial," which might confuse the trier of fact or just take too much time to adjudicate. Despite the problems associated with character evidence, the Evidence Code and decisional law do allow parties to present character evidence in certain situations.

Rules applicable to all types of cases

Section 788 allows a party to attack a witness's credibility by evidence that the witness has a felony conviction involving moral turpitude. (*People v. Chavez* (2000) 84 Cal.App.4th 25, 28. ["Moral turpitude offenses are crimes in which dishonesty is an element of the offense (i.e., fraud, perjury, etc.)"].)

In examining a witness about a felony conviction, the attorney may ask only the following: (i) the name of the felony; (ii) the general elements of the offense; (iii) the date of conviction; and (iv) the place of conviction. (*People v. Terry* (1974) 38 Cal.App.3d 432, 446.)

Generally, the examiner may not ask a witness about the details of the felony conviction. (*People v. Heckathorne* (1988) 202 Cal.App.3d 458, 462.) In a criminal case, Prop. 8, *infra*, may allow for the admissibility of the details of the felony conviction if the details are relevant on the issue of credibility. (*People v. Dalton* (2019) 7 Cal.5th 166, 213-214.) There is not any case law which suggests that the details of the felony conviction are admissible in a civil case.)

The trial court may "sanitize" the prior by allowing only a general reference to the crime, e.g., "a felony involving theft." (*People v. Massey* (1987) 192 Cal.App.3d 819, 825.) However, an examiner may inquire about the details of the felony conviction if the witness minimizes or misrepresents his or her role or conduct in the offense (*People v. Rowland* (1992) 4 Cal.4th 238, 256), or if the conduct that led to the felony conviction is presented as evidence pursuant to Evidence Code section 1101, subdivision (b). (*People v. Allen* (1986) 42 Cal.3d 1222, 1270.)

The *fact* of a misdemeanor conviction is inadmissible for impeachment (*People v. Wheeler* (1992) 4 Cal.4th 284, 297-298), but evidence of the underlying conduct is admissible. (*People v. Lepolo* (1997) 55 Cal.App.4th 85, 89-90; *People v. Cadogan* (2009) 173 Cal.App.4th 1502, 1514.) In the absence of an admission by the witness, since the prove-up of misdemeanor conduct may result in a "mini-trial," courts usually exclude the prove-up evidence pursuant to section 352.

Since a juvenile proceeding is civil in nature, the credibility of a witness may not be attacked with the record of a sustained adjudication. (*People v. Burton* (1989) 48 Cal.3d 843, 861.) However, the witness may be impeached with evidence of the prior conduct, assuming it qualifies as moral turpitude. (*People v. Rivera* (2003) 107 Cal.App.4th 1374, 1381-1382.)

Evidence Code section 788 prohibits impeachment of a witness with a conviction which has been set aside or dismissed pursuant to an expungement, a certificate of rehabilitation, or a pardon. (*People v. Field* (1995) 31 Cal.App.4th 1778, 1789-1790.) However, if the witness is also a defendant in a criminal trial, an expungement pursuant to Penal Code section 1203.4 would not prohibit the use of the former conviction as impeachment.

Specific instances of conduct

Section 786 limits the admissibility of character evidence to the traits of honesty and veracity, and dishonesty and untruthfulness. (*Piscitelli v. Salesian Society* (2008) 166 Cal.App.4th 1, 7.) Evidence Code section 790 excludes evidence of a witness's good character for honesty or veracity until the witness has been attacked with evidence of bad character for honesty or veracity. Section 787 prohibits the use of specific instances of a witness's conduct to attack or support credibility. However, there are significant exceptions to the general rule of inadmissibility of specific-act evidence. As discussed earlier, section 788 provides that evidence of a prior felony conviction is admissible to attack the witness's credibility. (*Robbins v. Wong* (1994) 27 Cal.App.4th 261, 269.) Also, specific instances of a witness's conduct are admissible to show that the witness: (i) has a bias, prejudice, interest, motive to fabricate, or other improper motive; (ii) has an impaired ability to perceive, recollect, or communicate; or (iii) that some portion of the witness's testimony is false. (Evid. Code, §§ 780, subds. (c), (d), (e), (f) and (i); *Piscitelli*, *supra*, 166 Cal.App.4th at p. 8.)

Because of Proposition 8, sections 786, 787, and 790 do not prohibit the use of specific-act evidence to attack or support the credibility of a witness in a criminal case. (*People v. Harris* (1989) 47 Cal.3d 1047, 1080-1082.) Therefore, a party may use specific act evidence, in addition to reputation or opinion evidence, to attack or support the credibility of a witness.

Section 1102 allows a defendant in a criminal action to offer opinion or reputation evidence of his or her character to prove that he or she behaved in a manner that was consistent with the relevant character trait, thereby raising a reasonable doubt that the charge is true. (*People v. Tuggles* (2009) 179 Cal.App.4th 339, 357.) If a defense witness were to testify about the defendant's good character, the prosecutor may ask the witness if the witness has *heard of* specific acts or conduct by the defendant that would be inconsistent with that character, so long as the prosecutor has a good faith belief that such acts or conduct occurred. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1170.) However, the prosecution may not ask the witness if the witness *knows* whether the defendant committed specific acts that would be inconsistent with the character. (*People v. Wagner* (1975) 13 Cal.3d 612, 619.)

In a criminal action, if the prosecutor has alleged that the defendant committed a sexual offense (Pen. Code, §§ 261-262, 264.1, 286, 287, and 289), section 782 provides that a defendant may not attack an alleged victim's credibility by presenting evidence of the victim's prior sexual conduct unless the defendant files a motion as prescribed by the section. (*People v. Bautista* (2008) 162 Cal.App.4th 762, 781-782.) Similarly, in a civil action

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in which the plaintiff has alleged sexual harassment, sexual assault, or sexual battery, a party may not attack the plaintiff's credibility by presenting evidence of the plaintiff's prior sexual conduct unless the proponent of the evidence files a motion as prescribed by section 783. (*In re Venus B.* (1990) 222 Cal.App.3d 931, 936.)

Under both sections 782 and 783, the defendant/party must file: (i) a written motion to notify the court and the parties that the defendant/party intends to present evidence of the plaintiff-victim-witness's sexual conduct, (ii) an affidavit under seal, and (iii) the affidavit must contain an offer of proof. If the court were to find that the offer of proof is sufficient for a hearing, the court will conduct an in limine hearing, and the court will allow the attorneys to examine the victim-witness about the offer of proof. After the evidentiary hearing, if the court finds that the proffered evidence is both relevant under section 780 and admissible under section 352, the court will issue an order which will prescribe the evidence that may be introduced and the nature of the questions it will permit. (*People v. Daggett* (1990) 225 Cal.App.3d 751, 757.)

If a defendant/party fails to follow the procedure prescribed by sections 782 and 783, the court will exclude the proffered evidence. (*People v. Sims* (1976) 64 Cal.App.3d 544.)

Also, if the alleged prior sexual conduct of the victim-witness is not relevant to attack his or her credibility based on the factors stated in Evidence Code section 780, or is not sufficiently similar to the charged conduct in the criminal case, the court will exclude the evidence. (*People v. Mestas* (2013) 217 Cal.App.4th 1509, 1514.)

Prior statements

A witness's prior consistent or inconsistent statement is a relevant factor in assessing credibility. The admissibility of prior inconsistent statements is governed by Evidence Code sections 769, 770, 780(h), and 1235, and the admissibility of prior consistent statements is governed by sections 780(g), 791, and 1236.

Prior inconsistent statements

A party may challenge the credibility of a witness by showing that the witness's testimony is inconsistent with statements the witness made before the trial. (*People v. Price* (1991) 1 Cal.4th 324, 474.) Although the prior statements must be clearly inconsistent with the relevant trial testimony, the inconsistency may be explicit or implied. (*Fibreboard Paper Products Corp. v. East Bay Union of Machinists* (1964) 227 Cal.App.2d 675, 699; *Price, supra,* 1 Cal.4th at 474; *People v. Alexander* (2010) 49 Cal.4th 846, 908-909.)

If a witness were to testify that he or she does not remember making certain prior statements, a party may impeach the witness with evidence of the prior statements. (*People v. Pickens* (1961) 190 Cal.App.2d 138, 147; *People v. Ervin* (2000) 22 Cal.4th 48, 84-85.)

Not only is evidence of a prior inconsistent statement admissible to attack the credibility of a witness, it may also constitute substantive evidence that the information in the prior statement is true. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1144.) In order to establish the foundation for the admissibility of the prior inconsistent statement as impeachment evidence (section 780(h)) as well as substantive evidence (section 1235), a party must comply with section 770. To comply with section 770, a party need only give the witness a chance to explain or deny the statement. The party need not disclose the prior inconsistent statement to the witness before inquiring about the statement. (Evid. Code, § 769; *People v. Kidd* (1961) 56 Cal.2d 759, 766; *McGraw v. Friend & Terry Lumber Co.* (1901) 133 Cal. 589, 592.)

As to what an "inconsistent" statement is and when it is admissible, courts have established the following framework:

1. A prior statement is not admissible if the witness refuses to testify or, if his [or her] testimony consists exclusively of 'I don't remember' answers. (Ed. Note: The prior statement may still be admissible under Evid. Code, § 780, subd. (h) to attack credibility.) (*People v. Alvarez* (1968) 268 Cal.App.2d 297, 303.)
2. A prior inconsistent statement is admissible if the witness admits making the inconsistent statement.
3. A prior inconsistent statement is admissible if the witness denies making the inconsistent statement.
4. A prior statement is admissible if it tends to contradict or disprove the testimony or any inference or impression to be deduced from it.
5. A prior inconsistent statement may be admitted if a witness remembers portions of an event, transaction, or statement, if the proponent of the statement establishes either that the witness is being evasive or that it is implausible that the witness has forgotten the statement after having been reminded that he made it. Where the witness recalls part, but not all, of a given event or statement, the proponent of the prior inconsistent statement must be given an opportunity to test the witness's memory so that the trial judge can determine whether the statement is, in fact, inconsistent with his testimony. In making this determination, the trial judge must base its determination on the credibility of the witness, the tenor of his testimony, and the likelihood that he does, in fact, recall the nature of his earlier statement. (*People v. Loyd* (1977) 71 Cal.App.3d Supp. 1, 9-10.)

Prior consistent statements

A party may support the credibility of a witness by showing that the witness's testimony is consistent with statements he or she made before the trial. (Evid. Code, §§ 780, subd. (g), 791, 1236.) A witness's prior consistent statement would be admissible in either of the following situations: (i) If a witness's prior inconsistent statement has been admitted to attack the witness's credibility, and the witness's prior consistent statement was made before the inconsistent statement; or (ii) there has been an allegation that the witness's testimony is recently fabricated or has been influenced by bias or improper motive *and* the prior

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consistent statement was made before the bias, motive for fabrication, or improper motive occurred. (*People v. Randle* (1992) 8 Cal.App.4th 1023, 1037.)

If the requirements of both sections 791 and 1235 have been satisfied, a prior consistent statement is admissible to prove the truth of the matters asserted in the statement as well as to support the credibility of the witness. Please note that evidence of a declarant's prior consistent statements is not admissible at a trial pursuant to either prong of section 791 if the declarant does not testify at the trial. (*People v. Kopatz* (2015) 61 Cal.4th 62,84; *People v. Hitchings* (1997) 59 Cal.App.4th 915, 922.) Also, if the prior consistent statement occurred after the bias, motive to fabricate, or improper motive arose, the statement is inadmissible under section 791, subdivision (b). (*Hitchings, supra*, 59 Cal.App.4th at p. 921.)

False and misleading testimony

Commonly, during an examination and without objection, a witness will give an answer that exceeds the scope of a proper question or will volunteer information that is not responsive to the question. Sometimes, a portion of that testimony is false or misleading testimony. Although section 780, subdivision (i) does not expressly reference false or misleading testimony, case law allows a party to attack the witness's credibility by presenting evidence that the witness's testimony was false or misleading in a material way. (*People v Doolin* (2009) 45 Cal.4th 390, 439; *Andrews v City & County of San Francisco* (1988) 205 Cal.App.3d 938, 946.) There are limitations to this rule, however. A party may not ask a witness a question on cross-examination for the sole purpose of contradicting it. (*People v. Contreras* (2013) 58 Cal.4th 123, 152; *People v Lang* (1989) 49 Cal.3d 991, 1017.)

Capacity, demeanor, manner, bias, interest, motives and more!

An attorney may attack or support a witness's credibility by showing that the witness's ability to perceive, to recollect, or to communicate was impaired – or perfectly fine. (Evid. Code, § 780, subds. (c) & (d).) A witness's ability to sense, to remember, and to talk about an event may depend upon factors such as the witness's location during the event, the duration of the observation, and whether there were any circumstances that affected or aided the witness's perception of the event. The following factors, among others, may impact a witness's credibility: (1) mental condition or emotional stability (*People v. Herring* (1993) 20 Cal.App.4th 1066, 1072), (2) traumatic experience (*People v. Boyce* (2014) 59 Cal.4th 672, 688), (3) brain injury (*Winfred D. v. Michelin N. Am., Inc.* (2008) 165 Cal.App.4th 1011), (4) poor memory (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1210), (5) intoxicated condition (*People v. Crow* (1941) 48 Cal.App.2d 666, 672), expert's knowledge, or lack thereof, about a material matter (*Laird v. T.W. Mather, Inc.* (1958) 51 Cal.2d 210, 219), witnesses' comparative maturity, age, and life experience (*Lumbermen's Mut. Cas. Co. v. McIver* (1939 S.D. Cal.) 27 F.Supp. 702, 705), and cumulative effect of mental disorders, hallucinations, and substance abuse. (*People v. Lewis* (2001) 26 Cal.4th 334, 350.)

In addition, a witness's demeanor and manner of testifying are always relevant to credibility. (*People v. Scott* (2011) 52 Cal.4th 452, 493; § 780(a), (b).)

The following factors, among others, are relevant to witness credibility: demeanor as exhibited by the witness's ease, anxiety, calmness, evasiveness, forthrightness, exuberance, lifelessness, carelessness, precision, or caution; the substance of the testimony in terms of plausibility, improbability, consistency, conflicting facts, reliability, or number of errors. (Please review the case annotations to Evid. Code, § 780 for the abundance of decisional law on demeanor, manner, and character of testifying.)

Also, a trier of fact may consider if the witness has a bias, interest, reason, or other motive that might affect his or her testimony. (Evid. Code, § 780, subds. (f), (j); *Briley v. City of West Covina* (2021) 66 Cal.App.5th 119, 135; *People v. Gutierrez* (1994) 23 Cal.App.4th 1576, 1587-1588.) Factors such as a witness expressing fear; having a prior conviction, an immunity or cooperation agreement, a favorable relationship with a party, a material bias, or a financial interest might tend to affect the weight to be given to such testimony. At the same time, if a witness expresses hostility against a party, or is on parole or probation or facing criminal prosecution, these circumstances are also relevant in the evaluation of witness credibility. (Please review the case annotations to Evid. Code, § 780 for the abundance of decisional law on bias, interest, or motive.)

Conclusion

I have provided a summary of the general principles of law about supporting and attacking the credibility of witnesses. Although the information in this primer may seem obvious and easy to use, many attorneys do have difficulties rehabilitating their witnesses and tearing down the credibility of adverse witnesses. My suggestion: Do trials, trials, and more trials.


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James Cooper has been a commissioner on the Los Angeles County Superior Court since 2020. Previously, he had been a criminal defense attorney for 33 years and had tried at least 125 jury trials to a verdict, including at least 30 murder cases. Mr. Cooper has co-authored a chapter in the CEB Publication, California Criminal Law: Procedure and Practice since 1999. He earned his law degree from UCLA in 1986.

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