

**NATIONAL DEFENDER TRAINING PROJECT
2017 PUBLIC DEFENDER
TRIAL ADVOCACY PROGRAM**

University of Dayton School of Law, Dayton, Ohio
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Impeachment

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I. Some General Principles for Impeachment

A. Plan Your Impeachment

1. Make sure you have done a complete investigation, and have obtained all discovery and Brady/Kyles materials before trial. Remember -- the U.S. Supreme Court has explicitly held that anything in the State's possession that can be used to impeach a State's witness must be disclosed under Brady. This applies even if the impeachment material does not in any way exculpate the defendant. As long as it can be used to impeach, contradict or discredit a prosecution witness, it is Brady material.

2. Before the witness takes the stand, you should know what information you have about the witness's convictions, bad acts and bad character that you can use to impeach. Plan this impeachment in advance. Write out the questions in advance, if necessary.

3. Before the witness takes the stand, you should know what information you have about the witness's biases and interests in the case that you can use to impeach. Plan this impeachment in advance. Write out the questions in advance, if necessary.

4. Although you cannot know in advance what the witness will say on direct, you must know in advance exactly what prior testimony and statements the witness has made. Make sure you are completely familiar with all of these prior statements, so if the witness testifies to something inconsistent, you are ready to impeach.

5. Be familiar with your theory of defense. That way you will know if you should be doing an impeachment. If the witness testifies to something inconsistent with a prior statement, only use the prior statement to impeach if the prior statement is more favorable to your theory of defense than the statement the witness just made on direct.

B. Never Ask an Impeaching Question That Calls For an Opinion or Explanation

C. Keep Your Questions Short and Simple

1. No multi-sentence questions.
2. No questions with a long preface or "wind up."
3. Use normal, clear language – no lawyer talk, no cop talk.
4. Don't be a wise ass. Let the impeachment material stand for itself.

E. The Ethics of Cross-Examination

1. You must have a good faith basis for every impeaching question you ask.
2. It is unethical to insert innuendo based on untrue facts.

3. It is unethical to ask accusatory questions for the purpose of embarrassing or rattling a witness if the answer to the question is irrelevant to the case at hand.

EX: The witness has a son who is in prison for child abuse. Unless this is somehow relevant to your case, it is improper to cross-examine the witness about this just for the purpose of embarrassing him, or getting him to lose his temper on the stand.

F. Stop When You Are Done

1. Don't ask one too many questions.

2. If the witness refuses to answer the impeaching question, do not rush in with another question. Every moment of silence just emphasizes that the witness is stuck.

3. Resist the urge to ask the conclusory question after the witness has been impeached. Save the conclusions about the witness for your closing argument.

II. Impeachment With Prior Inconsistent Statements

A. Know the Witness's Prior Statements Inside Out Before You Reach Trial

B. Listen Carefully to the Witness's Answers on Direct. If you Don't Remember What He Said on Direct, You Won't Know If He Can Be Impeached

C. There is a formula for impeaching someone with a prior inconsistent statement. If you follow the simple formula in asking impeachment questions, you can't go wrong.

D. The Formula For Impeachment By Prior Inconsistent Statement

1. Get the witness to repeat the statement he just made at trial

2. Ask the witness if he made a prior statement (Don't ask about the substance of that prior statement, just about whether he made one – you will get to the substance in a minute)

3. Accredit the prior statement by asking leading questions that get the witness to tell you how important it was to him that the prior statement was true.

4. Mark the prior statement for identification (Don't try to introduce it into evidence yet).

5. Confront the witness with the substance of the prior statement and ask the witness if he made that statement.

a. If the witness admits making the prior statement, stop there. You have established the inconsistency, and are not allowed to actually introduce the prior statement in evidence – the inconsistency is already before the jury.

b. If the witness denies making the prior statement, move to have the statement admitted into evidence as a prior inconsistent statement. Then read it to the jury, or have the witness read it aloud to the jury.

5. Do NOT give the witness a chance to explain the inconsistency. This means you should never ask the “one question too many” conclusory question.

EXAMPLE: At a preliminary hearing, the witness testified that the light was green. At trial, he testified on direct examination that the light was red. Here’s how to impeach.

NOTE: Which is better for your theory of defense, a green light or a red light? If a red light is better, DON’T IMPEACH. If, on the other hand, a green light is better, use the preliminary hearing transcript to impeach the witness.

1. GET THE WITNESS TO REPEAT THE STATEMENT HE JUST MADE AT TRIAL

Q: Did you testify on direct examination that the light was red?

A: Yes.

2. ASK THE WITNESS IF HE MADE A PRIOR STATEMENT

Q: Do you remember testifying at a preliminary hearing on March 15th of this year?

A: Yes.

3. ACCREDIT THE PRIOR STATEMENT BY ASKING A SERIES OF LEADING QUESTIONS THAT GET THE WITNESS TO SAY IT WAS IMPORTANT TO HIM THAT THE PRIOR STATEMENT WAS TRUE

Q: And before you testified at that preliminary hearing, you took an oath to tell the truth?

A: Yes.

Q: You knew it was important to testify truthfully at that preliminary hearing?

A: Yes.

Q: You knew that the court reporter was taking down everything you said?

A: Yes.

Q: You knew that after you testified at that preliminary hearing, a judge would rely on your testimony?

A: Yes.

Q: And a jury would rely on it?

A: Yes.

Q: So you thought carefully about your answers when you were testifying at the

preliminary hearing?

A: Yes.

Q: And you didn't make anything up when you testified at that preliminary hearing?

A: No.

Q: And you made sure you told the truth at that preliminary hearing?

A: Yes.

4. MARK THE RELEVANT LINES OF THE PRELIMINARY HEARING FOR IDENTIFICATION

Q: And at that preliminary hearing do you remember being asked the following question and giving the following answer? "Question: 'What color was the light?' Answer: 'Green'"

A: Yes

Stop here. The witness has acknowledged the inconsistency, and is impeached. You may not introduce the transcript of the preliminary hearing transcript. You should, however, be sure to refer to the inconsistency in your closing argument.

OR

A: No.

NOW OFFER THE RELEVANT LINES OF THE PRELIMINARY HEARING TRANSCRIPT INTO EVIDENCE. READ THEM TO THE JURY.

NOTE: Do not offer the entire transcript into evidence:

- a. Everything except the inconsistent statement is both irrelevant and hearsay.
- b. It probably contains a lot of other stuff that you don't want the jury seeing.