HTAA SUMMER PROGRAM



**Impeachment**

Introduction

Impeachment, in the context of mock trial, most of the time refers to impeachment by means of a prior inconsistent statement. However, the term impeach generally means to attack a witness’s credibility. This attack can take several forms:

1. Impeachment by negative character trait
2. Impeachment by prior bad act
3. Impeachment by prior inconsistent statement

This is not to say cross examining a witness about their ability to perceive an event, the absurdity of their version of events, or motivation to lie, it not an attack on their credibility. Those issues can lead to arguments that the witnesses testimony is not credible but an impeachment is usually a direct attack on credibility regardless of the facts at issue.

Impeachment by Introduction of a Negative Character Trait

 This method of impeachment is rarely used because the governing rules limit its use to a few unique circumstances. *See Federal Rules of Evidence* §§ 404(a), 608. Under these rules, the opposing party may offer negative character evidence in the form of reputation or opinion (NY reputation only) that bears on the credibility of the witness the opponent has called. For example, once a witness testified for an adversary, the opposing party may call a new witness who is familiar with that person and can testify that the person had a reputation for dishonesty in their community. This is to permit the jury to consider the witnesses reputation for honesty, truthfulness, etc, within their own community when considering whether to credit the testimony the witness has provided.

Impeachment by Introduction of a Prior Bad Act

This is a much more common technique that permits a jury to evaluate a witness’s testimony in light of their specific history of bad acts. *See F.R.E.* §§ 404(b), 609. The most important distinction to draw here is whether the witness in question is a criminal defendant as that will further restrict the topics an examiner is permitted to address. As opposed to impeachment by negative character trait, impeachment by prior bad act occurs solely on cross examination. During that examination, the opposing party will be permitted question the witness regarding prior specific bad acts that bear on their credibility. The most common example are prior criminal convictions. However, any act the attorney has a good faith basis to believe occurred, and bears on credibility, can be content of a question. For example, in a trial between former business partners, any act of deceit can be the basis of a question. Once the question is asked however, the examiner is bound by the answer.

Impeachment by Prior Inconsistent Statement

This is the most common form of impeachment. This is especially true in mock trial. Here, a prior, out of court statement, that would otherwise be considered hearsay, is allowed into evidence to demonstrate that on a prior occasion the witness said something contradictory to what he or she is saying now. *See F.R.E.* § 801(d)(1)(a). Under the Federal Rules the statement must be previously given under oath but in New York state there is no such requirement. There is however a foundation that must be laid to admit and emphasize a prior inconsistent statement.

1. Lock the witness into his or her answer
2. Establish the witness made a prior statement
3. Build up the importance of that prior statement
4. Confront the witness with the content of the prior statement
5. Depending on witness response:
	1. If witness acknowledges inconsistency – move on
	2. If witness denies inconsistency – prove inconsistency

**Sample Impeachment Regarding Testimony about a Stop Light**

Q: Is it your testimony that at the time of the crash the light was red?

Q: You gave testimony at a deposition in this matter on March 17, 2020?

Q: When you gave testimony at that deposition you were under oath?

Q: An oath to tell the truth?

Q: The whole truth?

Q: Nothing but the truth?

Q: So help you god?

Q: The same oath you are under here today?

Q: When you gave that testimony you were Honest?

Q: You wanted to be accurate?

Q: You wanted to give as complete an answer as possible?

Q: After you gave the testimony you were given a copy of your answers to review?

Q: You did review your answers?

Q: To make sure they were accurate?

Q: To make sure they were honest?

Q: To make sure they were complete?

Q: When you finished reviewing your answers you signed the deposition indicating those answers were accurate honest and complete?

Q: Isn’t it true that during that deposition you were asked this question and gave this answer? (refer opposing counsel to page and line number) (Read whole question and whole answer)

**Where witness answers yes acknowledging inconsistency:**

Q: So today when you testified in front of this jury that the light was red that was not true?

[move on to remaining questions]

**Where witness answers no denying inconsistency:**

Ask opposing counsel to stipulate that is the testimony from the deposition that was given by this witness

Impeachment By Omission

 A typical mock trial impeachment by omission is a legal fiction that is necessary because of the closed universe the mock trial takes place in. It is used where a witness has testified to a material fact that is not included in that witness’s deposition or accompanying paperwork. For an impeachment by omission to function properly it must be used in conjunction with a competition rule that prohibits a witness from answering that they were not asked that question. Obviously in a real trial, there is no such prohibition. Accordingly, in a real trial, the impeachment must be done using a prior question and answer that called for the information the witness is now adding. For example, a victim of a robbery is asked what happened when the defendant pulled out a gun. The witness previously testified that when the defendant pulled out a gun he demanded money but made no mention of any threats. The witness has now testified that the defendant threatened to shoot him as well.

Q: Isn’t it true you were previously asked this question and gave this answer? (refer opposing counsel to page and line number) Question: When the defendant pulled out the gun what did he say? A: He demanded my money.

A: Yes

Q: You didn’t mention anything about a threat?

Q: You didn’t say anything about him saying he would use a gun?

Q: In fact, you didn’t mentioned him saying anything about the gun at all?

Even in the mock trial setting, this method is preferable to the traditional method of impeachment by omission. Nonetheless, sometimes in the mock trial setting it is not possible to use this method. At that point, the traditional mock trial method must be used.

**Sample Impeachment by Omission Regarding Testimony about a Stop Light**

Q: Is it your testimony that at the time of the crash the light was red?

Q: You gave testimony at a deposition in this matter on March 17, 2020?

Q: When you gave testimony at that deposition you were under oath?

Q: An oath to tell the truth?

Q: The whole truth?

Q: Nothing but the truth?

Q: So help you god?

Q: The same oath you are under here today?

Q: When you gave that testimony you wanted to be Complete? Thorough? Detailed? (three questions)

Q: You wanted to provide as much information as possible?

Q: After you gave the testimony you were given a copy of your answers to review?

Q: You did review your answers?

Q: To make sure they were Complete? Thorough? Detailed?

Q: When you finished reviewing your answers you signed the deposition indicating those answers were Complete? Thorough? Detailed?

Q: Isn’t it true that at no point during your deposition did say anything about the color of the light?

**Where witness answers yes acknowledging inconsistency:**

Q: Today in front of this jury is the first time you have said anything about the color of the light under oath.

Q: You knew that information was important

Q: yet, you didn’t say anything about it until today

[move on to remaining questions]

**Where witness declines to admit to omission:**

Ask opposing counsel to stipulate that the information is absent from the deposition.