

# THE ART OF WITNESS IMPEACHMENT

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I often have occasion to recount wisdom-laden legal anecdotes for the edification of newer lawyers. These lawyers listen with rapt attention, even while glancing at their phones. Ahead, preserved for posterity, is one of those anecdotes. It provides the invaluable lesson that there is a need to apply science *and* art when it comes to witness impeachment.

## 1.

Professor Thomas Mauet writes that “[i]mpeachment 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.”<sup>1</sup>

Who doesn’t appreciate seeing someone else—to borrow from Shakespeare—“hoist with his own petard?”<sup>2</sup> And “’tis most sweet” when that someone else is the other side’s self-important star witness.<sup>3</sup>

## 2.

Effective impeachment undermines the credibility of testimony and the witness. Impeachment usually is employed during cross-examination, but Federal Rule of Evidence 607 instructs that “[a]ny party, including the party that called the witness, may attack the witness’s credibility.”

Impeachment may expose bias, prejudice, interest, or motive, or cast doubt on witness objectivity or reliability. Impeachment may reveal perception deficiencies or the witness’s pertinent criminal

convictions or past bad acts “probative of the character for truthfulness or untruthfulness.”<sup>4</sup>

The “most frequently used impeachment method at trial,” Mauet writes, is presenting a witness’s “prior inconsistent statements.”<sup>5</sup>

## 3.

To be effective, impeachment must be simple, clear, and material. Complicated or fuzzy impeachment is ineffective. Marginal impeachment is rarely effective and, worse, can backfire.

You don’t want to try to pass off a witness’s forgivable inconsistency or understandable memory lapse as a calculated transgression of the commandment against bearing false witness. Fact-finders have their own human foibles, and you do not want them to empathize with the adverse witness you are cross-examining. When planning impeachment, consider the Aristotelian golden mean: nothing too much.

So, witness contradictions warrant your attention only if they are material to your case. Marginal contradictions do not work because marginal mistakes are human. You learned this in high school from Walt Whitman.<sup>6</sup>

Next is an example of effective impeachment. It is followed by my eyewitness account of an impeachment that gets high marks for mechanics, but a zero in effectiveness.

#### 4.

Here is the effective impeachment.

**Q.** You testified that you saw the April 2019 car accident that brings us to this trial, right?

**A.** Right. I saw it.

**Q.** To be clear, you saw the accident in which plaintiff says defendant's 2019 Escalade flattened plaintiff's 1972 Chevy Vega on north-bound I-75 south of the Eleven Mile Road exit at 9:03 p.m. on Saturday, April 27, 2019? That is the accident you say you saw, right?

**A.** That's right.

**Q.** Take a look at this color photo from the Wall Street Journal. Isn't that you on the left, seated about five feet behind the podium, behind President Trump at his MAGA rally in Green Bay, Wisconsin on Saturday night, April 27, 2019? That's you. And the fact is that you did not see the accident in Michigan on April 27 because you were 300 miles away in Wisconsin at that very moment. Isn't that so?

Simple, clear, and effective, but hypothetical. My anecdote, however, is not hypothetical. It describes actual events, only slightly burnished by time.

I was sitting in a Detroit courtroom waiting to argue a motion. I was watching a jury trial. The defendant was charged with armed robbery. He was representing himself.

The complaining witness was on the stand, responding to the pro se defendant's cross-examination. Defendant Smith displayed mastery of the mechanics of impeachment by prior inconsistent statement.

**Q.** Sir, you testified just now that I robbed you last year?

**A.** Yes, I did. You robbed me. You had a gun.

**Q.** Sir, you testified just now that when I robbed you, I was wearing a blue shirt and khaki pants, right?

**A.** Yes.

**Q.** Sir, you remember that you testified at my preliminary examination in district court last year, in this very same case?

**A.** Yes.

**Q.** Your district court testimony was only a month or so after I robbed you, right?

**A.** Yes.

**Q.** So your memory then was pretty good? Fresh?

**A.** Yes.

**Q.** And way back then, last year, you testified under oath? And you swore to tell the truth, isn't that so?

**A.** Yes.

**Q.** And you testified back then—and I have the official transcript right here if you need it—and you testified back then that when I robbed you I was wearing a blue shirt and tan pants. That's your sworn testimony. *Tan pants. Not khaki pants.* So my question for you today, sir, is: *were you lying then or are you lying now? Which is it?*

**A.** I, uh...

**Judge:** Okay, Mr. Smith, that's enough. You made your point.

Mr. Smith sat down at counsel table, glowing in the success of his mechanically perfect impeachment by prior inconsistent statement.

Mr. Smith's problem, of course, was that every person in the courtroom had a vivid mental picture of Mr. Smith robbing the witness at gunpoint, while Mr. Smith was wearing a blue shirt and light-colored pants—maybe khaki, maybe tan.<sup>7</sup>

Mr. Smith had the mechanics mastered. He exercised witness control. He used leading questions to which he knew the answers. He had the transcript in

hand, ready if the witness denied, or professed not to remember, the earlier testimony. Mr. Smith clearly and simply showed the witness's contradictory testimony. Tan then, khaki now.

Mr. Smith knew quite a bit about the mechanics of impeachment before he undertook to represent himself at trial. What Mr. Smith did not know, it seems, is that mastery of the mechanics is necessary, but not sufficient. Much of litigation is science, but much is art.<sup>8</sup> 🍷

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## Notes

- 1 Thomas A. Mauet, *Trial Techniques* 273 (5th ed. 2000).
- 2 William Shakespeare, *Hamlet*, act 3, sc. 4.
- 3 *Id.*
- 4 See, e.g., Fed. R. Evid. 608(b)(1) and 609.
- 5 Mauet, *supra* note 1, at 280.
- 6 Walt Whitman, *Song of Myself*, part 51 (1892): "Do I contradict myself? Very well then I contradict myself, (I am large, I contain multitudes)."
- 7 Mr. Smith likely came to regret his decision to represent himself. And, likely, while pondering his fate for years in Jackson Prison, he came to regret in particular his questions using the phrase "When I robbed you." Mr. Smith likely came to other conclusions about the utility of the Fifth Amendment.
- 8 Mr. Smith apparently did not know that the thesaurus lists tan as a synonym for khaki. Among other synonyms listed are amber, bay, beige, dust, fawn, henna, nut, sepia, tawny, and burnt sienna. And Mr. Smith apparently did not take into account that persons who do not distinguish between khaki, tan, and burnt sienna still may credibly identify those who rob them at gunpoint.