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CRIMINAL TRIAL TECHNIQUES & OVI DEFENSE:

**Impeachment; Prior Inconsistent
Statements, Omissions,
Convictions, and Prior Bad Acts**

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“Impeachment; Prior Inconsistent Statements, Omissions, Convictions, and Prior Bad Acts”

I. Impeachment

- a. Attacking witness’s credibility or believability
 - i. Even well intentioned witness can have low credibility (i.e. needs glasses or has a poor memory)
 - ii. **Includes:** attempts to show that a person has lied, cannot remember, cannot articulate, is biased, is inept, or is uncertain
- b. Can occur in 2 ways:
 - i. Intrinsically – from the witness’ mouth
 1. **Forms:** Contradiction, untruthful prior inconsistent acts, testimonial capacities (i.e. perception, memory, narration, and sincerity), prior inconsistent statements (self-contradiction)
 - a. **Rule 616:** Includes bias, sensory or mental defect, specific contradictions
 - ii. Extrinsically – other evidence such as other witnesses or documents (i.e. convictions or a deposition containing an inconsistent statement)
 1. **Collateral Matter Rule:** Unimportant evidence not coming in – not going to waste time on collateral matters
- c. **Policy:** Promotes principles of efficiency and fairness
 - i. Must have a reasonable basis to impeach
 - ii. Need to have a good faith basis for believing that the impeaching fact is true
 - iii. Raise on cross and/or on presentation of your own evidence
 - iv. **Rule 607:** “the credibility of a witness may be attacked by any party, including the party calling him” on either direct or cross

II. Prior Inconsistent Statements and Omissions

- a. **Prior Inconsistent Statements:**
 - i. Governed by **Rule 613**
 1. Except as provided in **Rule 801(D)(1)(a)**, prior inconsistent statements constitute hearsay evidence and thus are admissible only for the purpose of impeachment
 2. **State v. Kline (1983), 11 Ohio App. 3d 208 -- (1) At 211:** "Extrajudicial statements offered for impeachment purposes are not hearsay since they are not offered for the truth of what they state." (2) Hearsay declarant may be impeached by his other hearsay statements.
 - ii. **Includes:** affidavits, depositions, pleadings, testimony, unsworn statements, even silence

1. *State v. Holmes* (1987), 30 Ohio St. 3d 20 -- Without a prior inconsistent statement having been placed in evidence, it is error to allow a party to impeach its own witness by implying future witnesses would be called to provide contradictory testimony
2. *State v. Baker* (2000), 137 Ohio App. 3d 628, 650-652 -- After defendant denied ever being drug-dependent, he was properly impeached using an application for treatment in lieu of conviction submitted in another case by former counsel

b. Prior Omissions:

- i. To show that the witness has failed to include a material assertion in their affidavit or testimony that they should have included

c. Rehab Last Rule: Have to give the witness the opportunity to explain AFTER his/her truthfulness has been challenged.

1. *State v. Riggins* (1986), 35 Ohio App. 3d 1 -- (1) Prior inconsistent statement made under oath is admissible for the truth of the matter asserted. (2) As foundation for admission, witness must be given an opportunity to explain or deny prior inconsistent statement
2. *State v. Nichols* (1992), 85 Ohio App. 3d 65, 70-71 -- Where a witness has been impeached using prior inconsistent statements, rehabilitation is limited to prior consistent statements made before the inconsistent statement, or before the existence of any motive to testify falsely.
3. Questions concerning specific acts are not permitted (FRE 608(a)(2))

d. Examples/practice pointers/techniques

- i. Demeanor of witnesses –it is not just what the witness says that counts the most, but rather how they say it
- ii. Never ask the witness which statement is true
- iii. Let the impeaching facts speak for themselves

III. Convictions

a. Governed by Rule 609

i. Very technical rule with 2 basic provisions:

1. First, any felony conviction, and any conviction involving dishonesty or false statements, can be used to impeach the credibility of any witness. The later of conviction or release from confinement must be within 10 years.

2. Second, in certain cases, the probative value of the conviction *must outweigh its prejudicial effect*. This balancing test is employed where:
 - a. The witness is a defendant in a criminal case and the prior conviction is a felony; or
 - b. The conviction is more than ten years old.
- b. **ORC 2945.42** provides that conviction of a crime "may be shown for the purpose of affecting the credibility of a witness"
- c. Can be offered on direct or cross
- d. **Admissible under Rule 609:**
 1. "*Crima falsi*"
 - a. Perjury
 - b. False statement
 - c. Fraud
 - d. Embezzlement
 - e. False pretense
 2. Appeals (even if pending)
- e. **Excluded under Rule 609:**
 1. Pardoned, annulled, expunged, stale convictions
 2. Indictments and arrests (to show bad character, reference to Rule 403 Character Evidence)
 3. Juvenile adjudications (typically)
 4. Misdemeanor crimes of violence or drug possession
- f. Cases:
 - i. ***State v. Wright (1990)*, 48 Ohio St. 3d 5 -- Syllabus:** "Evid. R. 609 must be considered in conjunction with Evid. R. 403. The trial judge therefore has broad discretion in determining the extent to which testimony will be allowed under Evid. R. 609. When exercising this discretion, all relevant factors must be weighed." (References to Evid. R. 403 are now incorporated in Evid. R. 609.)
 - ii. ***State v. Amburgey (1987)*, 33 Ohio St. 3d 115 -- Syllabus:** "Under Evid. R. 609, a trial court has broad discretion to limit any questioning of a witness on cross-examination which asks more than the name of the crime, the time and place of conviction and the punishment imposed, when the conviction is admissible solely to impeach general credibility."
 - iii. ***State v. Shields (1984)*, 15 Ohio App. 3d 112 --** Once prior conviction has been acknowledged, Evid. R. 403 permits limitation of inquiry as to specifics of the offense, if of marginal probative value. Also see *State v. Covrett* (May 4, 1993), Franklin Co. App. No. 92AP-1195, unreported (1993 Opinions 1615).

g. Examples/practice pointers/techniques

IV. Prior Bad “Untruthful” Acts

a. Governed by **Rule 608**

- i. Typically bars specific instances of conduct of a witness for purpose of attacking credibility
 - ii. **608(B) Exception to Rule 404(A)(3)** which prohibits the use of character evidence unless one of three enumerated exceptions applies. The third exception provides: "Evidence of the character of a witness on the issue of credibility is admissible as provided in Rules 607, **608**, and 609."
 - iii. **Permits** the use of specific instances of conduct on cross-exam which did not result in conviction, so long as the evidence is clearly probative of untruthful character
 1. **Fraud**
 2. **Deception**
 3. **Does not include acts of violence**
 - iv. May not be proven by extrinsic evidence –if witness denies the act, questioner must take the witness’s answer at face value (**FRE 608(B)**)
 - v. **Does not** operate as a waiver of witness’ privilege against self-incrimination
- b. **Policy:** People who have broken the law will not respect the oath they take before testifying
- c. **Judicial Discretion**
- d. Examples/practice pointers/techniques