FUNDAMENTALS OF
TRIAL ADVOCACY COURSE

April 30 - May 4, 2018
Phoenix, Arizona

IMPEACHMENT

Presented by:

ANGELA ANDREWS
Deputy Maricopa County Attorney
Phoenix, Arizona

Distributed by:

ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL
1951 West Camelback Road, Suite 202
Phoenix, Arizona 85015

ELIZABETH ORTIZ
EXECUTIVE DIRECTOR

IMPEACHMENT

Fundamentals of Trial Advocacy Course August 21-25, 2017

Angela Andrews
Maricopa County Attorney's Office

IMPEACHMENT

IMPEACHMENT

- DEFINITIONS
  - **Impeachment** is the process of calling into question the credibility of an individual testifying in a trial.
  - **Extrinsic evidence** is external, outside **evidence** or **evidence** that is inadmissible or not properly before the court, jury, or other determining body

RULES

- RULE 608:
  EVIDENCE OF CHARACTER AND CONDUCT OF WITNESS
- RULE 609:
  IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME
- RULE 613:
  PRIOR STATEMENTS OF WITNESSES
- RULE 404(a) & (c) :
  PERTINENT CHARACTER EVIDENCE OF VICTIM OR ACCUSED
- RULE 405:
  METHODS OF PROVING CHARACTER
- INFORMATION RELATING TO THE WITNESSES ABILITY TO SEE, HEAR, PERCEIVE THE EVENT

WHO CAN IMPEACH?

Who Can Impeach?

- Rule 607 Arizona Rules of Evidence
  - Any party ***including the party that called the witness*** may attack the witness's credibility.

Who Can Impeach?

- Rule 607 Arizona Rules of Evidence
  - Any party ***including the party that called the witness*** may attack the witness's credibility.
    - Recanting Witnesses
    - Hostile or Uncooperative Witnesses
    - Forgetful Witnesses
    - Unprepared Witnesses
    - Cross Examination

What can I use to impeach?

What can I use to impeach?

- **1.** Statements of the witness which are inconsistent with his/her present testimony or statement
- 2. Bias
- **3.** Character for truthfulness or untruthfulness
- **4.** Perception - defect of capacity, ability, or opportunity in the witness to observe, remember, or recount the matters about which he/she testified;
- **5.** Proof by other witnesses that material facts are not as testified to by the witness being impeached.
- 6. Prior convictions to impeach truthfulness.
- 7. Perception
- 8. Lack of experience
- 9. Experts

Character for Truthfulness or Untruthfulness

- Rule 608 (a) Reputation or Opinion Evidence
  - Credibility may be attacked or supported by testimony about reputation for truthfulness or untruthfulness.
  - But…evidence of truthful character is admissible only after witness' character for truthfulness has been attacked.

Character for Truthfulness or Untruthfulness

- Rule 608 (b) Specific Instances of Conduct
  - Other than priors extrinsic evidence is not admissible to prove specific instances of conduct to attack or support truthfulness.
  - They may be admissible on cross examination if they are probative of character for truthfulness or untruthfulness of
    - The witness
    - Another witness whose character the witness is being cross examined about.

Priors

- Rule 609
  - May be admitted
  - If the crime is a felony (punishable by death or imprisonment for one year.)
  - Subject to rule 403 Relevant evidence
  - If the witness is not the defendant
  - IF the witness is the DEFENDANT
    - Only if its probative value supported by specific facts and circumstances substantially outweighs its prejudicial effect.

PRIORS

- Rule 609
- Any crime regardless of the punishment may be admitted if the elements prove or the witness admits that the crime involved a dishonest act or false statement.

PRIORS

- Rule 609
  - If the prior is over 10 years since conviction or confinement (whichever is later) the prior may be admitted if the probative value substantially outweighs the prejudicial effect
  - And
  - The proponent gives an adverse party reasonable notice of the intent to use it.

PRIORS

- Rule 609
- Juvenile Adjudications
  - Criminal only
  - Of a witness not the defendant
  - An adult conviction of that offense would be admissible
  - Admitting the evidence is necessary to fairly determine guilt or innocence

PRIORS

- How to impeach with priors
  - Obtain certified copies
  - Make any necessary redactions after consultation with Defense Counsel and the Court
  - Make sure the prior has sufficient identifying information.
  - Ask the witness about prior.
    - Date of crime, Date of conviction
    - If admissible nature of offense
    - If witness denies than show the document to the witness
    - If witness still denies admit the document.

PRIOR INCONSISTENT STATEMENTS

PRIOR INCONSISTENT STATEMENTS

- Arizona Rules of Criminal Procedure Rule 19.3 (b)
  - No prior statement of a witness may be admitted for the purpose of impeachment unless it varies materially from the witness' testimony at trial.

PRIOR INCONSISTENT STATMENTS

- When do prior inconsistent statements have to be disclosed?

PRIOR INCONSISTENT STATEMENTS

- Rule 613
- When examining a witness about the witnesses' prior statement a party need not show it or disclose the contents to the witness but must show it to the adverse party's attorney upon request.

HOW TO IMPEACH PRIOR INCONSISTENT STATEMENT

PRIOR INCONSISTENT STATEMENTS

- Rule 613
- Extrinsic evidence is admissible only if the witness has been given an opportunity to explain or deny and an adverse party has the opportunity to examine the witness about it.
  - This rule does not apply to statements by a party-opponent as defined in Rule 801(d)(2) *Lynn v. Helitec Corp.*, 144 Ariz. 564, 570, 698 P.2d 1283, 1289 (Ct. App. 1984)
- (This does not apply to statements that are hearsay exceptions under Rule 801)

PRIOR INCONSISTENT STATEMENTS

- Rule 613
  - The party introducing a prior inconsistent statement does not have to be the one who gives the witness the opportunity to explain as long as the witness receives that opportunity

HOW TO IMPEACH PRIOR INCONSISTENT STATEMENT

- Commit the witness to what he/she testified to
- Direct witness to date/time/location of prior statement (do you recall being interviewed by police…day)
  - BE VERY SPECIFIC/WORD FOR WORD
- Confront the witness with prior inconsistent statement (do you recall making this statement…)
- Recall officer about statement

HOW TO IMPEACH PERCEPTION

Memory Loss

- Actual Memory Loss
  - Prior statements, writings or other information used to refresh the recollection of a witness. See Ariz. R. Evid. 612 (addressing disclosure obligations for "when a witness uses a writing to refresh memory"); State v. Ortega, 220 Ariz. 320, 329–30, ¶ 30, 206 P.3d 769, 778–79 (App.2008) (witness allowed to review prior interview to refresh memory).

Memory Loss

- Actual Memory Loss
  - QUESTIONS TO ASK
    - Was your memory better on (Date of incident) or is it better today?
    - Do you recall speaking to police (or whoever received the statement ie: medical, other witnesses etc.)?
    - When you spoke to that person did you try your best to tell that person the events as you recalled them at that time?

Memory Loss

- Arizona law draws a distinction between a true and a feigned loss of recall. Where the asserted loss is genuine, the prior statement is deemed not inconsistent under this rule, but if the loss is mere fakery, the statement falls within the rule." State v. Anaya, 165 Ariz. 535, 538, 799 P.2d 876, 879 (App.1990) (dicta). Accordingly, a "claimed inability to recall, when disbelieved by the trial judge, may be viewed as inconsistent with previous statements." State v.. Hausner, 230 Ariz. 60, 76, ¶ 58, 280 P.3d 604, 620 (2012) (quoting State v. King, 180 Ariz. 268, 275, 883 P.2d 1024, 1031 (1994)).

Memory Loss

- How do I prove feigned memory loss?

Memory Loss

- How do I prove feigned memory loss?
  - Demeanor
  - How much detail does the witness give to opposing party?
  - How much detail did witness provide in original statement?
  - What factors are missing that would result in memory loss ie; how much time has passed, lack of medical condition, subject matter of incident etc.

Memory Loss

- Witness would "rather not say"
- **STATE of Arizona, Appellee, v. Stanson Kee JOE, Appellant. No. 1 CA-CR 12-0730. Decided: January 21, 2014**
  - At trial, when asked during direct examination by the State about the assault, the victim responded on several occasions: "I don't remember." In response, the State asked: "You don't remember or you would rather not say?" Each time the victim answered: "I would rather not say." The victim added that it was difficult to testify, stating she "tried forgetting" the assault but it was "hard to get over it." Court held it was not abuse of discretion to admit prior inconsistent statements

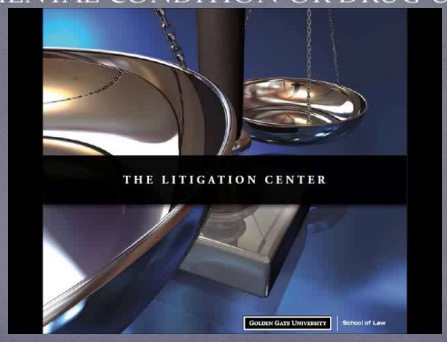
Memory Loss

- When a witness denies or does not remember making the statement, the party may then introduce extrinsic evidence of the prior statement.
  - *State v. Robinson*, 165 Ariz. 51, 58-59, 796 P.2d 853, 860-61 (1990)
  - *State v. Ortega*, 220 Ariz.320, 206 P.3d 769, ~~ 30-33 (Ct. App. 2008)

IMPEACHMENT WITH MENTAL CONDITION OR DRUG USE

- A party may introduce evidence about the witness' s mental condition or drug use to impeach the witness' s ability to perceive, remember, or relate, the party but must first make an offer of proof of evidence sufficient for the jurors to find that the witness's mental condition or drug use did have an effect on the witness's ability to perceive, remember, or relate.
  - *State v. Delahanty*, 226 Ariz. 502, 250 P.3d 1131, ,, 13-21 (2011)

INCONSISTENT STATEMENT /MENTAL CONDITION OR DRUG USE



404 EVIDENCE

- Evidence of character not admissible except:
- Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

404 EV IDENCE

- sexual propensity of the accused or a civil defendant pursuant to Rule 404(c)

404 EVIDENCE

- It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. 404(B)

QUESTIONS?