

The Recanting or Minimizing Victim

Impeachment by Prior Inconsistent
Statements

Categories of Impeachment

- Prior Inconsistent Statements
- Use of Character
- Case Data

Prior Inconsistent Statement

- Most Common Method of Impeachment
 - Do not believe this victim because his/her story has changed

Use of Character

- Aimed at demonstrating that the victim possesses some inherent trait or characteristic, unrelated to the case at hand, that renders the testimony less credible
 - This victim is not trustworthy because of who he/she is
 - Think impeachment by a felony conviction
- Victim is unbelievable but can't say that what they said was the truth!

Case Data

- Involves the establishment of facts that make the victim less reliable within the context of the case at trial
- *Some Interest in the outcome of the trial or is biased for or against one of the parties*
 - **Case Data impeachment establishes the relevancy of the DV Dynamics involved in your case**
 - Judge, at trial, the victim will not tell the truth because of [Insert DV Dynamic], therefore these facts are relevant to this case.

Prior Inconsistent Statements

- Evidentiary Authority
 - Evidentiary Rules
 - Statutes



In Colorado

C.R.S. 16-10-201 v. CRE 613

C.R.S. 16-10-201

- Foundational requirements
 - Statement is inconsistent
 - Witness be given an opportunity to deny or explain the statement OR witness is still available to testify
 - Prior statement purports to relate to a matter within the witness' own knowledge
 - **Otherwise competent**
- Competent extrinsic evidence admissible
- Admissible for:
 - Impeachment
 - Substantive evidence

CRE 613

- Foundational requirements
 - Statement is inconsistent
 - Must call witnesses attention to time, place, occasion, and person to whom she made statement
- Extrinsic evidence may NOT be admissible
- Admissible for:
 - Impeachment only

Process of Impeachment by Prior Inconsistent Statements

- Recommit the Victim
- Validate the Prior Statement
- Confront the Victim

Recommit the Victim

- Recommit the Victim to their Current Testimony
 - Underscores the Gulf Between Current Testimony and Prior Statement

Traditional Method of Recommitment

- Simply Restate the Victim's Statement on Direct or Cross Examination and Ask the Victim to Reaffirm it
 - DO NOT ask a victim to repeat his/her direct testimony
 - DO tell the victim what he/she previously stated
 - *Use vocal inflection and facial expression to inject "a note of doubt" as to the accuracy of the testimony*

Validate the Prior Statement

- Establishes that the victim actually made the impeaching statement

Basic Validation of Written Statements

- Simply Establish When and How the Earlier Statement was Made
 - On December 8, 2018 at 10:15pm, You WROTE a statement for Officer Jones
 - Try to Avoid Ambiguity
 - Avoid “Remember” otherwise you are refreshing
 - “Remember when you gave a statement that night?”
 - What is meant by “giving” a statement?
 - “On December 8, 2018 at 10:15pm, you WROTE (not gave) a statement for Officer Jones correct?”

Accreditation of Prior Statements

- In our line of work, it is frequently advantageous to show that the first statement was made under circumstances that make it more accurate of the two.
 - Importance of accuracy at the time
 - “You knew it was important to be accurate at the time”
 - Describing injuries to EMS
 - Duty to be accurate
 - Little affirmation of truthfulness at bottom of written police statement forms
 - Proximity in Time
 - More accurate that night because incident was fresh

Accreditation through Importance

- Accredited a Statement by Showing that the Victim had an Important Reason to be Accurate
 - Establishes the reasons to be as accurate and truthful as possible at the time that the original statement was given
 - Interview with Officers/Detectives
 - “At the time you spoke to the Detective were you concerned about what your children may have observed?”
 - 911 calls
 - “At the time you called 911 were you in need of help?”
 - Medical Reason to be Accurate
 - “At the time you described your injuries, were you in need of care”

Accreditation through Duty

- Accredited a statement by showing that the victim was under either a legal or a business duty to be accurate
 - Most common is Prior Testimony at a Hearing or Trial under Oath
 - “You testified at a prior hearing in this case correct?”
 - “Prior to your statement you swore an oath before a judge that you would tell the truth correct?”

Accreditation through Proximity in Time

- Accredited a statement by showing that it was given closer in time to the events being described
 - Value is in emphasizing things that may have caused the victim's memory to dim
 - Relies on gap in time between the two statements
 - Value can also be in emphasizing
 - change in circumstances between gap in time between two statements
 - the lack of timing to make up the statement
 - Think “On-Scene DV video statements”

Confront the Victim

- This is the final stage of Impeachment
- The purpose is to extract an admission that the earlier statement was in fact made
 - CRE 613 It is the fact that the earlier statement was indeed made that is admissible as impeachment
 - CRS 16-10-201 Not only fact that earlier statement was made but also the substance of the statement that is admissible

Does Confronting a Victim have to be Confrontational?

- No, it is more important that the confrontation be accomplished in a clear and concise manner
- Trust your Instincts

Classic Style of Confrontation

- Simply read the victim's own statement or state what they said
- Two Rules
 - DO NOT ask the victim to read the statement aloud
 - DO NOT ask the victim to explain the inconsistency

Do not ask victim to read the statement

- Surrenders control to the victim
 - No way of knowing how clearly, loudly, or accurately the victim will read the statement
 - Victim may read from a different portion of the statement
 - Nearly certain that they will not read with the inflection that you want
- You read/state the statement in a loud, clear, contrasting tone of voice

Do not ask the victim to explain the inconsistency between statements (Impeachment Only!)

- Again you surrender control of the examination
 - Victim will take opportunity to muddle the clarity of the impeachment
 - Or worse, the victim will give an explanation that undercuts the entire examination
- However, you might ask if you don't care what the answer is or the answer is useful later on
 - Think DV experts

Tactical Considerations

- Impeach only on Significant Matters
 - Avoid impeaching on irrelevant, trivial, or petty inconsistencies
- Impeach only on True Inconsistencies
 - Avoid if statements can be harmonized, explained, or rationalized
- Impeach only when success is likely
 - Outline your examination and index to the sources of your information
- Do not Impeach Favorable Information
 - Nothing gained to cast doubt on testimony that is helpful

Tactical Considerations Cont.

- Consider Impact of Multiple Impeachment
 - Multiple insignificant statements take on a life of their own
- Consider Rule of Completeness
 - Does the complete statement explain or negate the contradiction
- Consider Refreshing Recollection
 - A victim may testify inconsistently innocently or inadvertently

Special Cases

- The Denying Victim



- The Lying Victim



The Lying Victim

- Some victims will readily admit that they lied in the past
 - Take care to not validate the victim's claim that the prior statement was a lie
 - Try to connect willingness to lie to factors consistent with your theme
 - Think all the reasons a DV victim would recant and tie your impeachment to it

The Denying Victim

- Refuses to reconfirm their own testimony
- Resists validating the circumstances of the impeaching statement
 - Break the examination into small parts that the victim cannot deny
- Denies ever having made the prior statement
 - Writing—Confront and seek admission of statement
 - Oral--Call the impeachment victim