

## CC. IMPEACHMENT

### OVERVIEW:

Impeachment, in the broad sense, encompasses any attack on an opposing witness, including attacks upon the witness's present interest, bias or prejudice as well as the presentation of evidence of prior inconsistent statements or actions. Although impeachment normally occurs during cross-examination, it may also take place with the introduction of rebuttal witnesses or even in oral or written argument. However, for purposes of this discussion the technique of impeachment on cross-examination is being considered.

### OBJECTIVE:

To provide guidance on the principles for impeaching a witness; practical examples; and matters to consider when deciding whether to impeach on cross-examination.

#### 1. PRINCIPLES OF IMPEACHMENT:

- Commit the witness to the vulnerable testimony before impeaching. This rule is essential for impeachment of the testimony of an opposition witness;
- Do not impeach the insignificant;
- Use leading questions which clearly set forth weaknesses in the testimony;
- Use leading questions which permit complete control of the witness during impeachment;
- Be precise when quoting the testimony of the opposing witness;
- Attack, rather than assist, the witness;
- Know when not to attack on cross-examination;

See also [Part 2, Chapter U](#) concerning Adverse or Hostile Witness, [Rule 611\(c\)](#) (same techniques are used).

#### 2. PRACTICAL EXAMPLES:

- a. *Use of direct questions to commit witness:*

**Hypothetical** - The complaint alleges a violation of § [7116](#)(a)(1) and (2) based upon the suspension of Mr. Jones, a Union steward, in retaliation for his grievance activity. Mr. Smith, a secretary, has provided an affidavit that the manager who made the decision to suspend rides in his car pool. On the way home from work one evening, the manager told the secretary that she was tired of Mr. Jones filing grievances and was going to tell him the following day that she planned to suspend him for a day to see if Jones would get the message. Upon arriving home that evening, Mr. Smith made a written notation of what the manager had told him. That notation is dated November 11, 1996. The manager testified on direct examination that it was her decision and hers alone to

suspend Mr. Jones and that she did not discuss that decision with anyone else. Moreover, she testified that in accordance with her usual practice, she made the decision and promptly told Mr. Jones her decision the following day.

**Q.** You testified on direct examination that you decided to suspend Mr. Jones and you gave him written notice of that proposal the very next day.

**A.** That is correct.

**Q.** Your proposal to suspend him is dated November 12, 1996.

**A.** Yes.

**Q.** Prior to November 12, 1996, did you tell anyone of your decision to suspend Mr. Jones?

**A.** No one.

**Q.** You're sure of that?

**A.** Yes.

**Q.** No doubt in your mind?

**A.** None.

b. *Use of leading questions to commit witness:*

- *Do **not** use complex language to phrase your questions.*

If a witness testifies to "x" now and testified [or made statements] to "y" on a prior occasion, make the ALJ aware of this by your impeachment questions in the most simple and straightforward way possible. Use of leading questions is virtually mandatory, as it permits you to fashion your attack in the terms most favorable to the GC.

- *Control the opposition witness:*

Do not tolerate non-responsive answers. Explanations must not be permitted. The use of leading questions is required.

- *Confront the witness with the witness's exact words:*

If your questions do not accurately reflect the facts, the witness may be able to correct the cross-examiner and thereby diminish, if not destroy, the impact of impeachment.

- *Impeachment is an attack upon an opposing witness--Conduct it as such:*

There are times to be friendly to a witness on cross-examination, but impeachment is not one of them. Do not assist the opposition witness by helping the person either to "recall" his/her past testimony or statements or to refresh his/her recollection.

For example, do not ask if the witness recalls testifying in a proceeding before the MSPB. Rather, tell the witness that he testified on such and such a date in the matter of

Doe v. Agency, before an MSPB AJ at the MSPB office at 99 Summer Street, Suite 1800, Boston, Massachusetts. As a general rule, do not hand the witness an earlier statement or a transcript of the witness's earlier testimony to help the witness refresh recollection. Exceptions would include requests by the Judge, the opposing counsel, or the witness to permit the witness's examination of the document.

**Hypothetical** - The complaint alleges a violation of § 7116(a)(1) and (2) when the Respondent refused to rehire Mr. Doe, a former Union President, because of Doe's representational activities on behalf of the Union when he previously worked for the Respondent. Doe had quit his job as an electrician in the Respondent's Public Works Department to accept employment in the private sector. Things did not work out for him and he applied for a vacancy for the same position he had left. His former second-level supervisor was the deciding official and he did not select Doe. Doe complained to his Congressman who submitted an inquiry to the Respondent. The response to the Congressman was written by the second-level supervisor, but it was signed by Major Collins, the Public Works Department Director. In that response, the Respondent told the Congressman that Doe was not rehired because he was a poor employee who was not technically skilled in the type of electrical work commonly encountered by the incumbent of the position for which he had applied. In addition, he was not a reliable employee. However, the investigation disclosed that [1] Doe had received "outstanding" performance ratings for each of the five years prior to Doe's resignation and the supervisor had signed off on those ratings, and [2] for the nine months prior to his resignation, the Public Works Foreman position was vacant and he was made the Acting Foreman.

**Q.** You were the selecting official for the electrician's job that Mr. Doe applied for?

**A.** Yes.

**Q.** You made the decision not to select him?

**A.** Yes.

**Q.** Sometime after you made that decision, the Public Works Department received a letter from Congressman Perkins asking why Mr. Doe wasn't rehired?

**A.** Yes.

**Q.** Inquiries from Congress are important to the Agency?

**A.** Yes.

**Q.** It is important to respond truthfully to members of Congress?.

**A.** It is.

**Q.** You wrote the Public Works Department's response to Congressman Perkins inquiry?

**A.** That's right.

**Q.** Major Collins signed that response?

A. He did.

Q. You gave the Congressman the reasons why you did not rehire Mr. Doe?

A. I did.

Q. You told Congressman Perkins that one reason why Mr. Doe was not rehired was because he was a poor employee who was not technically skilled in the type of electrical work commonly encountered by the incumbent of the position for which he had applied?

A. Yes.

Q. You also told the Congressman that Mr. Doe was not a reliable employee?

A. I did.

Q. Those were the only reasons you gave to Congressman Perkins for not rehiring Mr. Doe?

A. Yes.

Q. Those were all of your reasons for not rehiring him; correct?

A. Yes.

Q. There were no other reasons for not rehiring him?

A. That's right.

Q. You're absolutely sure of that?

A. I am.

c. *Impeachment of witness:*

Q. At the time of Mr. Doe's resignation on August 3, 1995, you were his second-level supervisor?

A. I was.

- Q. You had been his second-level supervisor since 1988?
- A. Yes.
- Q. The electrician's job Mr. Doe had while you were his second-level supervisor was the same electrician's job which he applied for and for which you did not select him; correct?
- A. Yes.
- Q. As his second-level supervisor, you approved Mr. Doe's performance ratings in that electrician's job, right?
- A. Yes.
- Q. For the performance periods ending in 1991, 1992, 1993, 1994 and 1995 Mr. Doe's performance as an electrician was rated "Outstanding?"
- A. Yes.
- Q. And you approved each of those performance ratings?
- A. Yes.
- Q. The Foreman of Public Works reports directly to you?
- A. Yes.
- Q. The Foreman's job is an important one in the Public Works organization?
- A. Yes it is.
- Q. It is important that the Public Works Foreman be a reliable employee?
- A. Yes.
- Q. For the nine months prior to his resignation in 1995, Mr. Doe was the Acting Foreman for Public Works?
- A. He was.

### 3. **DECIDING WHETHER TO ATTACK ON CROSS:**

There are occasions when the best impeachment on cross-examination is no impeachment. An opposition witness may often testify to something you decide can be attacked. The Trial Attorney decides whether to conduct the attack on cross, in rebuttal or in argument. Attacking on cross normally is a contest between examiner and witness. The ALJ sees the result of that encounter. Most of the time there will be a winner and a loser. If you believe, following careful consideration of all the facts and knowing what you have in your briefcase that you will win, you will likely impeach by attacking on cross.

## Q [Part 2, Chapter BB](#) concerning Cross-Examination.