

P.I. PRIMER

Crimes and Misdemeanors – Impeachment by Misconduct

by

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A witness's effectiveness hinges largely on credibility. If that credibility is undermined, the witness's effectiveness can be diminished or destroyed. Knowing how to impeach the credibility of the opposing party's witnesses, and how to prevent impeachment of yours, could well mean the difference between winning or losing a case.

One way to impeach a witness's credibility is by attacking his or her character for truthfulness or mendacity. This can be accomplished by proving that the witness has been convicted of certain crimes or, under narrower circumstances, by cross-examining the witness about misconduct that has not resulted in a criminal conviction.

Criminal Convictions

A District of Columbia statute applicable to cases in the D.C. Superior Court authorizes impeachment of a witness with prior felony convictions and with misdemeanors involving dishonesty and false statement.² The theory behind this statute is that "a demonstrated willingness to commit some kinds of crime may well indicate a willingness to lie on the witness stand."³ D.C. CODE §14-305 provides as follows:

[F]or the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a criminal offense shall be admitted if offered, . . . but only if the criminal offense (A) was punishable by death or imprisonment in excess of one year under the

law under which he was convicted, or (B) involved dishonesty or false statement (regardless of punishment).⁴

To constitute a conviction within the meaning of the statute, there must be either a plea or verdict of guilty as well as a judgment of conviction and sentence.⁵ Thus, unless there is also a judgment and sentence, an arrest,⁶ an indictment,⁷ a guilty plea,⁸ a guilty verdict,⁹ or probation imposed without entry of a judgment of conviction¹⁰ is insufficient to impeach a witness under the statute. Nor may a conviction be used to impeach if it resulted either from a juvenile adjudication¹¹ or from a summary court-martial proceeding.¹²

Determining whether a criminal offense was punishable by death or imprisonment of more than one year is quite straightforward. The specific statutes that proscribe the crimes generally prescribe the punishment. These statutes can be found in the D.C. Code, Title 22 (criminal offenses and penalties) as well as in other scattered sections, such as Title 47 (taxes), Title 48 (drugs), and Title 50 (traffic).

Determining whether a criminal offense involved dishonesty or false statement is considerably trickier. D.C. courts generally look to the legislative history of D.C. CODE § 14-305 to decide whether a misdemeanor conviction may be used for impeachment.¹³ The House of Representatives Committee Report on the bill that eventually became the statute clarified which misdemeanor convictions may be used for impeachment purposes and which may not:

[T]he offenses which are excluded from use are primarily those of passion and short temper, such as assault.

The offenses which involve dishonesty or false statement and which may be used in the discretion of the cross-examining party include, but are not limited to, any offense involving fraud, or intent to defraud, larceny, robbery; rape; false pretenses, forgery, uttering, embezzlement, housebreaking, or burglary; receiving stolen property, sales of narcotic and depressant and stimulant drugs; unauthorized use of a motor vehicle; taking property without right; procuring; or any attempt to commit or any assault with intent to commit any of the above offenses.¹⁴

The courts have interpreted this legislative history as “indicating Congress’ intent to define broadly the requirement of ‘dishonesty or false statement.’”¹⁵ Accordingly, they have held a wide range of misdemeanor convictions to be usable for impeachment: carrying a pistol without a license¹⁶; malicious destruction of property¹⁷; robbery¹⁸; petit larceny¹⁹; attempted petit larceny²⁰; unlawful entry²¹; attempted housebreaking²²; taking property without right²³; selling narcotics²⁴; possession of narcotics²⁵ or marijuana²⁶; soliciting for prostitution²⁷; and contempt for refusing to abide by the condition of a pretrial release not to use drugs.²⁸ Very few misdemeanor convictions have been held to be excluded from operation of the statute: assault²⁹; threats to do bodily harm³⁰; and contempt for refusing to rise as directed when a judge entered the courtroom.³¹

Even if a witness has been convicted of a felony or of a misdemeanor involving dishonesty or false statement, the statute limits the admissibility of the conviction. Evidence of a conviction is inadmissible if either it “has been the subject of a pardon, annulment, or other equivalent procedure granted or issued on the basis of innocence,” or it “has been the subject of a certificate of rehabilitation or its equivalent and [the] witness has not been convicted of a subsequent criminal offense.”³² Evidence of a conviction is also inadmissible if more than 10 years has elapsed since the later of either the date of the release from confinement imposed for the witness’s most recent conviction, or the expiration of the period of parole, probation, or sentence granted or imposed with respect to the most recent conviction.³³

A party seeking to impeach a witness by evidence of a criminal conviction may do so either by cross-examining the witness or by offering “evidence aliunde,” which is a fancy way of saying evidence from another source.³⁴ To prove a conviction, it is not necessary to produce the whole record of the criminal proceedings; it is sufficient to produce “the certificate, under seal, of the clerk of the court wherein the proceedings were had, stating the fact of the conviction and for what cause.”³⁵ When the existence of a prior conviction is in dispute, the impeaching party

may not cross-examine the witness about it unless the party has the requisite certificate under seal or the trial judge has ruled in advance of the cross-examination or offer of proof aliunde that the party has presented sufficiently reliable proof of a prior conviction by the witness to permit cross-examination or proof aliunde.³⁶ The burden of establishing the existence of the prior conviction rests with the impeaching party.³⁷ Once the impeaching party has set forth a prima facie case, either by producing the certificate under seal or by providing other credible evidence, the burden of going forward shifts to the witness, who may present contrary evidence.³⁸ Then the trial court, after considering all the evidence presented, must determine whether the impeaching party has established the existence of the conviction by a preponderance of the evidence.³⁹

The pendency of an appeal from a conviction does not render evidence of that conviction inadmissible.⁴⁰ On the other hand, evidence of the pendency of an appeal is admissible.⁴¹

If a witness's prior criminal conviction meets the statutory requirements, it "shall," not "may," be admitted if offered.⁴² Therefore, "the trial court has no discretion to preclude the use of prior convictions for impeachment, including reference to the nature of the crimes . . . even though in a particular case the prejudicial impact on the party they are used against may outweigh the probative value to the party who elicits them."⁴³

Bad Acts

Under certain circumstances, a witness in D.C. Superior Court may be cross-examined on a prior bad act that has not resulted in a criminal conviction. This is allowed "only where (1) the examiner has a factual predicate for the question, and (2) the bad act bears directly upon the veracity of the witness in respect to the issues involved in the trial."⁴⁴

Where a party proposing cross-examination claims to have a factual predicate for inquiring into prior bad acts, the trial court may assess the questioner's offer of proof to

determine whether a factual predicate exists.⁴⁵ Although the D.C. Court of Appeals has not established a formal standard by which the factual basis for proffered evidence is measured, it has characterized the threshold requirement as “fairly undemanding.”⁴⁶ In one case, the court held that a criminal defendant was not entitled to attempt to impeach a prosecution witness on cross-examination with respect to a prior alleged instance of perjury, where the defendant’s offer of proof was too “scanty” because it was conclusory and based almost entirely on inadmissible hearsay.⁴⁷

The second prong of the test – whether the bad act bears directly upon the veracity of the witness in respect to the issues involved in the trial – turns on whether the bad act is “probative of truthfulness or untruthfulness.”⁴⁸ “[B]ad acts probative of truthfulness or untruthfulness are those ‘characterized by an element of deceit or deliberate interference with a court’s ascertainment of truth.’”⁴⁹ In determining whether a particular bad act is probative of truthfulness or untruthfulness, District of Columbia courts look to federal-court decisions interpreting Federal Rule of Evidence 608(b).⁵⁰ Federal courts interpreting Federal Rule of Evidence 608(b) have held the following criminal activities to be probative of character for truthfulness or untruthfulness: fraud,⁵¹ bankruptcy fraud,⁵² tax fraud,⁵³ swindling,⁵⁴ deceit⁵⁵; false swearing,⁵⁶ perjury⁵⁷; forgery⁵⁸; bribery⁵⁹; theft,⁶⁰ embezzlement,⁶¹ and misappropriation.⁶² By contrast, criminal activities that have been held to be not probative of truthfulness or untruthfulness include the following: crimes of violence⁶³ ranging from assault⁶⁴ to manslaughter⁶⁵ and murder⁶⁶; rape⁶⁷; sodomy⁶⁸ and other sexual misconduct⁶⁹; disorderly conduct⁷⁰; trespass⁷¹; false imprisonment⁷²; soliciting arson⁷³; failing to register a gun⁷⁴; speeding⁷⁵; drug-related activity⁷⁶ ranging from use⁷⁷ to sales⁷⁸; and alcohol use.⁷⁹ Note that sometimes, the very same activity, such as selling narcotics, that is deemed to involve dishonesty and therefore may be used to impeach a witness if it results in a criminal conviction, is deemed

to be not probative of truthfulness and therefore may not be used for impeachment if it does not result in a criminal conviction.⁸⁰

Impeachment with bad acts not resulting in criminal convictions differs from impeachment with criminal convictions in two other significant ways. First, whereas a trial judge has no discretion to exclude evidence of a criminal conviction that meets the requirements of D.C. CODE § 14-305, a trial judge does have discretion to preclude impeachment by bad acts not rising to the level of criminal convictions.⁸¹ In determining whether to allow impeachment by prior misconduct, the trial judge must “balance the probative value of the impeachment against its potential for prejudice, including its capacity to besmirch the witness unfairly, delay the proceedings, or distract the jury by a quarrel over the facts of what remains after all a collateral incident.”⁸² Second, whereas criminal convictions may be offered either through “the cross-examination of the witness or by evidence aliunde,”⁸³ evidence of prior bad acts not resulting in a criminal conviction “may be elicited only by cross-examination of the witness; it may not be proved by extrinsic evidence.”⁸⁴

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Impeachment by criminal convictions or prior bad acts can devastate a witness’s credibility. Sound advocacy, therefore, dictates learning as much as possible, through discovery or otherwise, about the prior misconduct of the opposing party’s witnesses. It also counsels informing yourself about the unsavory side of your own witnesses; armed with that information, you can take appropriate steps, such as filing motions in limine or avoiding use of some witnesses altogether, to prevent unpleasant surprises at trial.

Endnotes

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² D.C. CODE § 14-305 (2001). *Compare* FED. R. EVID. 609 – Impeachment by Evidence of Conviction of Crime (applicable in federal courts).

³ *United States v. Fox*, 473 F.2d 131, 136 (D.C. Cir. 1972).

⁴ D.C. CODE § 14-305(b)(1).

⁵ *Franklin v. United States*, 555 A.2d 1010, 1012 (D.C. 1989) (citing *Langley v. United States*, 515 A.2d 729, 734 (D.C. 1986)); *Twitty v. United States*, 541 A.2d 612, 613 (D.C. 1988) (same); *Godfrey v. United States*, 454 A.2d 293, 305 (D.C. 1982) (citing *United States v. Lee*, 509 F.2d 400, 405 (D.C. Cir. 1975); *Thomas v. United States*, 121 F.2d 905, 907 (D.C. Cir. 1941).

⁶ *Reed v. United States*, 452 A.2d 1173, 1178 (D.C. 1982); *Fox*, 473 F.2d at 146; *Thomas*, 121 F.2d at 907.

⁷ *Bill's Auto Rental, Inc. v. Bonded Taxi Co.*, 72 A.2d 254, 258 (D.C. 1950); *Sanford v. United States*, 98 F.2d 325, 327 (D.C. Cir. 1938) (per curiam).

⁸ *Godfrey*, 454 A.2d at 305 (citing *Lee*, 509 F.2d at 405).

⁹ *Franklin*, 555 A.2d at 1012 (citing *Langley*, 515 A.2d at 734; *Crawford v. United States*, 41 F.2d 979, 980 (D.C. Cir. 1930)).

¹⁰ *Twitty*, 541 A.2d at 613-14.

¹¹ *Walls v. United States*, 773 A.2d 424, 429-30 (D.C. 2001) (citing *Smith v. United States*, 392 A.2d 990, 993 (D.C. 1978)).

¹² *Zellers v. United States*, 682 A.2d 1118, 1125 (D.C. 1996).

¹³ *Bates v. United States*, 403 A.2d 1159, 1161 (D.C. 1979); *Williams v. United States*, 337 A.2d 772, 775-76 (D.C. 1975).

¹⁴ H.R. REP. NO. 91-907, at 62 (1970), *quoted in Bates*, 403 A.2d at 1161 *and Williams*, 337 A.2d at 775-76.

¹⁵ *Ross v. United States*, 520 A.2d 1064, 1065 (D.C. 1987) (citing *Bates*, 403 A.2d at 1161) (stating that Congress “had an expansive view of ‘dishonesty or false statement’”).

¹⁶ *Williams*, 337 A.2d at 775-76.

¹⁷ *Ross*, 520 A.2d at 1065-66.

¹⁸ *Gass v. United States*, 416 F.2d 767, 773-74 (D.C. Cir. 1969).

¹⁹ *United States v. Carr*, 418 F.2d 1184, 1186 (D.C. Cir. 1969); *Smith v. United States*, 406 F.2d 667, 668 (D.C. Cir. 1968).

²⁰ *Baptist v. United States*, 466 A.2d 452, 458-59 (D.C. 1983).

²¹ *Bates*, 403 A.2d at 1161-62.

²² *Hampton v. United States*, 340 A.2d 813, 817 (D.C. 1975).

²³ *Williams v. United States*, 409 F.2d 471, 472 n.1 (D.C. Cir. 1969) (per curiam); *but see Carr*, 418 F.2d at 1186 (stating that taking property without right is distinguishable from larceny in that proof of specific criminal intent to deprive owner of property permanently is absent).

²⁴ *Brooke v. United States*, 385 F.2d 279, 285-86 (D.C. Cir. 1967).

²⁵ *Durant v. United States*, 292 A.2d 157, 160-61 (D.C. 1972).

²⁶ *Holt v. United States*, 675 A.2d 474, 483 (D.C. 1996).

²⁷ *Brown v. United States*, 518 A.2d 446, 447 (D.C. 1986).

²⁸ *Thompson v. United States*, 571 A.2d 192, 194-95 (D.C. 1990).

²⁹ *See Harris v. United States*, 618 A.2d 140, 147 n.11 (D.C. 1992); *United States v. Akers*, 374 A.2d 874, 878 (D.C. 1977).

³⁰ *James v. United States*, 514 A.2d 793, 797 (D.C. 1986).

³¹ *In re DeNeueville*, 286 A.2d 225, 227 (D.C. 1972).

³² D.C. CODE § 14-305(b)(2)(A).

³³ *Id.* § 14-305(b)(2)(B).

³⁴ *Id.* § 14-305(b)(1); *see also Ironworkers Local Union No. 17 Ins. Fund v. Philip Morris, Inc.*, 186 F.R.D. 453, 458 n.5 (N.D. Ohio 1999) (defining “evidence aliunde”).

³⁵ D.C. CODE § 14-305(c).

³⁶ *Haley v. United States*, 799 A.2d 1201, 1208 (D.C. 2002) (citing *Reed v. United States*, 485 A.2d 613, 619 (D.C. 1984)).

³⁷ *Id.* (citing *Reed*, 485 A.2d at 618-19).

³⁸ *Id.* (citing *Reed*, 485 A.2d at 618-19).

³⁹ *Id.*

⁴⁰ D.C. CODE § 14-305(d).

⁴¹ *Id.*

⁴² *Id.* § 14-305(b)(1).

⁴³ *Wilson v. United States*, 691 A.2d 1157, 1159 (D.C. 1997) (quoting *Langley v. United States*, 515 A.2d 729, 735 (D.C. 1986)).

⁴⁴ *Riddick v. United States*, 806 A.2d 631 (D.C. 2002) (quoting *Murphy v. Bonanno*, 663 A.2d 505, 508-09 (D.C. 1995)); see also *Dean v. Garland*, 779 A.2d 911, 917 (D.C. 2001); *Wagner v. Georgetown Univ. Med. Ctr.*, 768 A.2d 546, 562 (D.C. 2001); *Woodward & Lothrop v. Hillary*, 598 A.2d 1142, 1149 (D.C. 1991).

⁴⁵ *Roundtree v. United States*, 581 A.2d 315, 323 (D.C. 1990).

⁴⁶ *Murphy*, 663 A.2d at 510, 511; see also *Roundtree*, 581 A.2d at 325 n.23 (finding no need to resolve whether trial court, in deciding whether a factual predicate exists, is to make its own factual determination or is simply to determine what a reasonable jury might find).

⁴⁷ *Sherer v. United States*, 470 A.2d 732, 738-39 (D.C. 1983).

⁴⁸ *Riddick*, 806 A.2d at 637 (quoting *Murphy*, 663 A.2d at 509).

⁴⁹ *Riddick*, 806 A.2d at 637 (quoting *United States v. Smith*, 551 F.2d 348, 363 (D.C. Cir. 1976)).

⁵⁰ *Id.* (citing *Murphy*, 663 A.2d at 509); see also FED. R. EVID. 608(b) (“Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’ character for truthfulness . . . may, . . . in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness . . . concerning the witness’ character for truthfulness or untruthfulness . . .”).

⁵¹ *United States v. Sanders*, 343 F.3d 511, 518-19 (5th Cir. 2003); *United States v. Gay*, 967 F.2d 322, 327-28 (9th Cir. 1992); see also *United States v. Munoz*, 233 F.3d 1117, 1135 (9th Cir. 2000).

⁵² *United States v. Cusmano*, 729 F.2d 380, 383 (6th Cir. 1984).

⁵³ *Chnapkova v. Koh*, 985 F.2d 79, 82 (2nd Cir. 1993); *United States v. Sullivan*, 803 F.2d 87, 90-91 (3rd Cir. 1986).

⁵⁴ *United States v. McClintic*, 570 F.2d 685, 690-91 (8th Cir. 1978).

⁵⁵ *United States v. Crippen*, 570 F.2d 535, 538-39 (5th Cir. 1978).

⁵⁶ *United States v. Reid*, 634 F.2d 469, 473-74 (9th Cir. 1980); *Pullman Co. v. Hall*, 55 F.2d 139, 140-41 (4th Cir. 1932); see also *United States v. Thiongo*, 344 F.3d 55, 59-60 (1st Cir. 2003)

(serving as legal witness to sham marriage); *United States v. Simonelli*, 237 F.3d 19, 23 (1st Cir. 2001) (altering timecards, inflating bills, and stealing company records).

⁵⁷ *United States v. Whitmore*, 359 F.3d 609, 619-20 (D.C. Cir. 2004); *United States v. Wilson*, 985 F.2d 348, 351-52 (7th Cir. 1993).

⁵⁸ *United States v. Waldrip*, 981 F.2d 799, 803 (5th Cir. 1993); *United States v. White*, 110 F. Supp. 2d 641, 644 (S.D. Ohio 1999).

⁵⁹ *Wilson*, 985 F.2d at 352; *Waldrip*, 981 F.2d at 804-05; *United States v. Hurst*, 951 F.2d 1490, 1500-01 (6th Cir. 1991).

⁶⁰ *United States v. Smith*, 80 F.3d 1188, 1193 (7th Cir. 1996). *Contra United States v. Sellers*, 906 F.2d 597, 603 (11th Cir. 1990).

⁶¹ *United States v. Schwab*, 866 F.2d 509, 514 (2nd Cir. 1989).

⁶² *Woodward & Lothrop*, 598 A.2d at 1149-50.

⁶³ *United States v. Geston*, 299 F.2d 1130, 1137 (9th Cir. 2002).

⁶⁴ *United States v. Page*, 808 F.2d 723, 730 (10th Cir. 1987); *United States v. Alberti*, 470 F.2d 878, 882 (2nd Cir. 1973).

⁶⁵ *United States v. Pickard*, 211 F. Supp. 2d 1287, 1293 (D. Kan. 2002).

⁶⁶ *United States v. Flaharty*, 295 F.3d 182, 190-91 (2nd Cir. 2002); *United States v. Parker*, 133 F.3d 322, 326-27 (5th Cir. 1998).

⁶⁷ *United States v. Rosa*, 11 F.3d 315, 336 (2nd Cir. 1993).

⁶⁸ *United States v. Rabinowitz*, 578 F.2d 910, 912 (2nd Cir. 1978).

⁶⁹ *United States v. Bertram*, 805 F.2d 1524, 1530 (11th Cir. 1986); *United States v. Nosov*, 221 F. Supp. 2d 445, 449 (S.D.N.Y. 2002).

⁷⁰ *Wanke v. Lynn's Transp. Co.*, 836 F. Supp. 587, 596 (N.D. Ind. 1993); *United States v. Hill*, 550 F. Supp. 983, 990 (E.D. Pa. 1982).

⁷¹ *Hill*, 550 F. Supp. at 990.

⁷² *Id.*

⁷³ *United States v. Cudlitz*, 72 F.3d 992, 996 (1st Cir. 1996).

⁷⁴ *United States v. Miles*, 207 F.3d 988, 993-94 (7th Cir. 2000).

⁷⁵ *United States v. Nazareus*, 983 F.2d 1480, 1486 (8th Cir. 1993).

⁷⁶ *United States v. Turner*, 104 F.3d 217, 223 (8th Cir. 1997); *Elliott v. Aspen Brokers, Ltd.*, 811 F. Supp. 586, 590 (D. Colo. 1993).

⁷⁷ *United States v. Clemons*, 32 F.3d 1504, 1511 (11th Cir. 1994); *United States v. Robinson*, 956 F.2d 1388, 1397-98 (7th Cir. 1992); *United States v. Sellers*, 906 F.2d 597, 602 (11th Cir. 1990); *United States v. McDonald*, 905 F.2d 871, 875 (5th Cir. 1990); *Crimm v. Missouri Pac. R.R. Co.*, 750 F.2d 703, 707-08 (8th Cir. 1984).

⁷⁸ *United States v. Williams*, 822 F.2d 512, 516-17 (5th Cir. 1987); *United States v. Fortes*, 619 F.2d 108, 118 (1st Cir. 1980).

⁷⁹ *Bennett v. Longacre*, 774 F.2d 1024, 1027 (10th Cir. 1985).

⁸⁰ Compare case cited *supra* note 24 with cases cited *supra* note 78.

⁸¹ Compare *Langley*, 515 A.2d at 735 (“under § 14-305 the trial court has no discretion to preclude the use of prior convictions for impeachment, . . . even though in a particular case the prejudicial impact on the party they are used against may outweigh the probative value to the party who elicits them”) with *Wagner*, 768 A.2d at 562 (stating that trial court is vested with broad discretion in deciding whether to permit cross-examination on prior bad act that has not resulted in criminal conviction, and court should “evaluate whether the probative value of the proffered cross examination is substantially outweighed by the danger of unfair prejudice”).

⁸² *Murphy*, 663 A.2d at 511; see also *Lee v. United States*, 454 A.2d 770, 775 (D.C. 1982).

⁸³ D.C. CODE § 14-305(b)(1).

⁸⁴ *Sherer v. United States*, 470 A.2d 732, 738 (D.C. 1983) (citation omitted); accord *Brown v. United States*, 726 A.2d 149, 153 (D.C. 1999).