

*Witness Impeachment by
Extrinsic Evidence: Objection
Sustained or Overruled?*

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When a witness denies a prior conviction, is the attorney permitted to impeach that testimony by offering a record of the conviction?

**Common law collateral fact rule:
impeachment of a witness as to a
collateral fact can only be accomplished
by intrinsic methods.**

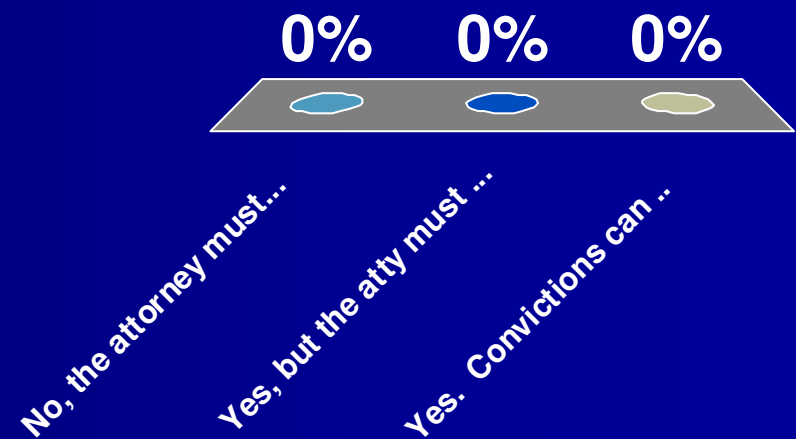
- *The attorney must accept the answer of the witness*
- *The attorney may, however, press or “sift” the witness within reasonable bounds*

Rule of Evidence 609 supersedes the collateral fact rule as to prior convictions:

- *“For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted... shall be admitted if elicited from the witness or established by public record during cross-examination or thereafter.”*

Upon denial of a conviction, can the attorney introduce the criminal record

1. No, the attorney must accept the answer.
2. Yes, but the atty must first ask the witness about record.
3. Yes. Convictions can be proved by cross-x or by admitting the record.



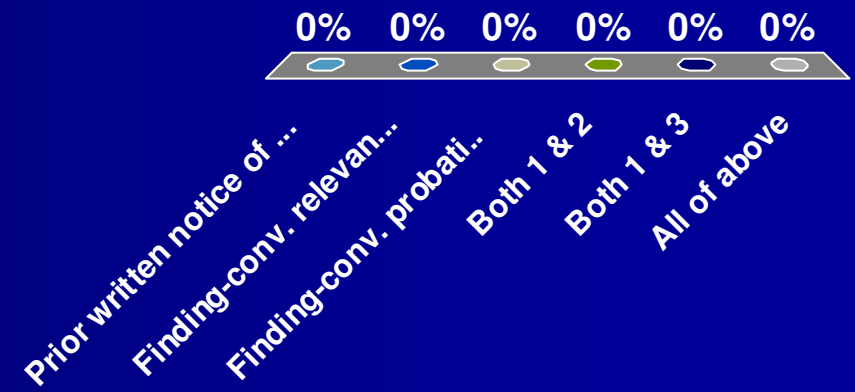
**What about convictions
outside the ten year period ?**

Convictions > 10 years old:

- *Proponent must give prior written notice*
- *Judge must make findings of fact*
 - *Prior conviction is probative as to truthfulness or untruthfulness*
 - *Weighing analysis as to other uses (e.g., propensity evidence)*

"Necessary showing" for conviction >10 years old

1. Prior written notice of intent to use
2. Finding-conv. relevant to present matter
3. Finding-conv. probative on credibility
4. Both 1 & 2
5. Both 1 & 3
6. All of above



Exception to Collateral Fact Rule:

Bias of the witness (a collateral fact) may be established by extrinsic evidence, but only after first showing the evidence to the witness.

When impeachment is sought on a matter that is material to the case, the facts may be established by intrinsic or extrinsic evidence.

Intrinsic:

Cross examination,
pressing or sifting

Extrinsic:

Other witnesses

Records, other exhibits

Materiality:

- *“relating to the matter in dispute”*
- *“involving matters pertinent and material to the pending inquiry”*
- *“constituting part of the evidence upon the transaction under investigation”*
- *“concerning the subject matter in regard to which he is examined”*

Test: Would this evidence be properly admissible, apart from its value for impeachment?

Material vs. Collateral

Material:

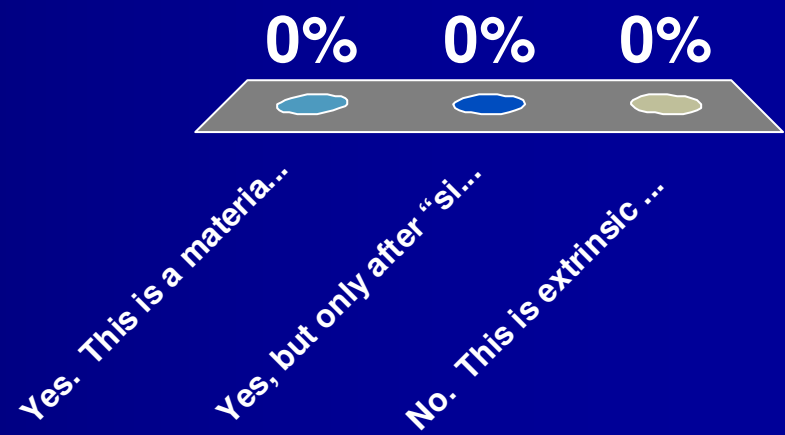
- 1. Evidence of D's flight*
- 2. Evidence that witness was paid for testimony*
- 3. Rebuttal of alibi evidence*

Collateral:

- 1. Witness credentials*
- 2. Newspaper article contradicting what witness said he read*
- 3. Bad act or crime not covered by R. 609*

Rebuttal witness on prior conversation on red/green light?

1. Yes. This is a material issue.
2. Yes, but only after "sifting" the witness.
3. No. This is extrinsic evidence on a material issue- not permitted.



Bad Acts Not Amounting to Criminal Convictions

Rule 608:

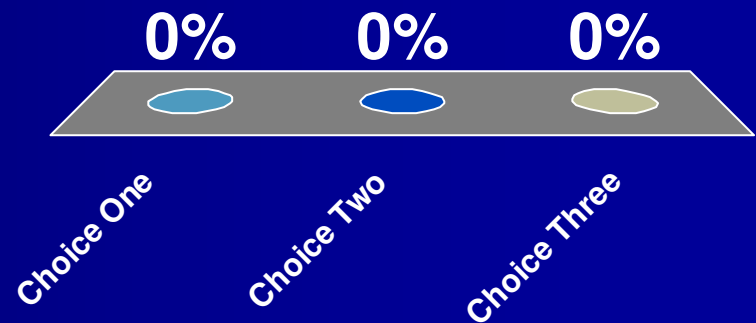
- *The evidence must be probative on truthfulness or untruthfulness*
- *Specific instances of conduct may not be proved by extrinsic evidence, but may be:*
 - asked about during cross-x of witness as to himself, or another as to whose character he has testified*

Procedure for Determining Admissibility of Extrinsic Evidence:

1. *Determine whether the extrinsic evidence is material or collateral. If material, the evidence may be received.*
2. *If collateral, determine whether the impeachment is based on bias, interest or disposition. If so, then the witness must first be confronted with the extrinsic evidence before it is offered, giving an opportunity to deny or explain it. If denied, then the matter may be proven by extrinsic evidence.*
3. *If the evidence is collateral not involving bias, then the examiner must accept the answer of the witness, subject to court's discretion as to "pressing" or "sifting."*

Can Caldwell use this extrinsic evidence of falsehoods?

1. Yes, after showing documents to witness
2. This is material and should be admitted
3. This is collateral and should not be admitted.



Procedure for Determining Admissibility of Extrinsic Evidence *(continued):*

- 4 *If the impeaching evidence consists of a criminal conviction, then the conviction may be established through cross examination of the witness or by public record.*
- 5 *If the impeaching evidence consists of specific bad acts other than conviction of a crime, such acts may not be proved by extrinsic evidence, but court has discretion to permit cross examination of witness concerning specific bad acts of himself or another about whose character he has testified, if the acts are probative of truthfulness or untruthfulness.*