

TYPES OF IMPEACHMENT (With Applicable TRE)

CATEGORIES:

1. BIAS OR INTEREST

Bias exists where a witness, through some relationship to the parties or attitude about the matter in dispute, has a frame of mind that could color his testimony. Examples: Married or related to a party, witness fired by party, etc.

Interest exists where a witness's relationship to a party or the lawsuit is such that he stands to gain or lose, usually financially, from a particular outcome of the case. Examples: Plaintiff has sued for damages, witness has outstanding loan to Plaintiff, expert has testified several times in the past for Defendant's counsel.

TRE 613 (b)

(b) Witness's Bias or Interest.

(1) *Foundation Requirement.* *When examining a witness about the witness's bias or interest, a party must first tell the witness the circumstances or statements that tend to show the witness's bias or interest.* If examining a witness about a statement—whether oral or written—to prove the witness's bias or interest, a party must tell the witness:

- (A)** the contents of the statement;
- (B)** the time and place of the statement; and
- (C)** the person to whom the statement was made.

(2) *Need Not Show Written Statement.* If a party uses a written statement to prove the witness's bias or interest, a party need not show the statement to the witness before inquiring about it, but must, upon request, show it to opposing counsel.

(3) *Opportunity to Explain or Deny.* A witness must be given the opportunity to explain or deny the circumstances or statements that tend to show the witness's bias or interest. And the witness's proponent may present evidence to rebut the charge of bias or interest.

(4) *Extrinsic Evidence.* Extrinsic evidence of a witness's bias or interest is not admissible unless the witness is first examined about the bias or interest and fails to unequivocally admit it.

Note: In practice, this rule means that in the case where the bias is not shown by using a statement – either oral or written (see italics above), the circumstances showing bias must be asked of the witness. Example: If bias is due to marital relationship, ask “you are married to Arthur Jackson” before asking additional questions.

If the bias is shown by using an oral or written statement, the remainder of the rule applies. You must describe the statement by content, time, place and the person to whom the statement was made. ***This is a Texas Rule.*** The Rules of Evidence do not require you to give the witness notice of the statement or an opportunity to explain it.

Example on how to give notice of the statement:

In car accident case, Ms. Smith testifies that Plaintiff did not run a red light at the intersection. Ms. Smith had previously made a statement to Ms. Jones, her neighbor, that she was engaged to Plaintiff. To give the required notice of the statement, you ask “Isn't it true that on March 1, 2016, while in Ms. Jones' apartment, you told Ms. Jones that you were engaged to Plaintiff?”

If Ms. Smith says “yes”, then you have shown potential bias due to the relationship between Ms. Smith and Plaintiff. If she says “no”, you can call Ms. Jones to talk about the prior statement made to her by Ms. Smith (proof using extrinsic or outside evidence).

2. PRIOR INCONSISTENT STATEMENT

When a witness testifies one way in trial and has previously made a contradictory statement, the prior statement can be used to impeach. Under the Texas rules, you must give the witness notice of the statement who then has the right to explain or deny the prior statement (see (3) below). Texas Courts have held that the impeaching attorney must give the witness the opportunity to deny the statement before impeaching, but that the requirement that the witness be allowed to explain the prior statement can be done by any counsel after the impeachment has been completed.

Example: In car accident case, Mr. Jones testifies in trial that his light was green. In prior deposition, he testifies that his light was red. Before confronting witness with the prior statement, you ask “Isn’t it true that you testified in your deposition on May 1, 2015 that your light was red?”

Note: If you are using an opposing party’s admission against him, this rule does not apply (see (5) below). Courts have held that the impeaching attorney needs to give the witness the opportunity to deny the statement, but does not have to give the witness an opportunity to explain as long as opposing counsel is given the right to question witness and give opportunity to explain.

Rule 613. Witness’s Prior Statement and Bias or Interest

(a) Witness’s Prior Inconsistent Statement.

(1) *Foundation Requirement.* When examining a witness about the witness’s prior inconsistent statement—whether oral or written—a party must first tell the witness:

- (A)** the contents of the statement;
- (B)** the time and place of the statement; and
- (C)** the person to whom the witness made the statement.

(2) *Need Not Show Written Statement.* If the witness’s prior inconsistent statement is written, a party need not show it to the witness before inquiring about it, but must, upon request, show it to opposing counsel.

(3) *Opportunity to Explain or Deny.* A witness must be given the opportunity to explain or deny the prior inconsistent statement.

(4) *Extrinsic Evidence.* Extrinsic evidence of a witness’s prior inconsistent statement is not admissible unless the witness is first examined about the statement and fails to unequivocally admit making the statement.

(5) *Opposing Party’s Statement.* This subdivision (a) does not apply to an opposing party’s statement under Rule 801(e)(2) (Admission by Party-Opponent).

(c) Witness’s Prior Consistent Statement. Unless Rule 801(e)(1)(B) provides otherwise, a witness’s prior consistent statement is not admissible if offered solely to enhance the witness’s credibility.

Comment to 2015 Restyling: The amended rule retains the requirement that a witness be given an opportunity to explain or deny (a) a prior inconsistent statement or (b) the circumstances or a statement showing the witness’s bias or interest, but this requirement is not imposed on the examining attorney. A witness may have to wait until redirect examination to explain a prior inconsistent statement or the circumstances or a statement that shows bias. But the impeaching attorney still is not permitted to introduce extrinsic evidence of the witness’s prior inconsistent statement or bias unless the witness has first been examined about the statement or bias and has failed to unequivocally admit it. All other changes to the rule are intended to be stylistic only.